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No. 66870-6-I

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

NORTHWEST INFRASTRUCTURE, INC., a Washington corporation,

Plaintiff/Respondent

v.

PCL CONSTRUCTION SERVICES, INC., a Washington corporation,
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Defendants/Third-Party Plaintiffs,

v.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a
Washington regional transit authority,

Third-Party Defendant/Appellant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Dean S. Lum and Timothy Bradshaw)

**PLAINTIFF/RESPONDENT NORTHWEST INFRASTRUCTURE,
INC.'S RESPONSE TO BRIEF OF APPELLANT SOUND TRANSIT**

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I. INTRODUCTION

This is a frivolous appeal following the trial court's correct dismissal of appellant Central Puget Sound Regional Transit Authority's ("Sound Transit") cross-claims against respondent Northwest Infrastructure, Inc. ("NWI"). In December 2005, Sound Transit approved Change Order 12 paying over \$500,000 for additional earthwork performed by NWI as a subcontractor on the Federal Way Transit Center Project ("the Project"). The change order was issued due to undisputed errors in the earthwork quantities found in Project Drawing C3.04 prepared by Sound Transit's project engineer, KPFF. In January 2006, the Project general contractor, PCL Construction Services, Inc. ("PCL") and NWI submitted a claim to Sound Transit asserting that Change Order 12 *underpaid* the actual cost of the additional earthwork. Even though Sound Transit's auditors later determined that Change Order 12 underpaid NWI up to an amount of over \$500,000, Sound Transit denied PCL and NWI's claim in December 2005.

In March 2009, NWI sued PCL under the parties' subcontract for the unpaid additional earthwork costs. PCL then passed that claim on to Sound Transit by way of a third party complaint. Sound Transit responded in August 2009 with cross-claims against NWI, asserting that NWI had made misrepresentations and violated the CPA by somehow

inducing Sound Transit to issue Change Order 12. Sound Transit alleged the cross-claims notwithstanding its own independent determination, with the aid of KPFF, that the earthwork quantities in Drawing C3.04 were indeed wrong; had grossly understated the site earthwork required by the Project; and had misled the contractors bidding the Project.

Sound Transit's cross-claims were not supported by any evidence, and not credible based on Sound Transit's own project records and its repeated contradictory fact allegations made in court filings and oral argument before the trial court. Sound Transit's cross-claims were properly dismissed on summary judgment. This Court should affirm, and award NWI its attorneys' fees and costs on appeal pursuant to RAP 18.9.

II. STATEMENT OF THE CASE

A. The Parties And The Project.

This case arises from additional earthwork performed by NWI on the Project. NWI was a subcontractor for the prime contractor, PCL. The Project owner was Sound Transit. The Project was subject to the Public Works Statute, RCW Ch. 39.04. By law, the project required a public invitation to bid, affording interested and qualified contractors to submit a competitive bid, i.e. a bid responsive to the invitation to bid package. By law, the bid package was to include the entire plans and specifications

required to fully execute the work to completion. RCW 39.04.020-.040; RCW 36.32.245.

B. The Project Earthwork Drawings And Specifications.

The Project specifications and drawings were prepared by Sound Transit's project engineer, KPFF. CP 276-354. The site earthwork and grading was governed principally by Project Drawing C3.04. CP 287. KPFF's Drawing C3.04 stated the Site Earthwork Volumes were Cut (excavation) 24,000 cubic yards, and Fill (backfill) 16,000 cubic yards. CP 287.

Under Washington law, contractors bidding the Project had to rely on the Site Earthwork Volumes specified in Drawing C3.04 when making their bids, because it was part of the public bid package filed by Sound Transit:

Whenever plans and specifications shall have been filed the work to be done shall be executed in accordance with such plans and specifications....

RCW 39.04.040. (Emphasis added.)

Nowhere on Drawing C3.04 does it state that the Site Earthwork Volumes were only a "rough estimate" or "estimate." CP 287. The drawing does not state that the volumes were for "permit purposes only." *Id.* There is no disclaimer stating that bidding contractors were not to rely on the Site Earthwork Volumes. *Id.* Nor is there any affirmative

statement that contractors were responsible for performing their own calculations, doing their own take-offs, or otherwise obligated to determine the earthwork volumes on their own. *Id.* Drawing C3.04 without qualification stated that the Site Earthwork Volumes for grading were 24,000 cubic yards Cut and 16,000 cubic yards Fill.

C. **PCL And NWI Both Relied Upon Drawing C3.04 In Preparing Their Bids.**

1. **PCL's Bid Recap Sheet Relied Upon The Site Earthwork Quantities Specified In Drawing C3.04.**

PCL was one of six general contractors who submitted bids to Sound Transit. CP 1145-1158. PCL tracked the bids received from earthwork subcontractors on a "bid recap sheet." CP 977 (larger version is at CP 1610-1611); CP 1195-1198. The bid recap sheet used the Site Earthwork Volumes found on Drawing C3.04. CP 287; CP 977; CP 1202-1203. The line item for "bulk excavation" is 24,000 cubic yards, directly correlating with the "Cut" quantity of 24,000 cubic yards specified on Drawing C3.04. *Id.* The backfill line item under PCL's estimated costs ("EXTB/Fill-Granular") quantity is 16,000 cubic yards, correlating directly with the "Fill" quantity of 16,000 cubic yards specified in Drawing C3.04. *Id.*; CP 1202-1203.

2. **NWI Submits A Bid For Site Earthwork And Pipelines To PCL, Relying On The Site Earthwork Volumes Specified In Drawing C3.04.**

The person responsible for overseeing NWI's bid was company president Hal Johnson. CP 1168. NWI bid two components of the Project: (1) the site earthwork and grading on Drawing C3.04; and (2) the pipelines on Drawing C3.06-.07. CP 1168-1170; CP 1736. Because this was a public project and to assure it was making a competitive bid, NWI relied specifically upon the Site Earthwork Volumes specified in Drawing C3.04 for the "Grading" portion of its bid. CP 1168-1170; CP 273-275; CP 996-1000. The "Cut" quantity of 24,000 cubic yards was incorporated under the NWI bid line item "Excavation." *Id.* The "Fill" quantity of 16,000 cubic yards was relied upon for the "embankment" portion of the bid. *Id.* For its export, NWI started with 8,000 cubic yards by subtracting the Fill quantity from the Cut quantity in Drawing C3.04 (24,000 cubic yards cut - 16,000 cubic yards fill = 8,000 cubic yards export). CP 1169; CP 1736-1737. NWI then added to its export portion of the bid two components: (1) an amount for the physical expansion of excavated soil, what Mr. Johnson calls "fluff" (because existing soil is compressed, after excavation it actually expands in volume), and (2) the additional export soil that was part of the separate pipeline utility work also part of NWI's bid. *Id.* Just as with the grading, the pipeline work also required soil to be

exported off site. Because the pipelines and gravel base would occupy space in the pipe zone trenches, there would be soil leftover after backfilling the trenches. CP 1736-1737.

When reviewing the bids received, PCL assured itself that the subcontractors were bidding the same earthwork, i.e. that PCL was comparing “apples to apples.” CP 1199. PCL’s estimator verbally confirmed the content of the written bids with each of the subcontractors, including NWI. CP 1170; CP 1199-1201.

D. During The Project, PCL And NWI Find The Site Earthwork Was Exceeding The Volumes On Drawing C3.04, But Sound Transit Refuses To Cooperate With The Contractors’ To Determine Why.

PCL was low bidder and was awarded the Project by Sound Transit. PCL entered into a subcontract with NWI for pipelines, grading, and site earthwork for a lump sum total of \$1,093,332. CP 355-377.

In July 2004, NWI began the site earthwork. The actual work took longer than originally scheduled by PCL, and by the fall of 2004, both NWI and PCL had determined that NWI was moving more dirt in grading the Project site than indicated by Drawing C3.04. CP 1170; CP 1178. However, neither NWI nor PCL could determine *WHY* there was more earthwork than stated by the Project plans and specifications. *Id.* PCL’s project manager, Jim Pittman, was well aware of the additional earthwork

being performed by NWI, and worked closely with NWI in monitoring the situation. *Id.* Sound Transit's on-site resident engineer, Scott Perry of Harris and Associates, was similarly kept abreast of the additional earthwork being performed by NWI. CP 1171; CP 1178-1179. NWI made repeated inquiries directly with Mr. Perry and Sound Transit to determine *WHY* NWI was moving more dirt. CP 1171-1172; CP 1178-1179. Sound Transit and Mr. Perry refused to provide any assistance to NWI, and also refused NWI's request to meet with Project engineer KPFF to determine a cause for the overwhelming increase in the site earthwork volumes. *Id.*

E. PCL's June 2005 Request For Change Order To Sound Transit For Additional Earthwork.

1. NWI Determines The Cause Of The Additional Earthwork Is The Defective Drawing C3.04 Created By KPFF.

With no assistance being provided by Sound Transit or its resident engineer Harris and Associates, NWI took matters into its own hands. CP 1171-1172; CP 1178-1180. NWI did two things: (1) NWI directly contacted KPFF to determine if the plans omitted any earthwork volumes, and (2) NWI retained an expert to digitally analyze the plans. *Id.*

Together, these steps later enabled NWI and PCL to specify the reason justifying a change order to compensate NWI for the additional site earthwork. CP 1172; CP 1180.

a) **KPFF Admits The Garage Was Omitted From The Earthwork Volumes In Drawing C3.04.**

By telephone on June 8, 2005 Harold Johnson of NWI made direct contact with the KPFF engineer assigned to the Project, Justin Matthews. CP 1171-1172; CP 1178-1180. In that telephone conversation, Harold Johnson asked Mr. Matthews specifically what was included in the Site Earthwork Volumes specified on Drawing C3.04. *Id.* Mr. Matthews said Drawing C3.04 failed to account for the “garage,” the underground and above ground parking structure that was the centerpiece of the Project. *Id.* Justin Matthews kept contemporaneous notes of his conversation with Harold Johnson. This is what his notes say:

Harold contacted me for help in determining what the volumes shown on Sheet FWC3.04 included. I told him I could not recall off the top of my head but I didn't think the garage was included. Any looking into this would have to come from the direction of Scott Perry (Harris). He said his next phone call would be to Scott.

CP 1123.

Mr. Matthews then contacted Scott Perry, Sound Transit's resident engineer, and reported his telephone conversation with Harold Johnson. CP 725-726. In his email exchange with Mr. Perry, Mr. Matthews affirmed that he would not have any further communication with Harold Johnson concerning the Site Earthwork Volumes and Drawing C3.04:

“Harold won’t get the time of day from me if he ever calls again, sorry about that.” CP 726. (Emphasis added.)

Harold Johnson spoke with Scott Perry about his conversation with Mr. Matthews and KPFF’s omission of the parking garage excavation in the C3.04 earthwork quantities. CP 1179-1180. Mr. Perry’s response to Harold Johnson: “You already have the gun, I am not going to give you the bullets.” CP 1179.

Harold Johnson’s inquiries to KPFF and Scott Perry were recounted a year later by one of Sound Transit’s claim consultants, Ron Maus. In his June 21, 2006 email to Sound Transit’s lawyers, Mr. Maus explains that the quantity errors in Drawing C3.04 supported the change order for additional site earthwork. CP 1159. Mr. Maus notes the C3.04 quantity errors were known by Sound Transit at bid time:

On the entitlement front, it does appear that there may be a few issues of fact or circumstance unfavorable to Sound Transit. In a variety of discussions, it was represented to us that: 1) ST, through its agents, insisted that the bid go to the street with known errors in the quantities on it; 2) that the senior Johnson here, Harold, confronted a part of the design team on the project site with respect to the apparent quantity error in the plans and that it was verified in such a way as to limit the discussion, because, “you already have the gun, I am not going to give you the bullets...” (Emphasis added.)

CP 1159.

b) The Digital Analysis Of The Site Earthwork Drawing By NWI's Consultant Reveals The Errors In Drawing C3.04.

In June 2005, NWI retained Earthwork Services, Inc. for the specific purpose of performing a digital analysis of the Project site drawings to ascertain the required cut and fill quantities using computerized modeling analysis. CP 378, 386-389; CP 1171-1172; CP 1180. *Earthwork Services' sophisticated analysis verified that the actual excavation, backfill, and export quantities required for site earthwork and grading on the Project were two to four times the amounts specified on Drawing C3.04.* CP 380; CP 386. The actual excavation ("Cut") was 57,166 cubic yards, over twice the 24,000 cubic yards specified in Drawing C3.04. *Id.* The actual backfill amount ("Fill") was 23,808 cubic yards, not 16,000 cubic yards stated by KPFF in the Project drawing. *Id.* Then there was the big number: instead of only 8,000 cubic yards of export indicated by Drawing C3.04, the actual amount of soil that needed to be hauled off the Project site was 33,363 cubic yards, *over four (4) times the amount indicated by the Cut and Fill volumes in the drawing at bid time. Id.*

Shortly after receiving Earthwork Services' report, NWI provided a claim package to PCL. CP 379-389; CP 1172. After independently reviewing NWI's claim information and NWI's original earthwork bid,

PCL submitted the request for change order claim package to Sound Transit by letter dated June 28, 2005 (“the June 2005 RFC”). CP 378-389.

2. **PCL’s Careful Review And Validation Of NWI’s Additional Earthwork Claim Results In Submission Of The June 2005 RFC To Sound Transit Without Qualification.**

The principal source of the facts in this section is the deposition testimony of PCL’s 30(b)(6) designee, Garth Hornland. Employed by PCL since 1978, Mr. Hornland is a Senior Manager for PCL’s Bellevue office, overseeing finance and administration. CP 1187-1190. After PCL was awarded the Project, Mr. Hornland worked with PCL’s Project Manager Jim Pittman with any contractual issues with the subcontractors, and any change orders. CP 1191-1192. In submitting contract claims to project owners, Mr. Hornland affirmed that it is the established business practice of PCL to submit claims that are in full compliance with contract requirements, and that PCL only makes claims in good faith. CP 1204-1206.

Mr. Hornland had direct involvement in the June 2005 RFC, working closely with PCL’s Project Manager Jim Pittman:

- Mr. Hornland reviewed the contract claim notice procedures, including the time for notice requirements. ***The additional earthwork claim fully complied with the claim notice provisions, and was timely.*** CP 378-389; CP 1192-1194; CP 1204; CP 1207.

- ***Mr. Pittman reviewed the additional quantities requested in NWI's earthwork claim (CP 378-389), including comparison of the requested additional quantities with (1) those in NWI's original bid, and (2) the drawings. PCL's review determined that the requested additional quantities were reasonable and appropriate. CP 1192-1193; CP 1204; CP 1207-1214.***
- PCL determined that NWI's pass-through claim was valid; that PCL had time for a complete review of the claim before submitting it to Sound Transit, thereby avoiding the need to "qualify" the claim. ***There was no qualification of the NWI pass-through claim in the June 2005 RFC, and PCL certified to Sound Transit that the June 2005 RFC was valid. CP 1208-1210.***

PCL also independently determined that the additional earthwork beyond the Drawing C3.04 quantities had directly impacted the Project's schedule entitling PCL to a contract time extension. CP 781-782; CP 1215-1217.

3. The Project Contract Provisions And Legal Requirements Governing PCL's Additional Earthwork Request For Change Order.

The prime contract between Sound Transit and PCL was for a "lump sum" price. CP 355. Likewise, NWI's earthwork subcontract with PCL was for a "lump sum" price. CP 1470. The only way that PCL and NWI could receive additional payment was if they were required to perform ***more work*** than that specified in Sound Transit's plans and specifications. Section 4.01B.1 of the Project contract provides that in the event of any Changes in the Work that add to the work, the contractor is

entitled to an increase in the Contract Price. CP 1101-1102. Changes in the Work include changes to the specifications, drawings, and designs. *Id.*

Before PCL and NWI could submit a contract change order request for additional earthwork, Section 4.02.A required the contractors to be in a position to specify the reasons why there was entitlement to the change order:

After the Contractor becomes aware of the need for or desirability of a requested change, an RFC may be submitted to Sound Transit in writing (in a format acceptable to Sound Transit) and must specify the reasons for such change, including relevant circumstances and impacts on the schedule. (Emphasis added.)¹

CP 1103. The first and only time PCL and NWI were in a position to specify the reasons for the June 2005 RFC was after (1) Harold Johnson's June 2005 conversations with KPFF's Justin Matthews and Sound Transit's Scott Perry, and (2) receipt of the June 2005 report from Earthwork Services. CP 1170-1172; CP 1178-1180.

The only determination to be made by Sound Transit concerning the June 2005 RFC was whether the earthwork quantities in Drawing C3.04 were wrong and misleading to bidders. If the drawing was not wrong and/or not misleading, Sound Transit could deny the change order

¹ Similar requirements were imposed by Section 10.01.A for claims. Claims could be submitted only after the contractor *discovered* acts or omissions of Sound Transit supporting the claims. The contractor was also obligated to provide the *reasons* supporting the claim. CP 1113.

request. If PCL and NWI had made a mistake relying upon the quantities, that would be reason to deny the June 2005 RFC. General Condition Section 4.01.F states:

Nothing in this Article shall be deemed to require a change in Contract Price when additional, extra or changed work is the result of actual conditions or performance differing from that assumed by the Contractor (except for differing site conditions) or as a result of the Contractor's error in judgment or mistake in designing, estimating, contracting, constructing, or otherwise performing the Work.

CP 1103. Sound Transit determined this was not a case of unilateral mistake by the contractors under Section 4.01.F.

F. Sound Transit's Independent Review Of The June 2005 RFC Determined That PCL And NWI Were Entitled To A Change Order For Additional Earthwork Due To Errors In Drawing C3.04.

Sound Transit's review of the June 2005 RFC lasted five months, ending in approval of Change Order 12 in December 2005. CP1536-1543; CP 1465-1466. The review included KPFF's re-analysis of the site earthwork quantities at Sound Transit's explicit direction. At the end of its five month review, Sound Transit concluded PCL and NWI were entitled to compensation for additional earthwork beyond the quantities stated in Drawing C3.04 because the quantities were wrong when compared to the actual earthwork required by the Project plans.

1. **KPFF Affirms Its Earthwork Quantities Were Wrong In Drawing C3.04; Sound Transit Determines NWI And PCL Were Entitled To Compensation For Additional Earthwork.**

Following receipt of the June 2005 RFC from PCL, Sound Transit directed KPFF to determine if the Site Earthwork Volumes in Drawing C3.04 were indeed wrong as calculated by NWI's consultant, Earthwork Services. KPFF performed data modeling of its own site plans, and determined the volumes were in fact substantially in error. Appendix 2, CP 2352-2363.² Based on KPFF's conclusions, Sound Transit first responded to the June 2005 RFC by letter dated August 24, 2005. CP 746-758. In that letter, under the heading "**ENTITLEMENT**," Sound Transit makes the following admission:

PCL has requested compensation "for the additional earthwork above and beyond the quantities shown on Drawing C3.04."

Sound Transit agrees that there is entitlement for the difference between the C3.04 earthwork quantities, and a reasonable theoretical earthwork quantities (TEQ), based on the Project documents, at the time of the bid. Actual quantities excavated above and beyond the TEQ would fall under either means and methods, or a differing site condition which has not been addressed in this request.

² The Court has linked this appeal with Appeal Case No. 66777-7 by notation ruling dated April 21, 2011. NWI filed notice on May 31, 2011 that the Clerk's Papers designated in Case No. 66777-7 were also designated as part of the record in this appeal. See Appendix 3. Appendix 2 is CP 2352-2363 in Case No. 66777-7. Sound Transit omitted the document in its designation of Clerk's Papers.

CP 746. (Emphasis added.) As indicated in the letter, Sound Transit did not rely on the Earthwork Services calculations. Rather, Sound Transit and KPFF had run their own data modeling of the site using the project plans. CP 746.

2. **KPFF Performs A Second Calculation, And Reaffirms The Drawing C3.04 Quantities Were Wrong, Even More So Than KPFF's Initial Calculation.**

In October 2005, PCL submitted supplemental information to Sound Transit on the RFC, including a report from Earthwork Services. CP 390-419. Sound Transit tasked KPFF with recalculating its site earthwork quantity numbers a second time. CP 759-774. *KPFF's second recalculation was much higher than its first:* excavation was actually 54,123 cy, not 35,828 cy per its first data modeling attempt (compare 24,000 cy in Drawing C3.04). The backfill was 26,404 cy, not 18,191 cy as first calculated in the initial data model effort (compare 16,000 cy in Drawing C3.04). KPFF's recalculation makes the actual export 27,719 cy, not 17,637 cy (compare 8,000 cy in Drawing C3.04). CP 775-778.

3. **Sound Transit Proposes Change Order 12 And Affirms NWI And PCL's Entitlement To Compensation For Additional Earthwork Due To The Errors In Drawing C3.04.**

In December 2005, Sound Transit's Project Manager Jerry Dahl and Resident Engineer Scott Perry co-authored a report to Sound Transit's in-house legal counsel with their recommendation to approve PCL's

requested change order (Change Order 12). CP 742-745. Mr. Dahl and Mr. Perry confirmed NWI's entitlement to compensation for the additional earthwork, explaining that the Drawing C3.04 earthwork specifications were in error and had misled all bidders:

...(the Drawing) included a note 'Site Earthwork Volumes' as 'Cut = 24,000 CY' and 'Fill = 16,000 CY'." ***It would seem reasonable for a bidder to rely on this quantity instead of performing an independent take-off.... the note on the drawing (C3.04) misled the bidders into assuming that the indicated quantities were the actual earthwork amounts.*** (Emphasis added.)

CP 744.

Sound Transit never relied on anything said by NWI or PCL in making the decision to issue Change Order 12. As acknowledged in the Dahl/Perry report, Sound Transit, KPFF, and Harris and Associates made that decision independently; they did not accept the Earthwork

Consultant's quantities:

The Sound Transit team evaluated the entitlement of each element and the quantities associated with each, as well as the contractor's requested unit pricing structure. Based on that analysis, Sound Transit responded on August 24, 2005 that entitlement had been determined, that the unit costs proposed were mostly reasonable, and that the quantity entitled had been calculated. Entitlement was based on the difference between the C3.04 quantities and the actual quantities shown on the plans at the time of the bid, not the as-built quantities that the contractor claimed....

CP 744.

By letter dated December 16, 2005, under “**ENTITLEMENT**,” Sound Transit notified PCL that the contractor was entitled to \$534,602.75 for additional earthwork. CP 1536-1543. Sound Transit’s decision was made after it had “rerun our data modeling of the site using the project plans.” CP 1537. However, Sound Transit explicitly stated it was denying any extra excavation at the detention vault. CP 1536. Accompanying Sound Transit’s December 16, 2005 letter was proposed “Modification of Contract” (Change Order) No. 12. CP 1539-1540.

Sound Transit separately denied PCL’s request for time extension caused by the additional site earthwork. CP 781-786; CP 978. Sound Transit later provided PCL with notice of intent to assess liquidated damages.³ CP 978.

4. Sound Transit Issues Change Order 12.

Although agreeing with Sound Transit’s determination that NWI was *entitled* to recover its costs for the additional earthwork, NWI and PCL disagreed with Sound Transit’s dollar amount for the additional earthwork. Sound Transit issued Change Order 12 “unilaterally.” CP 426; CP 1466.

³ PCL affirms that NWI was not responsible for any delay or liquidated damages assessed by Sound Transit, and that PCL will never back charge NWI for any liquidated damages. CP 1218-1219; CP 783-786.

G. PCL/NWI's Notice Of Intent To Claim Under Article 10.

1. PCL Submits The January 2006 Article 10 Claim.

Section 4.04.C and .D of the General Conditions afforded PCL/NWI the right to submit a claim under Article 10 of the Project Contract in the event the contractors disagreed with the dollar amount of a Sound Transit unilateral change order. CP 1105-1106. PCL provided Sound Transit with an Article 10 claim notice on January 27, 2006 ("the January 2006 Article 10 Claim"). CP 420. By letter dated March 27, 2006, PCL and NWI submitted a claim justification package to Sound Transit pursuant to Section 10.01.B.1.a. CP 420-724.

2. Following Receipt Of The Article 10 Claim, Sound Transit Pursues A Malpractice Claim Against KPFF And Audits NWI's Project Records.

After receiving the claim package on March 27, 2006, Sound Transit did two things. *First, Sound Transit made a claim against KPFF for negligence/professional malpractice for the defective earthwork specifications found in Drawing C3.04.* CP 1029-1047. Second, Sound Transit sent PCL/NWI written demand for document review and an audit of the January 2006 Article 10 Claim. Sound Transit's auditor was Navigant Consulting.

It was during the audit process that Sound Transit claims it first learned NWI had "misrepresented" its reliance on the Drawing C3.04 Site

Earthwork quantities in its bid to PCL. This “misrepresentation” allegation serves as the sole basis for Sound Transit’s cross-claims pled against NWI. CP 23, 30-32. The cross-claims were dismissed on summary judgment. CP 1801-1803; CP 1815-1822; CP 1832-1851. The summary judgment ruling is the subject of this appeal.

H. Overview Of Sound Transit’s Cross-Claims Against NWI That Were Dismissed On Summary Judgment.

NWI filed a complaint for breach of subcontract against PCL on March 2, 2009. CP 1-14. PCL was the only adverse party named. *Id.* Sound Transit first became a party to the action on April 30, 2009, when named as a defendant in a third party complaint filed by PCL. CP 15-22. Sound Transit first asserted claims against NWI on August 6, 2009, when it filed counterclaims against PCL and cross-claims against NWI. CP 23-24. As will be explained below, the cross-claims were filed over three years after Sound Transit admits it discovered evidence of NWI’s alleged misrepresentation concerning its earthwork bid to PCL.

1. Sound Transit’s Misrepresentation And CPA Cross-Claims Were Based Solely Upon NWI’s Bid Proposal To PCL.

Sound Transit asserted two cross-claims against NWI. CP 30-32. The first cross-claim alleged NWI made fraudulent misrepresentations that resulted in Sound Transit’s issuance of Change Order 12. *Id.* The second

cross-claim was that NWI's misrepresentations also amounted to violation of the Washington Consumer Protection Act. *Id.*

Sound Transit's sole factual allegation supporting both its first and second cross-claims was this: NWI intentionally misrepresented that it had relied upon the Drawing C3.04 earthwork quantities in preparing its bid. CP 31. The same factual allegations for the misrepresentation cross-claim were *incorporated* for the CPA cross-claim. CP 31-32.

2. Sound Transit's Discovery Responses To Contention Interrogatories Describe The "Facts" Supporting The Cross-Claims.

In discovery, the only facts specifically identified by Sound Transit in support of its cross-claims against NWI are found in its response to NWI's Interrogatory No. 2, requiring Sound Transit to identify the specific representations supporting its cross-claims, including identification of the speaker/source. Sound Transit answered this interrogatory not once, but twice. CP 1719-1724; CP 1001-1026. In both its initial and supplemental responses, and in its responses to NWI's second interrogatories (CP 1077-1090), Sound Transit identified only two NWI "misrepresentations," both found in documents. The first

“representation” is a table in the June 2005 RFC listing the Site Earthwork Volumes by “Plan” and “Actual.” CP 380.⁴ This is what that table says:

NWI
NORTHWEST INFRASTRUCTURE, INC.
Site Earthwork Volumes

Items	Plan	Actual	Differential	Unit Cost	Sum
Cut	24000 cy	57166 cy	33166 cy	\$5.55	\$184,071.30
Fill	16000 cy	23803 cy	7803 cy	\$2.60	\$20,287.80
Export	8000 cy	33363 cy	25383 cy	\$22.14	\$561,581.46

The table simply lists the Drawing C3.04 Cut, Fill, and Export quantities and the actual Cut, Fill, and Export quantities *calculated by NWI’s consultant Earthwork Services*. CP 380, 386.

The second “representation” identified by Sound Transit is the following italicized sentence contained in NWI’s letter to PCL dated October 6, 2005 (CP 393):

The earthwork quantities were specified on the published bid plans. *The competitive nature of the proposal dictated that NWI use those numbers.*

CP 1004. The italicized sentence is simply an accurate statement of Washington law (RCW 39.04.040) that explains why NWI used the Drawing C3.04 volume numbers for Cut, Fill, and Export. In recommending approval of Change Order 12, Sound Transit’s Mr. Dahl

⁴ The table is identified by Sound Transit by Bates Number FWTC768. See CP 1080, 1083.

and Mr. Perry independently reached the same conclusion back in December 2005. CP 744.

In its contention interrogatory answers signed under oath, Sound Transit states that NWI's internal bid estimate showed "...on its face that NWI did not rely solely on the quantities listed in Drawing C3.04." CP 1086-1087; CP 996-1000. Sound Transit claims that as soon as it had NWI's bid, the facts supporting the cross-claims became immediately known. So let's examine when Sound Transit and its lawyers and consultants first obtained the PCL and NWI bid documents, and their informed actions that followed.

I. Sound Transit Had Possession Of NWI's Bid No Later Than June 2006, Months Before Making A Decision On The January 2006 Article 10 Claim.

Sound Transit and its legal counsel first discovered NWI's "internal bid estimate" by June 21, 2006, when NWI transmitted copies of the bid estimate to Sound Transit's consultants Ronald Maus, Vanessa Schmidt and Henry Spieker. CP 1092-1097; CP 1466. In addition, on June 30, 2006, PCL's legal counsel gave Sound Transit's counsel a complete copy of PCL's bid estimate file, including NWI's bid and PCL's bid recap sheet. CP 794-976. On July 3, 2006, Sound Transit's outside counsel forwarded an entire copy of PCL's bid estimate file to Hainline & Associates. CP 796.

J. After Having Possession Of And Reviewing NWI's Bid, Sound Transit Continued To Maintain That The Quantities In Drawing C3.04 Misled All Bidders, Including NWI And PCL.

Sound Transit, its legal counsel at Lane Powell, and its construction claim consultants at both Navigant Consulting and Hainline & Associates all had seen, considered, and evaluated NWI's bid estimate by the end of June 2006. *After June 2006, all of these Sound Transit representatives continued to affirm NWI's entitlement to compensation for additional earthwork based on the erroneous quantities in Drawing C3.04.*

1. Sound Transit Consultant Ron Maus Affirms That Drawing C3.04 Misled Bidders, Entitling NWI To Compensation For Additional Earthwork.

After having in hand the PCL and NWI bid documents, Sound Transit consultant Ronald A. Maus of Navigant Consulting, Inc. reached the same conclusion as Jerry Dahl and Scott Perry in December 2005, i.e. that the erroneous earthwork quantities in Drawing C3.04 had misled bidders:

...On the entitlement front, it does appear that there may be a few issues of fact or circumstances unfavorable to Sound Transit. ...Unusually in this instance, NWI did not make its own take-off of the quantities on the site, and did not digitize the site because, unlike other drawings which often suggested the apparent quantities but told bidders to do their own due diligence about it, the ST (Sound Transit) documents instead said that the quantities were 24,000 c.y. for excavation and 16,000 c.y. for embankment. Because all bidders were bidding a fixed

price for the work, at unit prices NWI relied upon the failure of ST's documents to warn the bidders to make their own assessment of the quantities.

CP 1159. (Emphasis added.) And as noted earlier, Mr. Maus also acknowledged that the errors in Drawing C3.04 were known by Sound Transit at bid time: “*ST (Sound Transit), through its agents, insisted that the bid go to the street with known errors in the quantities on it.*”

Id.

2. Sound Transit Consultant Jay Congleton Affirms NWI Entitlement To Compensation For Additional Earthwork Because Bidders Were Misled By The Erroneous Quantities In Drawing C3.04.

Sound Transit consultant Jay Congleton of Hainline & Associates, concurred with the determinations made by Mr. Dahl, Mr. Perry, and Mr. Maus: the erroneous earthwork quantities in Drawing C3.04 had misled bidders. Mr. Congleton, along with Sound Transit's outside counsel Janis White of Lane Powell, met with KPFF representatives on June 30, 2006, after their receipt of NWI's bid and PCL's bid estimate file. CP 1124-1129. Addressing the site earthwork cut and fill quantities on Drawing C3.04, Mr. Congleton affirmed that “...your average contractor would have assumed the number (in Drawing C3.04) to be indicative of the difference between existing and finished grade.” CP 1127.

3. **After Having In Hand NWI's Bid, Sound Transit's Lawyers Continue Pursuit Of The Errors And Omissions Claim Against KPFF Based On The Erroneous Quantities In Drawing C3.04.**

In 2006, Sound Transit asserted an errors and omissions claim against KPFF based on the engineering firm's mistakes in the earthwork quantities stated in Drawing C3.04. CP 1029-1047. In September 11, 2006 correspondence to KPFF's legal counsel, Sound Transit's lawyer affirmed the same conclusions reached by Jerry Dahl, Scott Perry, Ron Maus, and Jay Congleton concerning the issuance of Change Order 12: any reasonable bidder on the Project, including NWI, would assume the quantities in Drawing C3.04 were correct:

When PCL first raised the claim for additional earthwork on behalf of its subcontractor, Northwest Infrastructure, Inc. ("NWI"), Sound Transit and KPFF reviewed the facts and concluded that it could have been reasonable for the bidding subcontractor to assume - given the absence of limiting language - that the cut and fill quantities noted on Drawing C3.04 were meant to include all excavation on the Project. Sound Transit then asked KPFF to calculate the reasonable theoretical earthwork quantities ("TEQ"), based on the Project documents, at the time of the bid. Sound Transit, with KPFF's agreement, issued a change order to PCL/NWI for the difference between the TEQ and the quantities shown on Drawing C3.04. (Emphasis added.)

CP 1709.

4. **After Having PCL's Entire Bid File And NWI's Bid, Sound Transit And KPFF Still Acknowledge That Drawing C3.04 Was Misleading To Bidders In The "Lessons Learned" From The Project.**

Further acknowledgement of the misleading quantity errors in Drawing C3.04 were made by Sound Transit and KPFF in a post-project review conference. CP 727-741. Attendees included Project Manager Jerry Dahl and Resident Engineer Scott Perry. CP 727. At the conclusion of the Project, in their process self-described to as "Lessons Learned," Sound Transit and KPFF addressed how to avoid future problems created by the misleading erroneous quantities in Drawing C3.04. Among the solutions identified by Sound Transit and KPFF for use on future projects:

- no earthwork quantities on plans
- remove references to quantities from bid documents
- don't include quantities on grading plans

CP 730-731.

5. **Even After Considering NWI's Bid, Sound Transit's Auditor Continued To Calculate The Compensation Payable To PCL/NWI For The January 2006 Article 10 Claim.**

Navigant did not issue its audit report until September 11, 2006, several months after Sound Transit, Lane Powell, Hainline & Associates, and Navigant had possession of PCL's bid file and NWI's bid estimate. CP 1048-1076. Navigant ultimately determined that just to break even on the additional earthwork, *NWI needed to be paid \$701,126 over and*

above the amount already paid by Change Order 12. CP 1072.

Navigant specifically refers to NWI's internal bid estimate in the audit report and attached it as an exhibit. CP 1050; CP 1160-1166.⁵

Navigant's report says nothing about fraudulent misrepresentations by either PCL or NWI in the issuance of Change Order 12.

6. **Sound Transit's Denial Of The January 2006 Article 10 Claim Was Not Based On NWI Or PCL Misrepresentations.**

Through legal counsel, Sound Transit denied NWI's Article 10 claim by letter dated December 7, 2006. In the denial letter, Sound Transit carefully goes over NWI's bid. CP 1130-1135. The letter goes on to state that the January 2006 Article 10 claim was denied because NWI's lump sum subcontract did not specifically refer to earthwork quantities:

Once NWI entered into a subcontract with PCL, it was contractually bound to perform the subcontracted scope of work. *As the subcontract made no reference to specific earthwork quantities, NWI lost any entitlement it might have had to claim the scope of its work was limited to the quantities noted on Drawing C3.04.*

CP 1133. (Emphasis added.)

⁵ The copy of the Navigant Report found at Dep. Ex. 74 (CP 1048-1076) omits the Tabs referenced in and attached to the original report. NWI's bid was attached as Tab D to the original Navigant report. A copy of Tab D is found at CP 1160-1166.

K. Sound Transit's Contradictory Positions Made On The Record Regarding Its Cross-Claims.

Concerning facts supporting its cross-claims, Sound Transit on a number of occasions took unsupportable and/or contradictory positions on the record.

1. Mr. Dahl's Declaration Dated August 5, 2010.

a) The Claim Denial In The December 7, 2006 Letter Was Not Based On Misrepresentation.

Mr. Dahl states under penalty of perjury that Sound Transit's December 6, 2006 letter denied NWI's claim for additional compensation based upon NWI's misrepresentations reflected in its bid. CP 1466-1467. Contrary to Mr. Dahl's declaration, that was not the grounds for denial and there is nothing in the letter even hinting to any false representations made by NWI or PCL. CP 1130-1135. Moreover, if misrepresentation had been the grounds for denial, Mr. Dahl offers no explanation why Sound Transit's December 7, 2006 letter did not demand full repayment of the entire sum paid by Change Order 12 (\$534,602.75) rather than only the alleged "overpayment" of \$186,933.23, although neither dollar figure was supported by the Navigant audit report. According to Navigant, NWI was owed an additional \$701,126 over and above Change Order 12 just to break even. CP 1072.

b) Mr. Dahl's Misrepresentation Of A Meeting With An NWI Representative That Never Happened.

In his declaration of August 5, 2010, Mr. Dahl testified to an entirely new "misrepresentation" attributed to NWI president Hal Johnson, which is remarkably precise in detail as to (1) the exact date the statement was made - June 15, 2005; and (2) the exact time and place the statement was made - during a weekly on-site construction meeting for the Project. CP 1464-1465; CP 1474-1477. Mr. Johnson's statement is noticeably absent from Sound Transit's answer and supplemental answer to NWI's Interrogatory No. 2, signed by Mr. Dahl on behalf of Sound Transit. CP 1001-1026.

Mr. Dahl's testimony regarding the occurrence of this meeting was not true, based on Sound Transit's own records. Hal Johnson was not at the June 15, 2005 meeting, nor was Mr. Dahl. The meeting minutes confirm that no one from NWI attended the meeting, and *neither did Mr. Dahl.* CP 1474; CP 1737-1738. *See also* CP 1688; CP 1732-1733. Mr. Dahl's name appears on the standardized template list of meeting attendees, adjacent to the form's separate column that says "Did Attend." Next to Dahl's name is "N" (No). CP 1474; CP 1732-1733. *The absence of both Dahl and any NWI representative is further confirmed by the*

meeting's sign in sheet. CP 1726-1727. *See also* CP 1696-1699 (Perry Dep. explaining how the minutes were kept); CP 1701-1707.

2. **Sound Transit's 30(b)(6) Designee Had No Knowledge Of Facts Supporting The Cross-Claims, And Testified To A New Misrepresentation Allegation Never Pled By Sound Transit.**

Rather than Project Manager Jerry Dahl, Sound Transit designated James Edwards its 30(b)(6) designee, i.e. the person most knowledgeable of the facts supporting the misrepresentation and CPA cross-claims against NWI.⁶ CP 979-983; CP 1221.

Mr. Edwards was the Deputy Director for the Design and Engineering Department. CP 1228. Mr. Edwards never read the Project specifications, and only made a single “cursory, high-level review” of the Project drawings before the Project was advertised to potential bidders. CP 1229-1230. During his entire professional career spanning 41 years, Mr. Edwards has never once bid a private or public construction project, and had no idea how a contractor would have used Drawing C3.04 in

⁶ As the person most knowledgeable of the facts pertaining to the cross-claims, the testimony of Mr. Edwards is deemed to be the complete, knowledgeable, and binding answers of Sound Transit on the subject matter designated in NWI's 30(b)(6) notice. *Flower v. TRA Industries*, 127 Wn. App. 13, 39, 111 P.3d 1192 (2005); *U.S. v. Taylor*, 166 FRD 356, 361 (MDNC 1996). Sound Transit was precluded from proffering any declarations or testimony from other witnesses that differ from the testimony of Mr. Edwards. *Casper v. Esteb Enterprises, Inc.*, 119 Wn.App. 759, 767-768, 82 P.3d 1223 (2004); *Rainey v. American Forest and Paper Assn., Inc.*, 25 F.Supp.2d 82, 94 (D.D.C. 1998).

preparing an earthwork bid. CP 1233-1234. Mr. Edwards had ever seen Sound Transit's responses to NWI's interrogatories and request for production until five or six days before his deposition. CP 1247-1248; CP 1254-1256.

Designated the person most knowledgeable concerning the facts supporting Sound Transit's cross-claims, this was Mr. Edward's testimony on NWI's "misrepresentations": knowing beforehand that the Drawing C3.04 quantities were actually wrong, NWI used those erroneous quantities in its bid to intentionally underbid the site earthwork, with the plan to make an additional earthwork claim later in the Project. CP 1249-1250. Mr. Edwards' testimony was based on his "belief" and "perception." *Id.* The only "evidence" identified by Mr. Edwards in support of his testimony was NWI's bid submitted to PCL in May 2004. CP 1235-1238; CP 1250-1253; CP 996-1000. Mr. Edwards, Sound Transit's 30(b)(6) designee, could not explain what was included or meant by any of NWI's bid line items, or how the bid otherwise revealed NWI's intent to fraudulently misrepresent the additional earthwork claim to Sound Transit. CP 1238-1246; CP 996-1000.

3. In Opposing NWI’s Summary Judgment Motion, Sound Transit Asserts On The Record That The Cut And Fill Quantities In Drawing C3.04 Were Actually Correct.

Sound Transit issued Change Order 12 because “the Sound Transit team” recalculated the site earthwork quantities and determined there was a difference between the Drawing C3.04 quantities and the actual quantities shown on the plans at the time of bid. CP 744. The difference calculated by Sound Transit (KPF’s TEQ) was far greater than the C3.04 quantities:

Item	Stated Quantities On Drawing C3.04	Actual Plan Quantities Calculated By The Sound Transit Team	Difference
Cut	24,000 cy	54,123 cy	30,123 cy
Fill	16,000 cy	26,404 cy	10,404 cy
Off haul (Export)	8,000 cy	27,719 cy	19,719 cy

See CP 1536, 1541. Even though the Sound Transit team independently determined by December 2005 the Drawing C3.04 quantities were wrong (later prompting Sound Transit’s malpractice claim against KPF in 2006), Sound Transit opposed NWI’s summary judgment motion in 2010 by denying that the Drawing C3.04 quantities were wrong:

NWI asserts in its Motion that Sound Transit and KPF concluded that the quantities listed on Drawing C3.04 were incorrect and in error. Sound Transit and KPF never made any such determination. KPF never admitted that the quantities on Drawing C3.04 were wrong. In fact, KPF stands behind the quantities listed on Drawing C3.04 as being accurate rough estimates of the

mass excavation for the project. (Citations omitted, emphasis added.)

CP 1561. Sound Transit's counsel repeated this position during oral argument:

So where we have KPFF presenting evidence to contradict the very statements that NWI is making now which is that KPFF has admitted that the drawing was wrong.

In fact, Sound Transit does not agree. *Sound Transit believes that the drawings were correct. And KPFF believes that the drawings were correct. We have a dispute there on that issue. Once again, another dispute to go to the jury.*

Summary Judgment Hearing Transcript at 40:10-41:8 (emphasis added).

III. STANDARD OF REVIEW.

When reviewing a summary judgment order, the appellate court engages in the same inquiries as the trial court, determining whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Trimble v. Washington State University*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). The appellate court reviews a summary judgment *de novo* and engages in the same inquiry as the trial court. *Keith v. Allstate Indemnity Co.*, 105 Wn. App. 251, 19 P.3d 1077 (2001).

Even as the non-moving party, Sound Transit has the ultimate burden of demonstrating the existence of material issues of fact in order to avoid summary judgment. Because Sound Transit ultimately bears the

burden of proof at trial, to successfully oppose the motion it must present competent evidence to establish the existence of each and every element essential and required to prove each cross-claim that would allow a reasonable jury to return a verdict in appellant's favor. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989); *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 6 P.3d 30 (2000).

In determining whether Sound Transit has presented sufficient proof establishing the existence of material issues of fact, the Court must take into account the overall proof burden that applies to the claims.

Sedwick v. Gwinn, 73 Wn. App. 879, 873 P.2d 528 (1994). As to Sound Transit's first cross-claim, proof of fraudulent misrepresentation requires clear, cogent, and convincing evidence to prove each element. *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996); WPI Civil 160.02.

The non-moving party cannot create an issue of fact and prevent summary judgment simply by offering two different versions of a story by the same person, *McCormick v. Lake Washington School District*, 99 Wn.App. 107, 992 P.2d 511 (1999); *Selvig v. Caryl*, 97 Wn.App. 220, 983 P.2d 1141 (1999), or by submitting an affidavit contradicting his or her own deposition, *Robinson v. Avis Rent-A-Car System, Inc.*, 106 Wn.App. 104, 22 P.3d 818 (2001); *Marshall v. Bally's Pacwest, Inc.*, 94 Wn.App. 372, 972 P.2d 475 (1999). Likewise, a party cannot create an issue of fact

by submitting an affidavit contradicting his or her own answers to interrogatories. *Department of Labor and Industries v. Kaiser Aluminum and Chemical Corp.*, 111 Wn.App. 771, 48 P.3d 324 (2002).

IV. ARGUMENT

In opposing NWI's summary judgment motion, Sound Transit filed declarations that did nothing more than assert conclusions; reiterate Sound Transit's unsupported fact allegations; contradicted Sound Transit's interrogatory answers; *and directly conflicted with a documentary record consisting of emails, correspondence, memos, reports, and handwritten notes authored by Sound Transit's representatives and KPFF over five years ago.* The trial court properly dismissed Sound Transit's cross-claims on summary judgment. Moreover, the record makes clear that Sound Transit's appeal of the trial court's ruling is frivolous. Under RAP 18.9, NWI is entitled to an award of attorneys' fees and costs incurred in opposing this meritless appeal.

A. Sound Transit Is Unable To Prove Fraudulent Misrepresentations By NWI.

To avoid summary judgment dismissing its misrepresentation claim, Sound Transit was required to respond to NWI's motion with admissible evidence allowing a reasonable juror to determine that each and every one of the following nine elements can be proven *by clear, cogent, and convincing evidence*:

- (1) Representation of an existing fact by NWI;
- (2) Materiality of the representation;
- (3) Falsity of the representation;
- (4) NWI's knowledge of its falsity;
- (5) NWI's intent that it be acted upon by Sound Transit;
- (6) Sound Transit's ignorance of the falsity;
- (7) Sound Transit's reliance on the truth of the representation;
- (8) Sound Transit's right to rely upon it; and
- (9) Resulting damages.

Stiley v. Block, 130 Wn.2d at 505; WPI Civil 160.01. Sound Transit presented no evidence to establish any one of these elements required to avoid summary judgment.

1. Elements 1-5: The Representations Were Truthful.

According to Sound Transit's discovery responses, the only representations made by NWI were (1) the table found in the June 2005 RFC showing the Drawing C3.04 quantities differed from the actual site earthwork quantities, and (2) NWI's statement that the competitive nature of the earthwork bid dictated that NWI use the C3.04 numbers. CP 393. The first "representation" was based on the calculations made by Earthwork Services after digitizing the plans (KPFF reached the same conclusion with its "TEQ"). CP 378-389. The second "representation" is a correct statement of Washington law (RCW 39.04.040), that all binders would rely on the C3.04 quantities, a statement corroborated by Sound Transit's own representatives: Jerry Dahl, Scott Perry, Ron Maus, Jay Congleton, and Lane Powell. Had the second "representation" been

inaccurate, it was unactionable because a misrepresentation of law cannot support a fraud claim. *Prest v. Adams*, 142 Wash. 111, 252 Pac. 686 (1927).

Further, Sound Transit undermined its misrepresentation cross-claim by its opposition to NWI's motion on its CPA cross-claim. In the "alternative," Sound Transit factually asserted on its CPA cross-claim that NWI actually used the Drawing C3.04 numbers in its earthwork bid to intentionally underbid the Project. CP 1565; CP 1574. If those were the facts, then Sound Transit could not credibly and factually contend in a different breath that NWI did not use, and had *misrepresented* it had used, the C3.04 quantities in its bid.

2. **Elements 6-8: Sound Transit Did Not Rely On Any NWI Representation.**

Sound Transit did not rely on any representation of either PCL or NWI in issuing Change Order 12. If Sound Transit had "relied" upon any representations of PCL or NWI, it would have accepted the June 2005 RFC on its face and issued Change Order 12 with no further action taken. But it didn't go down that way. Sound Transit did not accept that claim on its face, including Earthwork Services' data. Rather, Change Order 12 issued five months later only after Team Sound Transit *independently evaluated* whether PCL/NWI were entitled to a change order:

- *The “Sound Transit team”* independently evaluated the earthwork quantities, and determined entitlement to Change Order 12 based on the “...difference between the C3.04 quantities and the actual quantities shown at the time of the bid, not the as-built quantities that the contractor claimed.” CP 744.
- Sound Transit’s Project engineer KPFF independently ran and re-ran data modeling on the site earthwork quantities, each time confirming the C3.04 quantities grossly understated the required grading work. CP 746-758; CP 1536-1543.
- As affirmed by Sound Transit’s own counsel, Change Order 12 was issued *by agreement between Sound Transit and KPFF*, based on the “difference between the TEQ and the quantities shown on Drawing C3.04.” CP 1709.

The undisputed fact that Sound Transit did not rely on representations made by PCL and NWI is further made clear from its December 2005 letter approving Change Order 12. There, Sound Transit “questions” whether PCL and NWI were entitled to rely on Drawing C3.04, but goes on to conclude that the contractors were nonetheless entitled to be paid the difference between the C3.04 quantities and the reasonable “theoretical earthwork quantity” (TEQ) independently derived by KPFF. CP 1536. Yet even further proof that Sound Transit did not rely on any representation by PCL or NWI: (1) the actual earthwork quantities calculated by Earthwork Services were rejected by Sound Transit, who relied only upon KPFF’s TEQ numbers, and (2) Sound Transit rejected any request for extra earthwork at the detention vault (CP 1536).

3. Element 9 – No Proof of Causation.

Sound Transit failed to establish an issue of material fact as to the causation element. Neither PCL nor NWI caused Sound Transit to issue Change Order 12. The change order was issued solely as a result of the independent evaluation of Team Sound Transit.

B. Based On The Applicable Three Year Statute of Limitations, Sound Transit's Fraudulent Misrepresentation Claim Was Also Time Barred.

Sound Transit's misrepresentation cross-claim was also properly dismissed on summary judgment for an independent reason: no material issues of fact existed and as a matter of law, the claim was time barred by the three year statute of limitations, RCW 4.16.080(4). The statute was not tolled by the filing of either NWI's complaint or PCL's responsive pleading.

Causes of action for fraud begin to accrue when the claimant discovers, or should have discovered, the elements of a claim. *Norris v. Church*, 115 Wn.App. 511, 63 P.3d 153 (2003). Based on Sound Transit's discovery of NWI's bid documents by at least June 21, 2006, the fraud claim lapsed on June 21, 2009. Sound Transit did not file its fraud cross-claim against NWI until August 6, 2009.

In support of its argument that the statute was tolled, Sound Transit erroneously relies upon *J.R. Simplot v. Vogt*, 93 Wn.2d 122, 605 P.2d

1267 (1980). As explained by this Court in *Rieger v. Bennett*, 120 Wn.App. 74, 81, 84 P.3d 265 (2004), the same arguments now advanced by Sound Transit in reliance upon *J.R. Simplot* are *misplaced*. Based on *Rieger*, the three year statute of limitations under RCW 4.16.080(4) was not tolled on Sound Transit's fraud cross-claims.

*The holding in Rieger is that where a cross-claim seeks affirmative relief separate and independent from the plaintiff's complaint, the statute of limitations is not tolled on the cross-claim by the filing of the plaintiff's complaint. 120 Wn.App. at 81.*⁷ That rule applies here. Sound Transit's cross-claim for fraud against NWI is independent and separate from the third party complaint of PCL against Sound Transit. For the Court to determine otherwise would be to ignore (1) the nature and character of the claims asserted under Civil Rule 13 governing counterclaims and cross-claims and Civil Rule 14 governing third party practice/impleader; and (2) long-established Washington law governing construction claims and rules of contract privity, which bar direct claims of owners and subcontractors against the other in construction contract disputes.

⁷ As the *Rieger* court explained, *J.R. Simplot* is readily distinguishable - that case involved statutory lien claims, where multiple parties asserted a common interest in the same collateral. 120 Wn.App. at 80-81.

1. Sound Transit Is A Party In This Action Only By Way of A Third Party Complaint Asserted By PCL; Sound Transit's Cross-Claim Against NWI Is Separate And Independent From The Third Party Complaint.

NWI commenced this lawsuit as a breach of subcontract action against one defendant, PCL, in view of the economic loss/contract privity rules established under *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994); *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn.App. 192, 49 P.3d 912 (2002); and *Lobak Partitions, Inc. v. Atlas Const. Co., Inc.*, 50 Wn.App. 493, 749 P.2d 716 (1988). Under *Berschauer*, *Donald B. Murphy*, and *Lobak*, NWI and Sound Transit could not sue the other for any economic loss arising from the Project. Privity of contract was required, and none existed as between these parties.

2. The Holding in J.R. Simplot Does Not Apply Because Those Cases Did Not Involve Impleader.

Sound Transit is only fortuitously a party to this action because of PCL's Rule 14 impleader action. PCL could have sued Sound Transit in an independent action following the conclusion of the *NWI v. PCL* lawsuit. *Puget Sound Bank v. Richardson*, 54 Wn.App. 295, 773 P.2d 429 (1989).

In order to circumvent the economic loss/privity of contract rules imposed by *Berschauer*, *Donald B. Murphy*, and *Lobak*, Sound Transit

asserted a cross-claim against NWI sounding in *tort* - negligent misrepresentation. Under Sound Transit's theory, it would not have issued Change Order No. 12 absent its reliance upon the alleged misrepresentations of NWI. Sound Transit's cause of action against NWI is *independent* of PCL's third party complaint filed against Sound Transit based on the Project contract. In an independent lawsuit, Sound Transit could have filed a misrepresentation complaint against NWI regardless of whether NWI had filed its complaint against PCL and in the absence of PCL's third party complaint. However, Sound Transit's independent misrepresentation cause of action remained at all times subject to the three year statute of limitations under RCW 4.16.080(4). It was not tolled, and could not be tolled, by the pleadings filed by NWI and PCL.

C. **Sound Transit Is Unable To Present Facts Sufficient To Avoid Summary Judgment On Its CPA Cross-Claim.**

To establish its CPA claim, Sound Transit must prove each and every of the following five elements:

- (1) NWI engaged in an unfair and deceptive act or practice;
- (2) NWI's act or practice occurred in the conduct of NWI's trade or commerce;
- (3) The act or practice affected the public interest;
- (4) Sound Transit was injured in its business; and

- (5) NWI's act or practice at issue caused Sound Transit's injury.

WPI Civil 310.01; *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 787-93, 719 P.2d 531 (1986). A finding that any element is not established is fatal to the claim. *Hangman Ridge*, 105 Wn.2d at 784, 793.

Sound Transit's CPA claim is based on conflicting, alternative fact theories (with one never even pled), each of which foreclose and nullify the other. In its opposition to NWI's summary judgment motion, Sound Transit asserted the following two alternative misrepresentation theories for its CPA cross-claim:

Sound Transit alleges that NWI violated the Washington Consumer Protect (sic) Act in one of two ways: NWI either presented Sound Transit with a change order request premised upon a false representation of its bid or NWI unreasonably and intentionally underbid the project with the intent to make a claim for additional compensation.⁸

CP 1565. As explained by Sound Transit's counsel at the summary judgment hearing, Sound Transit advanced the latter alternative theory in the event NWI was able to defeat Sound Transit's first cross-claim, i.e.

⁸ *The fact allegations pled in Sound Transit's fraud claim (CP 31) were the only fact allegations pled supporting Sound Transit's CPA cross-claim. CP 32. Sound Transit never pled that NWI intentionally underbid the Project at the outset. Id.* In addition to not pleading it, Sound Transit provided no interrogatory responses identifying facts supporting this alternative claim.

that it had misrepresented its site earthwork bid. Summary Judgment Hearing Transcript at 50:3-51:16.

Sound Transit's CPA claim was properly dismissed on summary judgment because it could not prove (1) an unfair or deceptive act attributable to NWI that (2) affected the public interest, and (3) caused damage to Sound Transit.

1. **No Proof Of A Deceptive Or Unfair Act.**

Even with two alternative "theories," Sound Transit was unable to prove an unfair or deceptive act on the part of NWI because none are established by the record. Sound Transit's misrepresentation cross-claim, the basis for Sound Transit's first CPA theory, was properly dismissed on summary judgment. This left Sound Transit's second and alternative theory, i.e. that NWI intentionally underbid the Project by using the quantities in Drawing C3.04 knowing the quantities were actually wrong. For that theory to fly first required proof that the quantities in Drawing C3.04 were indeed erroneous. Unfortunately for Sound Transit, it nullified this alternative theory by taking another contradictory position in opposing NWI's summary judgment motion: ***Sound Transit asserted that the quantities stated in Drawing C3.04 were not in error, but in fact correct.*** CP 1561; Summary Judgment Hearing Transcript at 40:10-41:8. If the C3.04 quantities were correct, then NWI could not have

intentionally underbid the Project by relying on those quantities.

Notwithstanding this contradictory assertion, Sound Transit adduced no admissible evidence that NWI underbid the Project, intentionally or otherwise.

2. **Sound Transit Was Unable To Present Evidence Creating An Issue Of Fact As To The Public Interest Element.**

There are two different tests in establishing the public interest element, depending upon whether a CPA claim involves a consumer transaction or a private dispute. *Hangman Ridge*, 105 Wn.2d at 789-791. Because the claims here involve a private dispute, the applicable factors in determining whether the public interest is affected include the following:⁹ (1) Were the alleged acts committed in the course of NWI's business? (2) Did NWI advertise to the public in general? (3) Did NWI actively solicit this particular claimant (Sound Transit), indicating potential solicitation of others? (4) Did Sound Transit and NWI occupy unequal bargaining positions? *Id.*, 105 Wn.2d at 790-791.

Sound Transit failed to present any admissible evidence demonstrating a material issue of fact to establish impact upon the public interest. NWI did not solicit the earthwork subcontract from Sound Transit. Sound Transit had a far superior bargaining position in the

⁹ Sound Transit omits to address these factors in its opening brief.

transaction, and in fact never actually bargained directly with NWI when awarding the Project. Sound Transit's claims are nothing more than the equivalent of a breach of contract claim. Where there is a breach of a private contract affecting no one but the parties to the contract, it is not an act or practice affecting the public interest. *Jolley v. Regence Blue Shield*, 153 Wn.App. 434, 451-452, 220 P.3d 1264 (2009). *See also, Hangman Ridge*, 105 Wn.2d at 790. Here, there actually was no contract between Sound Transit and NWI. The only party having a contract relationship with Sound Transit was PCL.

3. Sound Transit's Failure To Present Any Evidence Supporting Causation.

To prove the causation element, a claimant must show that it relied upon a misrepresentation of fact attributable to the adverse party. *Robinson v. Avis Rent-A-Car System, Inc.*, 106 Wn.App. 104, 119, 22 P.3d 818 (2001). As explained earlier, Sound Transit is unable to prove causation establishing that Change Order 12 was issued based on alleged conduct of NWI. Change Order 12 was issued only as a result of Team Sound Transit's independent evaluation of the June 2006 RFC.

D. NWI Is Entitled To An Award Of Attorneys' Fees And Costs In Defending Sound Transit's Frivolous Appeal.

Pursuant to RAP 18.9, NWI respectfully requests an award of its attorneys' fees and costs incurred in this appeal. RAP 18.9 permits this

Court to require an appellant to pay the fees and costs incurred by the respondent for defending a frivolous appeal. *Fay v. Northwest Airlines*, 115 Wn.2d 194, 200-201, 796 P.2d 412 (1990). “An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal.” *Eugster v. City of Spokane*, 139 Wn.App. 21, 34, 156 P.3d 912 (2007).

Under the foregoing standards, the Court should determine that Sound Transit’s appeal is indeed frivolous, entitling NWI to an award of its fees and costs. Even though it is a public agency, Sound Transit is not entitled to a free pass in bringing what is plainly a meritless and baseless appellate challenge to the trial court’s proper dismissal of meritless and baseless cross-claims against NWI.

V. CONCLUSION

Sound Transit had not a scintilla of evidence to support its cross-claims. The trial court’s summary judgment ruling should be affirmed, and NWI awarded fees and costs for defending this frivolous appeal.

RESPECTFULLY SUBMITTED on July 21, 2011.

CABLE LANGENBACH KINERK &
BAUER, LLP

By Jack M. Louis #36962 FOR
Bryan P. Coluccio, WSBA 12609
*Attorneys for Plaintiff/Respondent
Northwest Infrastructure, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2011, I caused the foregoing document to be served on the following counsel of record, via hand delivery:

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Andrew J. Gabel, Esq.
Ryan McBride, Esq.
Lane Powell, PC
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338

David Groff, Esq.
Shelley Tolman, Esq.
Groff Murphy PLLC
300 East Pine Street
Seattle, WA 98122



Rosanne M. Wanamaker, Legal Secretary

APPENDIX 1

RCW 39.04.040

Work to be executed according to plans — Supplemental plans.

Whenever plans and specifications shall have been filed the work to be done shall be executed in accordance with such plans and specifications unless supplemental plans and specifications of the alterations to be made therein shall be made and filed in the office where the original plans and specifications are filed.

In the event that the probable cost of executing such work in accordance with the supplemental plans and specifications shall be increased or decreased from the estimated cost as shown by the original estimate to an amount in excess of ten percent of such estimate, then a supplemental estimate shall be made of the increased or decreased cost of executing the work in accordance with the supplemental plans and specifications and filed in the office where the original estimate is filed.

WPI 160.01 Elements of Fraud

There are nine elements of fraud. They are:

- (1) Representation of an existing fact;
- (2) Materiality of the representation;
- (3) Falsity of the representation;
- (4) The speaker's knowledge of its falsity;
- (5) The speaker's intent that it be acted upon by the plaintiff;
- (6) Plaintiff's ignorance of the falsity;
- (7) Plaintiff's reliance on the truth of the representation;
- (8) Plaintiff's right to rely upon it; and
- (9) Resulting damage.

WPI 160.02 Fraud—Burden of Proof

A party who alleges [fraud] [] has the burden of proving each of the elements of [fraud] [] by clear, cogent, and convincing evidence. Proof by clear, cogent, and convincing evidence means that the element must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. Clear, cogent, and convincing evidence exists when occurrence of the element has been

shown by the evidence to be highly probable. However, it does not mean that the element must be proved by evidence that is convincing beyond a reasonable doubt.

A “preponderance of the evidence” means that you must be persuaded, considering all the evidence in the case, that a proposition is more probably true than not true. “Preponderance of the evidence” is defined here solely to aid you in understanding the meaning of “clear, cogent, and convincing.”

WPI 310.01 Elements of a Violation of the Consumer Protection Act

_____ claims that _____ has violated the Washington Consumer Protection Act. To prove this claim, the plaintiff has the burden of proving each of the following propositions:

- (1) That _____ engaged in an unfair or deceptive act or practice;
- (2) That the act or practice occurred in the conduct of _____ trade or commerce;
- (3) That the act or practice affected the public interest;
- (4) That _____ was injured in either [its] [his] [her] business or [its] [his] [her] property, and
- (5) That _____ act or practice caused [was a proximate cause of] _____ injury.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for _____ [on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for _____ [on this claim].

RULE OF APPELLATE PROCEDURE 18.9

Violation of Rules

(a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party. If an

award is not paid within the time specified by the court, the appellate court will transmit the award to the superior court of the county where the case arose and direct the entry of a judgment in accordance with the award.

(b) Dismissal on Motion of Commissioner or Clerk. The commissioner or clerk, on 10 days' notice to the parties, may (1) dismiss a review proceeding as provided in section (a) and (2) except as provided in rule 18.8(b), will dismiss a review proceeding for failure to timely file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, or a petition for review. A party may object to the ruling of the commissioner or clerk only as provided in rule 17.7.

(c) Dismissal on Motion of Party. The appellate court will, on motion of a party, dismiss review of a case (1) for want of prosecution if the party seeking review has abandoned the review, or (2) if the application for review is frivolous, moot, or solely for the purpose of delay, or (3) except as provided in rule 18.8(b), for failure to timely file a notice of appeal, a notice of discretionary review, a motion for discretionary review of a decision of the Court of Appeals, or a petition for review.

(d) Objection to Ruling. A counsel upon whom sanctions have been imposed or a party may object to the ruling of a commissioner or the clerk only as provided in rule 17.7.

APPENDIX 1

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WPI 310.01 Elements of a Violation of the Consumer Protection Act

_____ claims that _____ has violated the Washington Consumer Protection Act. To prove this claim, the plaintiff has the burden of proving each of the following propositions:

- (1) That _____ engaged in an unfair or deceptive act or practice;
- (2) That the act or practice occurred in the conduct of _____ trade or commerce;
- (3) That the act or practice affected the public interest;
- (4) That _____ was injured in either [its] [his] [her] business or [its] [his] [her] property, and
- (5) That _____ act or practice caused [was a proximate cause of] _____ injury.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for _____ [on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for _____ [on this claim].

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award is not paid within the time specified by the court, the appellate court will transmit the award to the superior court of the county where the case arose and direct the entry of a judgment in accordance with the award.

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(d) Objection to Ruling. A counsel upon whom sanctions have been imposed or a party may object to the ruling of a commissioner or the clerk only as provided in rule 17.7.

HONORABLE TIMOTHY BRADSHAW

Noted for Hearing: August 12, 2010

Time of Hearing: 1:30 p.m.

CASE NUMBER: 09-2-12930-4 SEA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

NORTHWEST INFRASTRUCTURE, INC.,
a Washington corporation,

Plaintiff,

vs.

PCL CONSTRUCTION SERVICES, INC., a
Washington corporation; FIDELITY AND
DEPOSIT COMPANY OF MARYLAND
Bond No. 6318278/400SL4177,

Defendants.

No. 09-2-12930-4 SEA

**SUPPLEMENTAL
DECLARATION OF BRYAN P.
COLUCCIO IN SUPPORT OF
PLAINTIFF NORTHWEST
INFRASTRUCTURE, INC.'S MOTION
FOR SUMMARY JUDGMENT
DISMISSING CROSS-CLAIMS OF
THIRD-PARTY DEFENDANT CENTRAL
PUGET SOUND REGIONAL TRANSIT
AUTHORITY**

RE: ERRATA DEPOSITION EXHIBITS

PCL CONSTRUCTION SERVICES, INC., a
Washington corporation,

Third-Party Plaintiff,

vs.

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY, a Washington
Regional Transit Authority,

Third-Party Defendant.

SUPPLEMENTAL DECLARATION OF BRYAN P. COLUCCIO IN SUPPORT
OF PLAINTIFF NORTHWEST INFRASTRUCTURE, INC.'S MOTION FOR
SUMMARY JUDGMENT DISMISSING CROSS-CLAIMS OF THIRD-PARTY
DEFENDANT CENTRAL PUGET SOUND REGIONAL TRANSIT
AUTHORITY RE: ERRATA DEPOSITION EXHIBITS - 1

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Bryan P. Coluccio, being first duly sworn, declares and states as follows:

1. I am one of the attorneys for plaintiff in this action. I have personal knowledge of the facts contained in this declaration, and I am competent to testify thereto.

2. Attached are true and correct copies of deposition exhibits which were inadvertently omitted from the Declaration of Bryan P. Coluccio in Support of Plaintiff Northwest Infrastructure, Inc.'s Motion for Summary Judgment Dismissing Cross-Claims of Third-Party Defendant Central Puget Sound Regional Transit Authority Re: Deposition Exhibits, filed on July 20, 2010:

Dep. Ex. 47 KPFF Confirmation Record, dated June 8, 2005

Dep. Ex. 52 KPFF Memorandum from Matthews to Perry, Harris & Associates, dated August 23, 2005

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED August 4, 2010, at Seattle, Washington.

CABLE LANGENBACH KINERK & BAUER LLP

/s/ Bryan P. Coluccio
Bryan P. Coluccio, WSBA No. 12609
Attorney for Plaintiff Northwest Infrastructure, Inc.
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SUPPLEMENTAL DECLARATION OF BRYAN P. COLUCCIO IN SUPPORT OF PLAINTIFF NORTHWEST INFRASTRUCTURE, INC.'S MOTION FOR SUMMARY JUDGMENT DISMISSING CROSS-CLAIMS OF THIRD-PARTY DEFENDANT CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY RE: ERRATA DEPOSITION EXHIBITS - 2

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. The document was served via electronic service

on:

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SUPPLEMENTAL DECLARATION OF BRYAN P. COLUCCIO IN SUPPORT OF PLAINTIFF NORTHWEST INFRASTRUCTURE, INC.'S MOTION FOR SUMMARY JUDGMENT DISMISSING CROSS-CLAIMS OF THIRD-PARTY DEFENDANT CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY RE: ERRATA DEPOSITION EXHIBITS - 3

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Exhibit 47



1601 Fifth Avenue, Suite 1600 Seattle, WA 98101
(206) 822-6822 Fax (206) 822-8130

Date 6/8/05 Job No. _____

Project FWTG

Discussion With Harold

Company NWE (PCL sub)

By JEM

Telephone Direct

Confirmation Record

Harold contacted me for help in determining what the volumes shown on sheet FW-C3.04 included. I told him I could not recall off the top of my head but I didn't think the garage was included. Any leaking into this would have to come from the direction of Scott Perry (Harold). He said his next phone call would be to Scott.

Exhibit 97
 Witness JEM
 Date 7-8-10
 Duell Realtime Reporting
 (206) 287-9066

Exhibit 52

MEMORANDUM

Date: August 23, 2005
To: Scott Perry, Harris and Associates
From: Justin Matthews: *JM*
Subject: Federal Way Transit Center- Earthwork Verification

At the request of Sound Transit, KPFF reviewed the contractor's earthwork change order request (reference PCL's letter dated June 28, 2005) and has performed an independent check of earthwork quantities for the Federal Way Transit Center project. This memo summarizes the methodology of our earthwork quantity takeoffs. Attached is a summary entitled "Excavation and Fill Quantity Verification" which contains tables of cut and fill volumes by line item, and a summary table entitled "Quantity Take Off Comparison" which compares the quantities calculated by KPFF in this memo to those proposed by the Contractor. Volumes are in place bank cubic yards and have not been adjusted for shrink or swell.

CUT VERIFICATION

Item No. 1 in the cut summary table is the mass grading excavation quantity. It was obtained by comparing the existing grade elevations to proposed top of subgrade elevations using a 3-D digital terrain model (software: Land Development Desktop). The volume and proposed top of subgrade contours are shown in Exhibit 1. This model takes into account the different impervious surface thicknesses proposed around the site to establish this top of subgrade surface. In the area of the garage, the top of subgrade contours were set at 1-foot below top of slab to account for slab thickness and drain rock. The excavation slopes around the garage were set at 1.5 (horizontal) to 1 (vertical) per the project soil type stated in the project's geotechnical report dated May 8, 2002, prepared by PacRim Geotechnical Inc. Exhibit 1 also includes grid ticks (negative number indicates cut) indicating the difference in elevation between proposed top of subgrade and existing grade.

Item No. 2 is the volume of existing pavements and slabs identified for demolition in areas of the project site to be cut. As these items are specified as demolition removals, it is a deduction from the above mass grading cut quantity. An average depth of 4 inches was used, under the assumption that some of the pavement could be thinner than this but the slabs would be thicker. See Exhibit 2.

Item No. 3 accounts for an additional 4 inches of cut in areas of landscaping, as this cut is not included in the mass grading analysis of Item 1. This additional 4 inches of cut is to allow for topsoil placement, as indicated in the notes on Sheet FW-L1.04. See Exhibit 3.

Item No. 4 is the excavation (cut) quantity associated with the detention vault construction. The bottom of vault was set per the design plans; 1.5 (horizontal) to 1 (vertical) temporary excavation side slopes were used. The top surface used to

Memo

Exhibit	<i>Perry</i>
Witness	<i>[Signature]</i>
Date	<i>7-8-10</i>
Buel Realtime Reporting (206) 267-9066	

determine the excavation volume was the same top of subgrade surface used in Item 1. See Exhibit 4.

Item No. 5 is the excavation quantity for the structural earth wall. It was calculated using the typical industry standard average end area method along the length of wall with an excavation limit as shown on Sheet FW-C3.10. See Exhibit 5.

Item No. 6 is the excavation quantity for foundations and footings. See Exhibit 6.

Item No. 7 is the excavation quantity for structural fill removed underneath the demolished building pad. See Exhibit 7.

FILL VERIFICATION

Item No. 8 in the fill summary table is the mass grading fill quantity. It was obtained by comparing the existing grade elevations to proposed top of subgrade elevations using a 3-D digital terrain model (software: Land Development Desktop). The volume and proposed top of subgrade contours are shown in Exhibit 1. This model takes into account the different impervious surface thicknesses around the site to establish this top of subgrade surface. Exhibit 1 also includes grid ticks (positive numbers indicate fill) that show the difference in elevation between proposed top of subgrade and existing grade.

Item No. 9 is the additional fill needed in areas of demolition or stripping. The mass grading model in Item 8 does not take into account the initial stripping of the site; this item accounts for that additional fill, see Exhibit 3.

Item No. 10 is the detention vault backfill. It is equal to the volume of excavation, for the vault minus the vault volume, and volume of drainage gravel on the sides of the vault. See Exhibit 4.

cc: Dan Eder, Sound Transit

Federal Way Transit Center
Excavation and Fill Quantity Verification
8-22-05

KPFF Consulting Engineers
Job # 101189

CUT SUMMARY TABLE

Item	Description	Exhibit	Volume (CY)
1	Cut/Excavation volume from LDD mass grading analysis- The difference between existing grade contours and the proposed subgrade	1	21853
2	Existing pavement removal volume -Deducted as it is a demolition item	2	-1456
3	Excavation in areas to be landscaped:	3	638
4	Excavation for detention vault:	4	8972
5	Excavation for structural earth wall	5	350
6	Excavation for foundations	6	2926
7	Excavation of structural fill underneath existing building slab	7	2547
Total Excavation:			35628

FILL SUMMARY TABLE

Item	Description	Exhibit	Volume (CY)
8	Fill/Embankment volume from LDD mass grading analysis- The difference between existing grade contours and the proposed subgrade	1	12626
9	Additional fill to account for needed material in demolition/stripped area	3	1604
10	Detention vault backfill	4	3961
Total Fill:			18191

Federal Way Transit Center
 Quantity Take Off Comparison
 8/22/2005

KPFF Consulting Engineers
 Job #101189

Item	Description from Contractor's Letter	Contractor's Take off		KPFF's Take off		Explanation for significant differences
		Cut (CY)	Fill (CY)	Cut (CY)	Fill (CY)	
1	Demolition/ Stripping	5684		N/A		Demolition/Stripping specified in Section 02220
2	Excavate Building Pit	24728		See Note 1		Contractor's model appears to have excavated approx 5' too deep on north face of bldg; Excavation side slopes not noted
3	Excavate footings	2739		2926		
4	Excavate auger casting	1391		N/A		Disposal of augercast spoils specified in Section 02465
5	Excavate det vault	12871		8972		Contractor's model appears to have excavated deeper than shown in the design documents; Excavation side slopes not noted
6	Excavate south wall	2056		350		Contractor's model appears to have excavated further behind wall than shown in the design documents
7	Back fill structures and grade to subgrade	7733	23803	23580	18191	Contractor's backfill model appears to be up to finished grade and not to bottom of subgrade. As contractor's estimates for garage, vault and wall excavation are higher, so is backfill
Totals		57202	23803	35828	18191	

Note 1: Mass grading for building pit not broken out separately, included in overall 3D model see (Item 7)

EXHIBIT 1 (p 1 of 2)

SITE MASS GRADING, CUT/FILL:
EXISTING GRADE TO PROPOSED SUBGRADE
VOLUMES CALCULATED BY 3D MODEL, THREE
METHODS AVERAGED TO OBTAIN CUT/FILL
QUANTITY

CUT: 21,853 cy
FILL: 12,626 cy

(SEE NEXT SHEET)

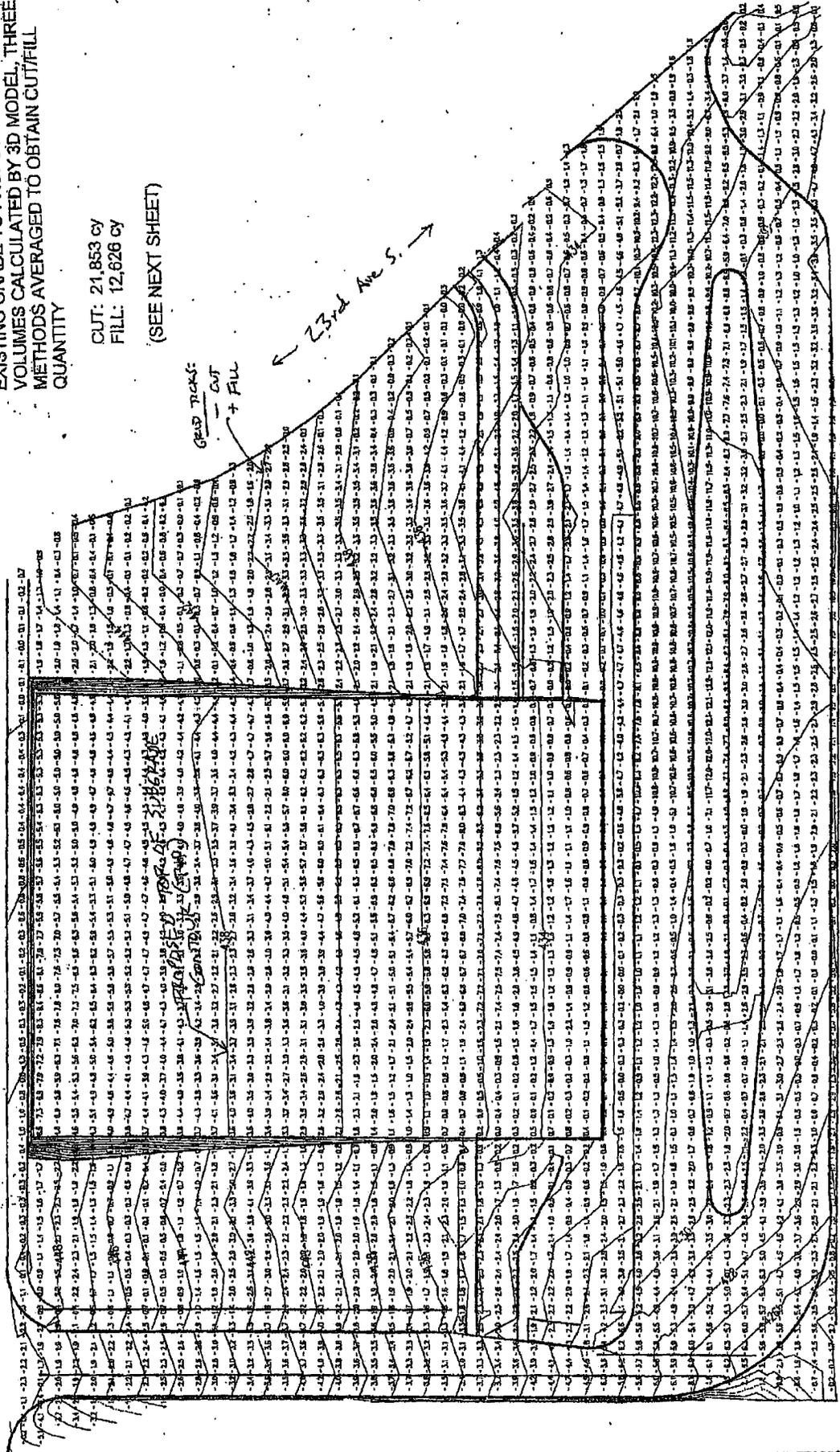
1
N
1" = 50'

← S. 316th St. →

← 23rd Ave S. →

Grid ticks:
- CUT
+ FILL

FEDERAL WAY TRANSIT CENTER
KPF CONSULTING ENGINEERS
8/22/2005



FEDERAL WAY TRANSIT CENTER
KPFF CONSULTING ENGINEERS
8/22/2005

EXHIBIT 1 (p 2 of 2)

Earthwork Report.txt

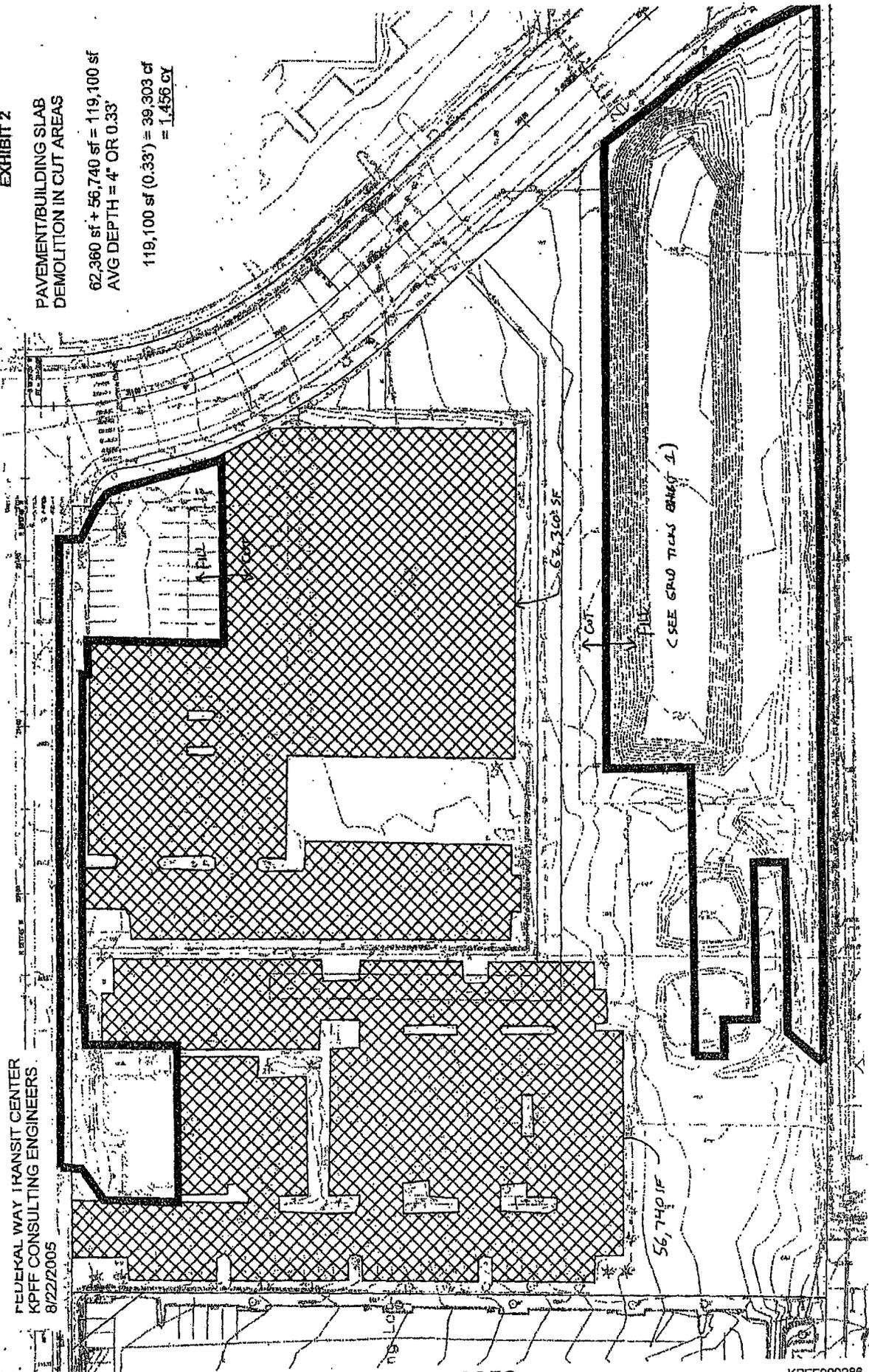
Site	Volume cu.yds	Table: unadjusted Fill cu.yds	Net cu.yds	Method
Site: Federal Way Transit Center				
Stratum: earthwork	21689	12252		9437 (C) Grid
	21957	12880		9076 (C) Composite
	21913	12746		9167 (C) End area

USE AVG. → 21,853 cy. 12,626 cy
OF THE
THREE METHODS.

EXHIBIT 2

PAVEMENT/BUILDING SLAB
DEMOLITION IN CUT AREAS

62,360 sf + 56,740 sf = 119,100 sf
AVG DEPTH = 4" OR 0.33'
119,100 sf (0.33') = 39,303 cf
= 1,456 CY



FEDERAL WAY TRANSIT CENTER
KPFF CONSULTING ENGINEERS
8/22/2005

EXHIBIT 3

- EXCAVATION FOR LANDSCAPED AREA/
- FILL IN STRIPPED AREAS

LANDSCAPE EXCAVATION:

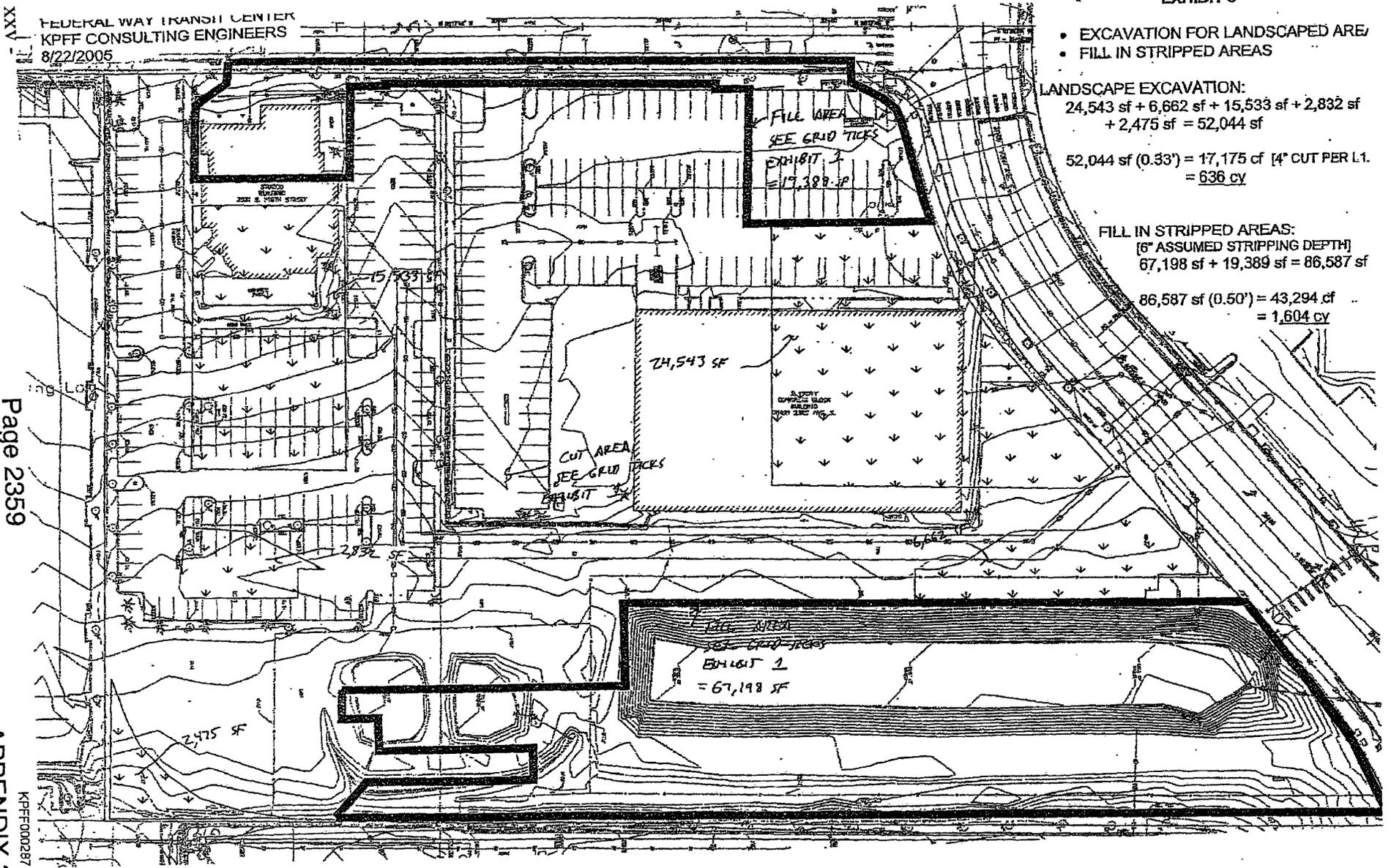
$$24,543 \text{ sf} + 6,662 \text{ sf} + 15,533 \text{ sf} + 2,832 \text{ sf} + 2,475 \text{ sf} = 52,044 \text{ sf}$$

$$52,044 \text{ sf} (0.33') = 17,175 \text{ cf} \text{ [4" CUT PER L1.} \\ = 636 \text{ cy}$$

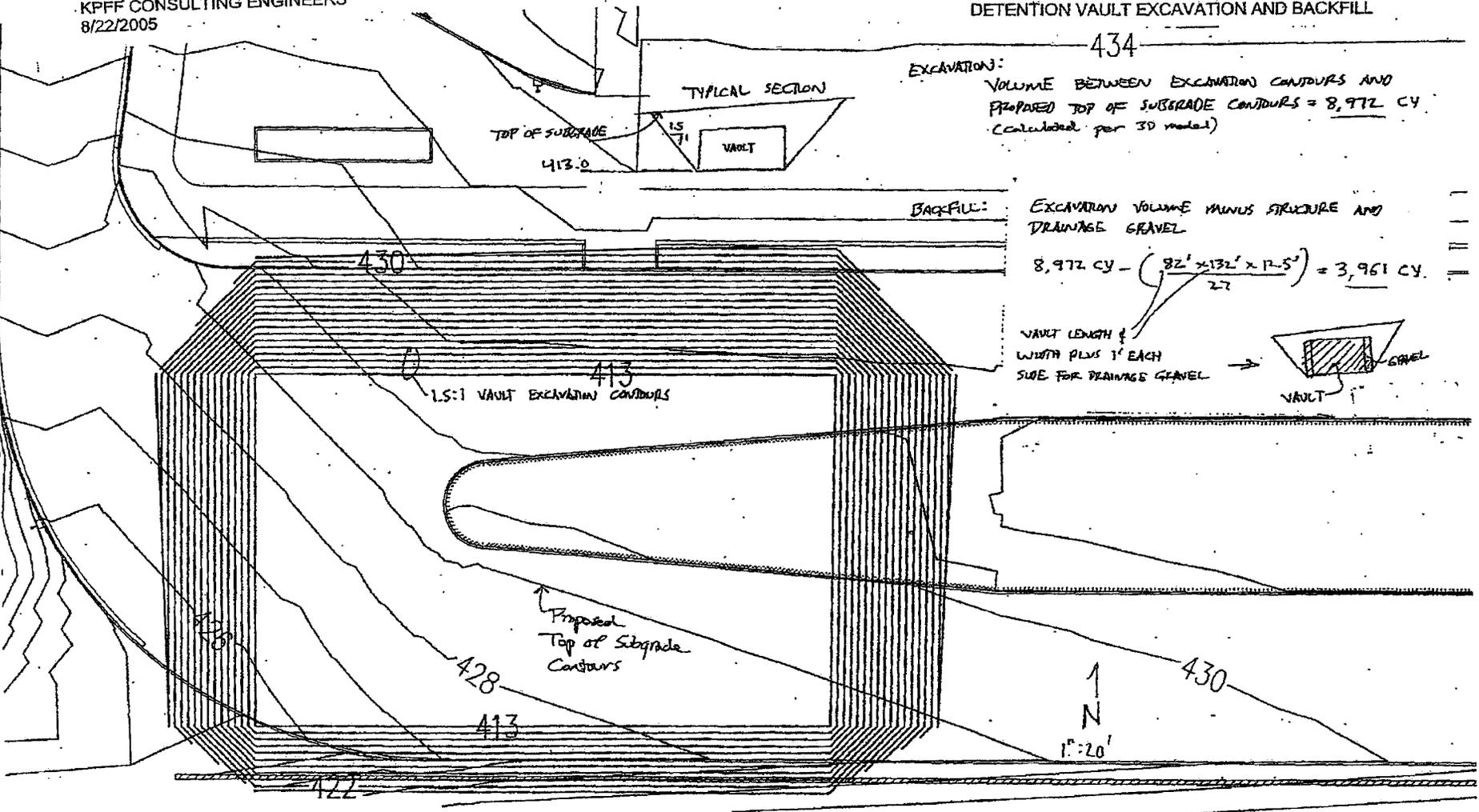
FILL IN STRIPPED AREAS:

$$[6" \text{ ASSUMED STRIPPING DEPTH}] \\ 67,198 \text{ sf} + 19,389 \text{ sf} = 86,587 \text{ sf}$$

$$86,587 \text{ sf} (0.50') = 43,294 \text{ cf} \\ = 1,604 \text{ cy}$$



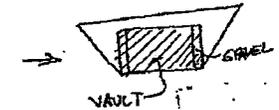
DETENTION VAULT EXCAVATION AND BACKFILL

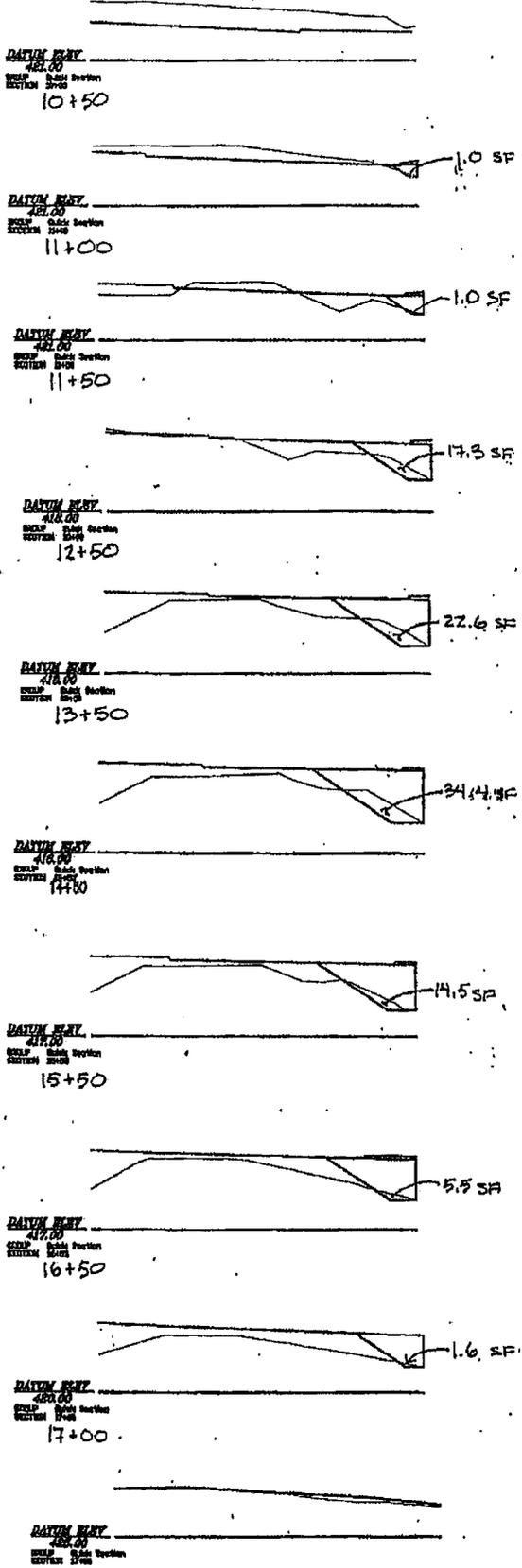


EXCAVATION:
 VOLUME BETWEEN EXCAVATION CONTOURS AND
 PROPOSED TOP OF SUBGRADE CONTOURS = 8,972 CY
 (calculated per 3D model)

BACKFILL:
 EXCAVATION VOLUME MINUS STRUCTURE AND
 DRAINAGE GRAVEL
 $8,972 \text{ CY} - \left(\frac{82' \times 132' \times 12.5'}{27} \right) = 3,961 \text{ CY}$

VAULT LENGTH &
 WIDTH PLUS 1' EACH
 SIDE FOR DRAINAGE GRAVEL





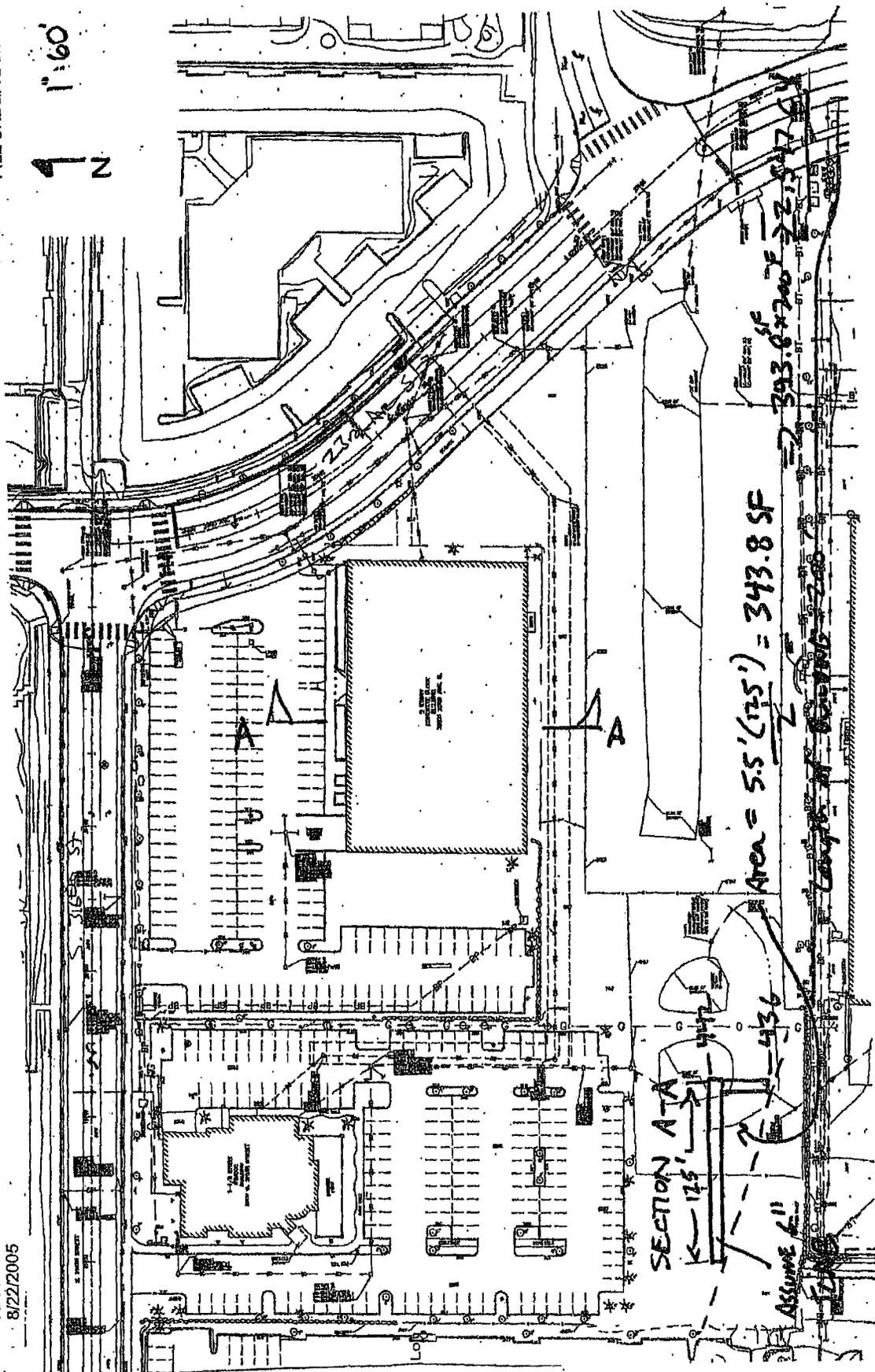
AREA (sf)	AVG (sf)	LENGTH (ft)	VOLUME (cf)
1.0	1.0	50.0	50.0
1.0	8.7	100.0	870.0
17.3	20.0	100.0	2000.0
22.6	28.5	100.0	2850.0
34.4	24.5	100.0	2450.0
14.5	10.0	100.0	1000.0
6.5	3.6	50.0	180.0
5.5			
1.6			
			9400 cf
			= 350 cy

EXHIBIT 5
 CUT/EXCAVATION FOR STRUCTURAL EARTH WALL
 FEDERAL WAY TRANSIT CENTER
 KPFF CONSULTING ENGINEERS
 8/22/2005

EXHIBIT 6
FOUNDATION EXCAVATION

FEDERAL WAY TRANSIT CENTER
KPFF CONSULTING ENGINEERS
8/22/2005

Pile No.	Type	Length (ft)	Diameter (in)	Material	Pile Cap Cut		Pile Take-Off		Total Cubic Yards
					W	H	W	H	
A12	CF10	100	24	100	0	0	0	0	0
A13	CF10	100	24	100	0	0	0	0	0
A14	CF10	100	24	100	0	0	0	0	0
A15	CF10	100	24	100	0	0	0	0	0
A16	CF10	100	24	100	0	0	0	0	0
A17	CF10	100	24	100	0	0	0	0	0
A18	CF10	100	24	100	0	0	0	0	0
A19	CF10	100	24	100	0	0	0	0	0
A20	CF10	100	24	100	0	0	0	0	0
A21	CF10	100	24	100	0	0	0	0	0
A22	CF10	100	24	100	0	0	0	0	0
A23	CF10	100	24	100	0	0	0	0	0
A24	CF10	100	24	100	0	0	0	0	0
A25	CF10	100	24	100	0	0	0	0	0
A26	CF10	100	24	100	0	0	0	0	0
A27	CF10	100	24	100	0	0	0	0	0
A28	CF10	100	24	100	0	0	0	0	0
A29	CF10	100	24	100	0	0	0	0	0
A30	CF10	100	24	100	0	0	0	0	0
A31	CF10	100	24	100	0	0	0	0	0
A32	CF10	100	24	100	0	0	0	0	0
A33	CF10	100	24	100	0	0	0	0	0
A34	CF10	100	24	100	0	0	0	0	0
A35	CF10	100	24	100	0	0	0	0	0
A36	CF10	100	24	100	0	0	0	0	0
A37	CF10	100	24	100	0	0	0	0	0
A38	CF10	100	24	100	0	0	0	0	0
A39	CF10	100	24	100	0	0	0	0	0
A40	CF10	100	24	100	0	0	0	0	0
A41	CF10	100	24	100	0	0	0	0	0
A42	CF10	100	24	100	0	0	0	0	0
A43	CF10	100	24	100	0	0	0	0	0
A44	CF10	100	24	100	0	0	0	0	0
A45	CF10	100	24	100	0	0	0	0	0
A46	CF10	100	24	100	0	0	0	0	0
A47	CF10	100	24	100	0	0	0	0	0
A48	CF10	100	24	100	0	0	0	0	0
A49	CF10	100	24	100	0	0	0	0	0
A50	CF10	100	24	100	0	0	0	0	0
A51	CF10	100	24	100	0	0	0	0	0
A52	CF10	100	24	100	0	0	0	0	0
A53	CF10	100	24	100	0	0	0	0	0
A54	CF10	100	24	100	0	0	0	0	0
A55	CF10	100	24	100	0	0	0	0	0
A56	CF10	100	24	100	0	0	0	0	0
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A58	CF10	100	24	100	0	0	0	0	0
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A71	CF10	100	24	100	0	0	0	0	0
A72	CF10	100	24	100	0	0	0	0	0
A73	CF10	100	24	100	0	0	0	0	0
A74	CF10	100	24	100	0	0	0	0	0
A75	CF10	100	24	100	0	0	0	0	0
A76	CF10	100	24	100	0	0	0	0	0
A77	CF10	100	24	100	0	0	0	0	0
A78	CF10	100	24	100	0	0	0	0	0
A79	CF10	100	24	100	0	0	0	0	0
A80	CF10	100	24	100	0	0	0	0	0
A81	CF10	100	24	100	0	0	0	0	0
A82	CF10	100	24	100	0	0	0	0	0
A83	CF10	100	24	100	0	0	0	0	0
A84	CF10	100	24	100	0	0	0	0	0
A85	CF10	100	24	100	0	0	0	0	0
A86	CF10	100	24	100	0	0	0	0	0
A87	CF10	100	24	100	0	0	0	0	0
A88	CF10	100	24	100	0	0	0	0	0
A89	CF10	100	24	100	0	0	0	0	0
A90	CF10	100	24	100	0	0	0	0	0
A91	CF10	100	24	100	0	0	0	0	0
A92	CF10	100	24	100	0	0	0	0	0
A93	CF10	100	24	100	0	0	0	0	0
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A95	CF10	100	24	100	0	0	0	0	0
A96	CF10	100	24	100	0	0	0	0	0
A97	CF10	100	24	100	0	0	0	0	0
A98	CF10	100	24	100	0	0	0	0	0
A99	CF10	100	24	100	0	0	0	0	0
A100	CF10	100	24	100	0	0	0	0	0



No. 66870-6-I

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

NORTHWEST INFRASTRUCTURE, INC., a Washington corporation,

Plaintiff/Respondent,

v.

PCL CONSTRUCTION SERVICES, INC., a Washington corporation,
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Defendants/Third-Party Plaintiffs,

v.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a
Washington regional transit authority,

Third-Party Defendant/Appellant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Dean S. Lum and Timothy Bradshaw)

**RESPONDENT NORTHWEST INFRASTRUCTURE, INC.'S
NOTICE RE DESIGNATION OF RECORD ON APPEAL**

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TO: CLERK OF THE COURT

AND TO: COUNSEL OF RECORD

Please be advised that pursuant to the April 21, 2011 notation ruling by Commissioner James Verellen that Case No. 66777-7 and Case No. 66870-6 shall be linked for consideration on the merits by the same panel, Northwest Infrastructure, Inc. notifies the Court and counsel the April 5, 2011 Designation of Clerk's Papers and the April 22, 2011 Supplemental Designation of Clerk's Papers filed by Northwest Infrastructure, Inc. in Case No. 66777-7 are also designated as part of the record on appeal on Case No. 66870-6.

RESPECTFULLY SUBMITTED on May 31, 2011.

CABLE LANGENBACH KINERK &
BAUER, LLP

By



Bryan P. Coluccio, WSBA 12609
*Attorneys for Plaintiff/Respondent
Northwest Infrastructure, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2011, I caused the foregoing document to be served on the following counsel of record, via first class U.S. mail, postage prepaid:

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