No. 983950

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 79407-8-I
COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

SAK & PATCH, INC., AQUAGUARD WATERPROOFING LLC, ARROW INSULATION, INC., COMMERCIAL INDUSTRIAL ROOFING, INC., HIGHPOINT CONSTRUCTION INC., et al.

Respondents,

v.

EDIFICE CONSTRUCTION COMPANY, INC., a Washington corporation,

Petitioner.

BRIEF OF AMICUS CURIAE ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON IN SUPPORT OF EDIFICE CONSTRUCTION COMPANY, INC.'S PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Amicus Curiae Associated General Contractors of Washington ("AGC") respectfully submits this brief in support of Petitioner Edifice Construction Company, Inc.'s ("Edifice") Petition for Discretionary Review. This Court should grant the Petition because the decision below is contrary to precedent enforcing incorporation by reference provisions critical to a wide variety of contracts, but especially construction contracts, and fails to consider Washington's public policy in favor of arbitration.

II. IDENTITY AND INTERESTS OF AMICUS CURIAE

AGC, in existence since 1922, is the state's largest, oldest, and most prominent construction industry trade association, representing and serving the commercial, industrial and highway construction industry. The AGC of Washington chapters serve more than 1,000 general contractors, subcontractors, construction suppliers and industry professionals. AGC members perform both private-sector and public-sector construction and are involved in all types of construction in the state, including office, retail, industrial, highway, healthcare, utility, educational and civic projects.

The construction industry's contribution to the state's economy is significant. A 2012 University of Washington annual study revealed that, in 2011, more than 192,800 workers were employed by contractors, construction services and material suppliers in the state, and the workers in

the construction industry comprised 8.3% of the state's private-sector workforce. When the construction industry grows, the state's economy exponentially grows with it. For each dollar invested in new construction, an additional $1.97 in economic activity is generated throughout the state. AGC members have built and are presently constructing many of the state's most significant public works projects.

AGC's experience enables it to provide a unique perspective on the legal implications of the Appellate Court's decision. Review is critical to all Washington contractors; the decision below invalidates explicit contract language agreed to by the parties contrary to established case law. Incorporation by reference clauses such as the one at issue here are especially common and important in construction contracts to ensure that, despite the significant number of parties that are involved (the owner, general contractor, subcontractors, sub-tier subcontractors, suppliers, etc.), the project owner's prime contract requirements for the project (e.g., plans and specifications necessary to build the project, safety requirements, dispute resolution requirements, etc.) flow down and align with the obligations and rights of the various tiers of subcontractors and other parties performing the work. Effectively "flowing down" the plans and specifications and other key documents comprising the Main Contract is critical to construction projects to ensure that the numerous parties

performing various components of the project cohesively work together toward successful completion. Washington contractors rely on this flow down structure when pricing their work, and have a reasonable expectation that contract provisions, which are agreed to by both parties, will be enforced as written and not invalidated by the courts after the fact.

III. ISSUES ADDRESSED BY AMICUS CURIAE

Whether this Court should grant review of a Court of Appeals decision that directly contradicts precedent enforcing clear, unequivocal incorporation by reference provisions, and overlooks Washington public policy favoring arbitration.

IV. STATEMENT OF THE CASE

AGC adopts the Statement of the Case as presented by Petitioner.

V. ARGUMENT

The Court of Appeals, Division I, concluded that despite the Subcontracts' explicit incorporation by reference language, the Subcontractors were not bound to such language as well as the Main Contract's arbitration provision because Petitioner offered no evidence that the Subcontractors "knew or assented to the terms of the main contracts." App. Op. at p.5. The Appellate Court's decision contradicts the plain language of the Subcontracts (stating the Subcontractors assented to the terms), precedent broadly enforcing incorporation by reference provisions

as written, and policy favoring arbitration. Review should be granted.

1. Incorporation By Reference And Flow Down Provisions Are Critical In The Construction Context

Construction projects involve multiple parties and multiple contracts. The larger or more complex the project (e.g., large public works or complex commercial construction projects), the more trades and tiers of parties will be involved. The project owner contracts with its general contractor under the "main" or "prime" contract. In turn, the general contractor will enter into various subcontracts. This structure continues down through multiple tiers with each sub or sub-subcontractor performing a portion of the project work scope and referring to contracts up the chain. To ensure that the project owner obtains the project for which it contracted and that lower tiers are not performing different or altered work, incorporation by reference and flow down provisions are critical. These clauses generally incorporate the main contract and align rights and obligations consistently throughout the chain of contracts from the general contractor to the various lower-tiered subcontractors.

Washington courts have long recognized the enforceability and importance of these incorporation by reference and flow down provisions. *See Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co*., 176 Wn.2d 502, 518, 296 P.3d 821, 829 (2013); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 801,

225 P.3d 213 (2009); *Santos v. Sinclair*, 76 Wn. App. 320, 325, 884 P.2d 941 (1994); *Brown v. Poston*, 44 Wn.2d 717, 719, 269 P.2d 967 (1954) (dismissing a subcontractor's suit to recover the cost to provide higher priced material because the Court found the subcontractor agreed to perform the work "as per the plans and specifications" which required the higher priced material and no further "evidence" of assent was necessary).

The Edifice Subcontracts include industry standard incorporation by reference and "flow down" provisions that bind the Subcontractors to Edifice's contract with the Owner (or the "Main Contract"). CP at 164, 210, 243, 273. The Appellate Court, however, refused to enforce this provision to compel the Subcontractors to arbitrate, asserting that, despite (a) explicit reference to the Main Contract documents, and (b) explicit agreement "…that all of the…main contract documents are incorporated herein by this reference and expressly made part of this Subcontract," the Subcontractors are excused from this clear incorporation provision, unless Edifice demonstrates by extrinsic evidence that the Subcontractors *also* "saw the main contracts, knew the AIA forms the main contract involved, or that the AIA forms used were standard in the industry." App. Op. at p.6. This conclusion directly conflicts with Washington law, disregards the plain language of the Subcontracts agreed to and executed by the parties, and frustrates the purpose of incorporation by reference provisions critical to the

construction industry. Therefore, Supreme Court review of Division I's decision is necessary and appropriate.

2. Enforcement Of The Plain Language Of Incorporation Clauses Is Well Established.

Washington Courts uphold the general rule that under the principle of freedom to contract, courts will enforce those contracts as written provided they do not contravene public policy. *See Snohomish Cty. Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.*, 173 Wn.2d 829, 834, 271 P.3d 850, 853 (2012) (citing *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 176, 94 P.3d 945, 948 (2004)); *see also Shepler Const., Inc. v. Leonard*, 175 Wn. App. 239, 245, 306 P.3d 988, 992 (2013) ("…**contract terms will be viewed as mandatory in the sense that the parties agreed that they will be bound by them and expect that they will be enforced by the court**.") (emphasis added). If contract language is clear and unambiguous, "the court must enforce the contract as written; it may not modify the contract or create ambiguity where none exists." *Lehrer v. State, Dep't of Soc. & Health Servs.*, 101 Wn. App. 509, 515, 5 P.3d 722, 726 (2000). When courts fail to enforce contracts as written, they "frustrate the reasonable expectations of the contracting parties and thus interfere with their freedom to contract." *See Stocker v. Shell Oil Co.*, 105 Wn.2d 546, 549–50, 716 P.2d 306 (1986).

This same principal applies to incorporation by reference and flow-down provisions, which are broadly enforced. Specifically, this Court holds that if "the parties to a contract clearly and unequivocally incorporate by reference into their contract some other document, that document becomes part of their contract." *See Huber, Hunt, and Nichols-Kiewit Construction Company*, 176 Wn.2d at 517–18 (collecting cases and noting courts have repeatedly held that "incorporation by reference and flow-down provisions in prime contracts that bind subcontractors are enforced by courts in a 'wide variety of contexts'."); *see also Satomi Owners Ass'n*, 167 Wn.2d at 801 and *Sime Const. Co. v. Washington Pub. Power Supply Sys.*, 28 Wn. App. 10, 16, 621 P.2d 1299, 1303 (1980).

Notably, this Court's decision in *Huber, Hunt, and Nichols-Kiewit Construction Co*., which Division I did **not** cite, concluded that because (a) the flow-down provisions "plainly provided" for the flow-down of liability from the general contractor to the subcontractor for defective work, and (b) the incorporation by reference provision was "even clearer about what is incorporated and plainly extend to incorporated documents governing procedural matters," the provisions at issue clearly and unequivocally incorporated the prime contract by reference. 176 Wn.2d at 519–20. This Court enforced the plain language of the subcontracts at issue and did **not** require additional extrinsic evidence that the Subcontractors "saw the main

contracts, knew the AIA forms the main contract involved, or that the AIA forms used were standard in the industry."

Here, the Appellate Court abandoned this Court's reasoning in *Huber, Hunt, and Nichols-Kiewit Construction Co.*, wrongly interpreting the *Ferrellgas* case to require extrinsic evidence of the parties' assent to incorporated terms despite explicit agreement to their incorporation. App. Op. at p.5. *Ferrellgas* demands no such result. The problem in *Ferrellgas* was that the incorporation by reference provision was itself unclear, stating only that work will be performed in accordance with the general term "Project Contract Documents" or the "Contract Documents." *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494–95, 7 P.3d 861 (2000). The Court could not determine what documents were included in the undefined "Contract Documents" that the parties intended to incorporate by reference, and, therefore, resorted to extrinsic evidence of their intent. *Id.* Ultimately, the Court identified references to AIA Document A201 in a project manual provided to the subcontractor (not the incorporation by reference provision itself) and held that these references nevertheless satisfied the requirement that the parties assented to incorporate the AIA document by reference. *Id*.

Here, unlike in *Ferrellgas*, the Subcontracts' incorporation by reference provision is clear and detailed on its face. It incorporates the

"Main Contract" and all of its provisions, specifically defines the "Main Contract" as the contract executed on April 25th, 2010 between Owner and Edifice (in addition to other identifying information), and explicitly states the Main Contract was "available to the Subcontractor." *See* CP at 164, 210, 243, 273. No extrinsic evidence that the Subcontractors saw the document or knew it was a standard form is required. The Subcontracts at issue clearly and unequivocally incorporated the Main Contract in its entirety. Edifice should not bear the burden of demonstrating the Subcontractors reviewed the document they agreed to incorporate. The Appellate Court erred by failing to enforce the incorporation by reference provision by its plain terms and review should be granted.

3. Washington Public Policy Favors Arbitration Agreements.

Washington State has a strong public policy favoring arbitration. *e.g. Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301, 103 P.3d 753 (2004); *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 51, 42 P.3d 1265 (2002); *see also* RCW 7.04A.060(1). Washington courts thus "indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Grp., Inc.*, 148 Wn. App. 400, 407, 200 P.3d 254 (2009) (internal citation omitted).

Arbitration is heavily favored in the construction industry owing to its relative economy, speed, and decision-maker expertise. *See* Bruner & O'Connor on Construction Law § 21:1. Washington precedent recognizes the enforceability of dispute resolution flow down provisions as tools for contractual risk allocation. *See Huber, Hunt & Nichols-Kiewit Const. Co.*, 176 Wn.2d at 518.

In failing to enforce the Subcontracts' clear incorporation by reference provision, the Court of Appeals overlooked Washington policy and precedent favoring arbitration. Its decision undermines enforceability of arbitration agreements to the industry's detriment. If clear contract language incorporating mandatory arbitration by reference is unenforceable, general contractors will litigate claims arising from the same projects and sharing common facts in multiple forums at significant expense. Such an outcome would undermine both the efficacy of arbitration as a tool for cost-efficient dispute resolution, and the reliability of contractual risk allocation essential to the construction industry.

VI. CONCLUSION

The Court of Appeals, Division I, ignored clear precedent establishing the fundamental principle that contracting parties are bound to terms they explicitly incorporate by reference. For these reasons, review should be granted.

Dated this 23rd day of June, 2020.

Respectfully submitted,

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