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No. 681320

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

NINA L. MARTIN, individually and as Personal Representative of the
ESTATE OF DONALD R. MARTIN, RUSSELL L. MARTIN,
THADDEUS J. MARTIN, and JANE MARTIN,

Plaintiffs-Appellants,

vs.

DEMATIC dba/fka RAPISTAN, INC., MANNESMANN DEMATIC, and
SIEMENS DEMATIC; GENERAL CONSTRUCTION COMPANY;
WRIGHT SCHUCHART HARBOR COMPANY; and FLETCHER
CONSTRUCTION COMPANY NORTH AMERICA,

Defendants-Respondents.

BRIEF OF APPELLANTS

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2012 MAY - 8 AM 11:19
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I. INTRODUCTION

On August 13, 2004, Donald Martin was working at a pulp mill in Everett, Washington, where he had been employed for the past 15 years. A dipping conveyor used to make tissue paper was inadvertently lowered onto Mr. Martin while he was doing his job, performing a standard procedure to clean paper out of a chute located below the conveyor. The conveyor crushed him against the chute and caused his death. Mr. Martin's wife, Nina, and his children Russell, Thaddeus and Jane (collectively the "Martin family"), filed this wrongful death and survival action against those believed to be responsible for his death. CP 3576-85.

The dipping conveyor was installed in 1980-81, and the company responsible for the installation, known as Wright Schuchart Harbor Co. ("WSH"), no longer exists as a separate entity. WSH's assets were sold to General Construction Company ("General Construction") in 1996, and, through a series of mergers occurring both before and after the sale, it has been incorporated into Fletcher Construction Company North America ("FCCNA"). CP 2450-53 & 2792.

In their original complaint, the Martin family named General Construction as a defendant, alleging that it was formerly known and/or conducted business as WSH. CP 3576-85. After they learned of the asset sale and mergers involving WSH in the course of litigation, they amended

their complaint to identify FCCNA as a corporate successor in interest to WSH. CP 2402-08.

The superior court below dismissed the Martin family's claims against General Construction on summary judgment, on grounds that General Construction did not assume liability for Mr. Martin's death under the terms of its agreement to purchase the assets of WSH. CP 802-05. The superior court also dismissed the claims against FCCNA on summary judgment, on grounds that the amendment identifying it as a successor to WSH occurred after the expiration of the limitations period, that the amendment was akin to an amendment adding a new party, and that the amendment did not relate back to the filing of the original complaint for purposes of the statute of limitations. CP 133-35. From these and related orders, the Martin family now appeals. CP 1-24.

II. ASSIGNMENTS OF ERROR

1. The superior court erred by denying the Martin family's motion for summary judgment against General Construction Company regarding successor liability. CP 1388-90.

2. The superior court erred by granting General Construction Company's renewed motion for summary judgment regarding successor liability. CP 802-05.

3. The superior court erred by denying the Martin family's motion for reconsideration of the order granting General Construction Company's renewed motion for summary judgment regarding successor liability. CP 661.

4. The superior court erred by granting FCCNA's motion to dismiss based on the statute of limitations. CP 133-35.

5. The superior court erred by denying the Martin family's motion for reconsideration of the order dismissing FCCNA based on the statute of limitations. CP 46-49.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did General Construction assume liability for the death of Donald Martin under the terms of its agreement to purchase the assets of the company into which WSH had been merged? (Assignments of Error #1-3.)

2. Did the Martin family's claims against FCCNA accrue before they discovered its identity as WSH's successor? (Assignments of Error #4-5.)

3. Is the statute of limitations tolled against FCCNA, as WSH's successor, by filing the summons and complaint with the court and serving it on the other defendants? (Assignments of Error #4-5.)

4. Does the Martin family's amendment identifying FCCNA as WSH's successor change the *party* against whom a claim is asserted for purposes of determining whether the amendment relates back to the date of the original complaint for statute of limitations purposes? Or, does it merely correct a misnomer regarding the *name* of the party against whom the claim is asserted? (Assignments of Error #4-5.)

5. If the Martin family's amendment identifying FCCNA as WSH's successor is deemed to be a change of parties, does the amendment relate back to the date of the original complaint for statute of limitations purposes? (Assignments of error #4-5.)

IV. STATEMENT OF THE CASE

A. Chronology of key events.

For purposes of this appeal, the following chronology of events is relevant:

- In 1980-81, WSH installed the machinery that killed Donald Martin. CP 2437-2438 & 2792. At the time, WSH was owned by Wright Schuchart Inc. CP 2438, 2451.
- In 1987, a subsidiary of a large multinational corporation involved in industrial construction, known as Fletcher Challenge, purchased Wright Schuchart Inc. (and thereby, WSH). CP 2438, 2451.

- In 1993, Fletcher Challenge merged several subsidiaries, including WSH, into Fletcher General. CP 2438. Fletcher General succeeded to the liabilities of WSH and continued to do business in industrial construction. CP 2438 & 2451-52.

- In 1996, General Construction acquired the assets of Fletcher General by means of a transaction described in § B, *infra*.

- In 2001, what remained of Fletcher General following the asset sale merged into FCCNA. CP 401.

- On August 13, 2004, Donald Martin was killed.

- On June 29, 2007, the Martin family filed their original complaint, naming General Construction and WSH, but not FCCNA. CP 3572-85.

- On July 5, 2007, the Martin family served General Construction with the summons and complaint. CP 398.

- On July 24, 2007, unbeknownst to the Martin family, General Construction tendered the defense of their claims to Fletcher General, care of a parent company. CP 62-63.

- On November 28, 2007, before being identified by the Martin family as a successor to WSH, FCCNA forwarded the tender letter from General Construction to its insurer, acknowledging that it is the successor to Fletcher General (and thereby, WSH). CP 401-02.

- On December 11, 2009, General Construction filed a motion for summary judgment, arguing that it was not a successor to WSH, and that FCCNA had succeeded to the liabilities of WSH. General Construction's motion and the related proceedings are described in § C, *infra*.

- On January 6, 2010, the Martin family sought to amend their complaint to identify FCCNA as a corporate successor in interest to WSH. The superior court granted leave to amend, and they filed an amended complaint. CP 2409-10.

- On November 23, 2010, FCCNA filed a motion to dismiss the amended complaint based on the statute of limitations. FCCNA's motion and the related proceedings are described in § D, *infra*.

B. Summary of asset purchase by General Construction.

General Construction acquired the assets of Fletcher General, the company into which WSH merged, by means of a management buy-out. The senior management of Fletcher General formed both General Construction and another company known as GC Investment Co. ("GC Investment") to take over the marine and civil construction business headquartered in Seattle, Washington. CP 2473 (Recitals A & B).¹ They

¹ There appear to be several companies and divisions of other companies also known as "General Construction" or "General Construction Company," which may or may not be related. CP 2241-42, 2438, 2451, 2665-66 & 2719-20. This brief uses the name "General

structured the transaction and assumed responsibility “for any liabilities arising by virtue of the structure selected for the transaction and for implementing that structure.” CP 2473 (Recital A).

Acting through GC Investment, the senior management of Fletcher General entered into a written Stock Purchase Agreement with Fletcher General and an affiliated company. CP 2473-2778.² The managers formed General Construction in advance so that they could prequalify to submit bids for public construction projects, obtain contractor licenses, and otherwise be prepared to take over the business of Fletcher General on the date of closing of the Stock Purchase Agreement. CP 2473 (Recital B); CP 2485 (Article II, § 2.01). After closing, GC Investment and General Construction merged. CP 2378.

Under the Stock Purchase Agreement, General Construction received the assets of Fletcher General in exchange for two principal forms of consideration. First, General Construction issued all of its stock

Construction” solely to refer to the company formed by the senior management of Fletcher General for purposes of the Stock Purchase Agreement.

² The key portions of the Stock Purchase Agreement are reproduced in the Appendix to this brief. They consist of the Stock Purchase Agreement itself, CP 2472-2508; the Memorandum of Transfer of Assets for Capital Contribution Purposes, dated Oct. 10, 1996, required by Article III, § 3.02(a)(vii) of the Stock Purchase Agreement, CP 2665-66; and the two Memoranda of Assumption of Liabilities, dated Oct. 10 and 17, 1996, required by Article III, § 3.02(a)(vii)-(viii) of the Stock Purchase Agreement, CP 2691-97 & 2745-51.

to Fletcher General. CP 2473, 2485-86 & 2665-66.³ Second, General Construction assumed specified liabilities of Fletcher General. CP 2485-86, 2665-66, 2691-97 & 2745-51. The assignment of assets by Fletcher General, and the transfer of stock and assumption of liabilities by General Construction occurred on October 10, 1996, described in the relevant documents as the Organization Date. CP 2485, 2665-66 & 2691-97. GC Investment, in turn, paid \$22.5 million to Fletcher General in exchange for the stock of General Construction on October 17, 1996, described as the Closing Date. CP 2485-86.

The Stock Purchase Agreement defines “Assumed Liabilities” to include nine separate categories of liabilities, specifically including certain uninsured tort claims:

“Assumed Liabilities” means the obligations, liabilities and expenses of Seller^[4] or General included in clauses (i) through (ix) below, except to the extent any such obligations, liabilities and expenses are covered by insurance, held by Seller with respect to events occurring prior to Closing, in which case they shall constitute Excluded Liabilities . . .

(iii) All extraordinary liabilities of Seller or General incurred outside the ordinary course of business of Seller or General after July 1, 1996 and that are not accounted for as

³ While a Recital of the Stock Purchase Agreement describes the transaction as a *transfer* of previously issued and outstanding stock, CP 2473, Article II, § 2.01 of the agreement, and the related Memorandum of Transfer of Assets for Capital Contribution Purposes describe it as an *issuance* of stock, CP 2485 & 2665.

⁴ “Seller” is defined as Fletcher General in the preamble of the Stock Purchase Agreement. CP 2473.

project costs under any Pre 7/23 Bonded Jobs in accordance with Seller's existing project accounting practices, including, without limitation:

(A) all liabilities and obligations arising out of, resulting from, or relating to claims, whether founded upon negligence, strict liability in tort, and/or other similar legal theory, seeking compensation or recovery for or relating to injury to person or damage to property with respect to the operation of the Business^[5] . . .

provided, that, the Assumed Liabilities shall not include any extraordinary liabilities of Seller incurred by Seller after the Closing with respect to the portion of the Business retained by Seller or any other activities of Seller unrelated to the Business[.]

CP 2474-2475 (brackets & ellipses added; formatting & underscoring in original).

The agreement defines "Excluded Liabilities" by reference to those not included within the definition of Assumed Liabilities:

"Excluded Liabilities" means all liabilities of Seller and the Business that are not specifically included within the definition of Assumed Liabilities. As so conditioned, the Excluded Liabilities include, without limitation:

(i) All obligations of liabilities of the Business, Seller or any of its Affiliates of any nature whatsoever, arising with respect to any acts, actions, omissions or events occurring prior to July 1, 1996 . . .

(iv) All extraordinary liabilities of Seller or General (except as specifically covered as Assumed Liabilities above) incurred outside the ordinary course of business of

⁵ "Business" means "the marine and civil construction company headquartered in Seattle, Washington." CP 2473, 2692 & 2748.

Seller or General (x) prior to July 1, 1996 in any event or (ii) [sic] between July 1, 1996 and the Closing to extent [sic] covered by insurance held by Seller, including, without limitation:

(A) all liabilities and obligations arising out of, resulting from, or relating to claims, whether founded upon negligence, strict liability in tort, and/or other similar legal theory, seeking compensation or recovery for or relating to injury to person or damage to property with respect to the operation of the Business[.]”

CP 2477-2478 (ellipses & brackets added; formatting in original).

Before closing, during the organizational phase of the transaction, General Construction agreed to assumption of “all of the Assumed Liabilities to which Seller was subject as of the Organization Date,” i.e., October 10, 1996, as well as “all additional Assumed Liabilities to which the Seller becomes subject between the Organization Date and the Closing Date,” i.e., October 10-17, 1996. CP 2485 (Article II, § 2.01).

At closing, the Stock Purchase Agreement called for General Construction to execute and deliver two separate Memoranda of Assumption of Liabilities, one corresponding to the Organization Date, and the other corresponding to the Closing Date. CP 2486 (Article III, § 3.02(a)(vii)-(viii)). As executed and delivered, both memoranda provide that:

General Construction Company, a Washington corporation, (“General”), by this Memorandum of Assumption of Liabilities (“Memorandum”), does hereby assume and

accept from Fletcher General, Inc., a Washington corporation (“Fletcher”), the liabilities and obligations described on the attached Schedule A (the “Assumption”, the liabilities and obligations described on attached Schedule A being the “Assumed Liabilities”). No assumption or acceptance of the liabilities or obligations described on attached Schedule B (the “Excluded Liabilities”) is intended or is hereby effected. The Assumption shall be effective on the date set forth below.

CP 2691 (Organizational Date memorandum; underscoring in original); *accord* CP 2745 (Closing Date memorandum). In their respective Schedules A, both memoranda reproduce the definition of Assumed Liabilities in terms materially identical to the definition of the phrase in the Stock Purchase Agreement. CP 2692-2695 & 2746-2749.⁶ Likewise, in their respective Schedules B, both memoranda reproduce the definition of Excluded Liabilities in materially identical terms. CP 2696-2697 & 2750-2751.⁷ In accordance with the agreement, General Construction executed and delivered both Memoranda of Assumption of Liabilities. CP 2691 & 2745.

⁶ The definitions of Assumed Liabilities in the two memoranda substitute “Fletcher” for “Seller,” substitute actual dates for “Closing,” and contain additional definitions of terms, which appear to be consistent with the definitions and usage of terms in the Stock Purchase Agreement. *Compare* CP 2474-2475 (Article I, § 1.01, Stock Purchase Agreement) *with* CP 2692-93 (Schedule A, Memorandum of Assumption of Liabilities, dated Oct. 10, 1996) *and* CP 2746-2747 (Schedule A, Memorandum of Assumption of Liabilities, dated Oct. 17, 1996).

⁷ The definitions of Excluded Liabilities in the two memoranda substitute “Fletcher” for “Seller,” substitute actual dates for “Closing,” and correct what appears to be a typographical error (“(y)” instead of “(ii)”) in subparagraph (iv). *Compare* CP 2477-2478 (Article I, § 1.01, Stock Purchase Agreement) *with* CP 2697-2697 (Schedule B, Memorandum of Assumption of Liabilities, dated Oct. 10, 1996) *and* CP 2750-2751 (Schedule B, Memorandum of Assumption of Liabilities, dated Oct. 17, 1996).

C. Summary judgment regarding General Construction's liability as a successor.

General Construction moved for summary judgment on the issue of its liability as a successor to WSH. CP 2436-49. Among other things, the company argued that it did not expressly or impliedly assume the liabilities of WSH under the terms of the Stock Purchase Agreement and related transaction documents. CP 2442. In making this argument, it relied on the definition of Excluded Liabilities in the Stock Purchase Agreement, in particular the language excluding liability for “[a]ll obligations or liabilities of the Business, Seller or any of its Affiliates of any nature whatsoever, *arising with respect to any acts, actions, omissions or events occurring prior to July 1, 1996.*” CP 2442 (quoting from definition of Excluded Liabilities, CP 2478; italics added); CP 2233-34 (same). General Construction reasoned that, because the allegedly negligent acts of WSH occurred in 1980-81, liability arose prior to July 1, 1996, and was thereby excluded, even though the death of Donald Martin occurred afterward. CP 2442 & 2233-34.

In response to General Construction's motion, the Martin family relied on the language in the Stock Purchase Agreement defining Excluded Liabilities with reference to Assumed Liabilities, and further defining Assumed Liabilities to include “[a]ll extraordinary liabilities of

Seller or General incurred outside the ordinary course of business of Seller or General *after July 1, 1996*,” specifically including tort claims. CP 2319 (quoting from definition of Assumed Liabilities, CP 2474-76; italics added). The family reasoned that, because the death of Donald Martin occurred in 2004, liability was incurred after July 1, 1996, and was thereby assumed, even though the alleged negligence occurred beforehand. The superior court denied General Construction’s motion. CP 2172-74.

Following the superior court’s denial of General Construction’s motion, the Martin family moved for summary judgment in their favor on essentially the same grounds that they proffered in opposition to General Construction’s motion. CP 2114-21. In response, General Construction did not dispute that the death of Donald Martin satisfied the definition of Assumed Liabilities. Instead, the company pointed to language in the Stock Purchase Agreement describing the organization of General Construction as including “the assumption by General of all the Assumed Liabilities *to which Seller was subject* as of the Organization Date” and “*to which Seller becomes subject* between the Organization Date and the Closing Date.” CP 2485 (Article II, § 2.01; italics added); CP 1250 (referring to Article II, § 2.01). General Construction reasoned that, because the death of Donald Martin occurred after the Closing Date, i.e.,

October 17, 1996, it was not “subject to” such liability on or before that date. CP 1250. The superior court denied the Martin family’s motion. CP 1388-90.

General Construction then renewed its motion for summary judgment on the same grounds it proffered in opposition to the Martin Family’s motion. CP 1249-61. In response, the Martin family pointed to the two Memoranda of Assumption of Liabilities required by the Stock Purchase Agreement, both of which omitted any “subject to” language, and instead provided that “General Construction ... does hereby assume and accept” the Assumed Liabilities. CP 947 (quoting Memoranda of Assumption of Liabilities, CP 2691 & 2745). However, the superior court granted General Construction’s motion, and denied a subsequent motion for reconsideration. CP 802-05 (summary judgment order); CP 661 (reconsideration order).

The Martin family appeals the denial of their motion for summary judgment, the granting of General Construction’s motion for summary judgment regarding the company’s successor liability, and the denial of their motion for reconsideration. CP 1-24.

D. Summary judgment regarding FCCNA’s affirmative defense based on the statute of limitations.

FCCNA moved for summary judgment based on the statute of

limitations. CP 741-57. The company argued that, since the amendment identifying it as a successor to WSH did not occur until more than three years after Donald Martin's death, the relevant limitations period had expired. CP 742. The company further argued that the amendment did not relate back to the date of the original complaint for statute of limitations purposes. CP 743-44.

In connection with its motion, FCCNA did not disclose that General Construction had tendered defense of the Martin family's claims (without the knowledge of the Martin family) within less than three years after Donald Martin's death. Instead, FCCNA stated "[t]here is no evidence in the record that FCCNA received notice of this claim by August 13, 2007, within the 3-year statute of limitations." CP 743.

In response to FCCNA's motion, the Martin family contended that their claim against FCCNA did not accrue until they discovered its identity, that the statute of limitations was tolled under RCW 4.16.170 upon service of the summons and complaint on the other defendants, and that it was not really a new party in light of the mergers going back to WSH. They also argued that the amendment related back to the date of their original complaint. The superior court rejected these arguments, and granted FCCNA's motion. CP 133-35.

After the superior court granted FCCNA's motion, the Martin family

learned of General Construction's tender of defense. As it turns out, the tender letter was sent via fax and Federal Express on July 24, 2007—less than three years after Donald Martin's death. CP 62-63. On a motion for reconsideration, the Martin family highlighted this newly discovered evidence, CP 50-58, but the superior court denied the motion. CP 46-49.

From the grant of summary judgment in favor of FCCNA and the denial of their motion for reconsideration, the Martin family appeals. CP 1-24.

V. SUMMARY OF ARGUMENT

General Construction expressly assumed liability for the Martin family's claims under the terms of the Stock Purchase Agreement and two Memoranda of Assumption of Liabilities, by which it purchased the assets of Fletcher General, into which WSH had merged. The superior court's orders granting summary judgment in favor of General Construction and denying reconsideration should be reversed and vacated. Instead, summary judgment should be granted in favor of the Martin family.

With respect to FCCNA, the statute of limitations does not bar the Martin family's claims based on several independent grounds. First, the claims against FCCNA did not accrue until the Martin family identified FCCNA as a successor to Fletcher General, and thereby WSH. The discovery rule applies to the identity of a defendant to the same extent as

any other element of a plaintiff's claim, as the court held in *Orear v. International Paint Co.*, 59 Wn.App. 249, 796 P.2d 759 (1990), *rev. denied*, 116 Wn.2d 1024 (1991).

Second, the statute of limitations was tolled under RCW 4.16.170 once the Martin family filed and served their complaint on the remaining defendants. The naming of WSH served to identify its successor, FCCNA, with sufficient "reasonable particularity" to obtain such tolling in compliance with *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991).

Third, an amendment identifying a successor to a merged corporation, which is already a defendant, relates back to the date of the original complaint under CR 15(c) for purposes of the statute of limitations. Because the predecessor is already named as a defendant, identifying the successor merely corrects a misnomer rather than adding a new party. It is not therefore necessary to satisfy requirements for relation back of a party amendment.

Nonetheless, the requirements for a party amendment to relate back are satisfied in this case. FCCNA had notice of the Martin family's claims and received a copy of the complaint within three years of Donald Martin's death, regardless of when their claims against FCCNA accrued or whether the statute of limitations was tolled. FCCNA knew or should have

known that it was mistakenly omitted as a defendant in the Martin family's original complaint. The omission was not a strategic choice, nor did it otherwise constitute "inexcusable neglect," given the complex series of non-public mergers and acquisitions involving WSH and related companies over an extended period of time. For any of these reasons, the superior court's orders granting summary judgment in favor of FCCNA and denying reconsideration should be reversed and vacated.

VI. ARGUMENT

A. The superior court erred in concluding that General Construction did not expressly assume liability for the death of Donald Martin under the Stock Purchase Agreement with WSH's successor, Fletcher General.

A corporation that purchases the assets of another corporation is liable as a successor when it expressly or impliedly agrees to assume liability for the torts of the seller. *See Hall v. Armstrong Cork*, 103 Wn.2d 258, 261-62, 692 P.2d 787 (1984). The rationale for imposing successor liability under these circumstances is that such liability is bargained for and presumably reflected in the purchase price of the assets. This existence and scope of such liability is essentially a matter of contract law, focusing on the terms of the relevant documents by which the asset purchase is accomplished. *See, e.g., Creech v. Agco Corp.*, 133 Wn.App. 681, 684-87, 138 P.3d 623 (2006) (analyzing terms of asset purchase

documents to determine scope of liabilities assumed); *see generally* George W. Kuney, *A Taxonomy & Evaluation of Successor Liability*, 6 Fla. St. U. Bus. L. Rev. 9, 23 (2007).

Washington continues to follow the objective manifestation approach to contracts, determining the parties' intent by focusing on the objective manifestations of agreement, rather than their unexpressed subjective intentions, and imputing an intention corresponding to the meaning of the words used. *See Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). Interpretation of an unambiguous written asset purchase agreement is a question of law that may be resolved on summary judgment. *See, e.g., Creech*, 133 Wn.App. at 684-87 (resolving scope of liabilities assumed as a matter of law); *Siepp v. Stetson Ross Mach. Co.*, 32 Wn.App. 224, 226-27 & n.1, 646 P.2d 783 (1982) (same). As in other contexts, review of summary judgment is *de novo*. *See Creech*, at 683 (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

In this case, General Construction expressly assumed liability for tort claims such as those alleged by the Martin family under the terms of the Stock Purchase Agreement and the two Memoranda of Assumption of Liabilities. Summary judgment should have been granted in their favor, and the superior court's order to the contrary should be reversed.

1. The definition of Assumed Liabilities in the Stock Purchase Agreement and two Memoranda of Assumption of Liabilities includes claims such as those alleged by the Martin family.

Assumed Liabilities is a specially defined phrase. CP 2474-76. Specially defined contract terms must be given the meaning ascribed by the parties. *See Blue Mtn. Memorial Gardens v. State*, 94 Wn.App. 38, 43, 971 P.2d 75, *rev. denied*, 138 Wn.2d 1011 (1999). The definition used here includes all “extraordinary liabilities . . . incurred . . . after July 1, 1996[.]” CP 2474. Such “extraordinary liabilities,” in turn, specifically include “all liabilities and obligations arising out of, resulting from, or relating to [tort] claims[.]” CP 2475. It does not matter how the tort claims are characterized, “whether founded upon negligence, strict liability . . . and/or other similar legal theory[.]” CP 2475. It does not matter whether they seek compensation or other recovery for personal injuries or property damage. CP 2475.

Moreover, it does not matter whether the claims are deemed to be liabilities of the Seller or General Construction, as long as they relate to “the operation of the business.” CP 2475. The Business is defined as the “marine and civil construction company headquartered in Seattle, Washington[.]” CP 2473, 2694 & 2748. In this way, the assumption of liability follows the activity of the business rather than any particular

corporate entity that happens to be operating the business. In short, it is difficult to imagine a tort claim that could possibly be brought against General Construction after July 1, 1996, that would be outside of this definition.

The Martin family's tort claims fall within the definition of Assumed Liabilities. Liability in this case will be incurred, if at all, after July 1, 1996. The word "incurred" is not separately defined in any of the relevant documents. Undefined contract terms should be given their ordinary meaning, as discerned from the dictionary. *See Wm. Dickerson Co. v. Pierce County*, 128 Wn.App. 488, 493, 116 P.3d 409 (2005). The ordinary meaning of "incur" is "to become liable or subject to." Merriam-Webster Online, *s.v.* "incur" (viewed May 3, 2012; available at www.m-w.com); *accord State v. Goodrich*, 47 Wn. App. 114, 117, 733 P.2d 1000 (1987) (applying same definition from Webster's International Dictionary to interpret criminal restitution statute). Liability on the Martin family's claims has not been incurred to date, and will not be incurred unless and until judgment is entered in their favor.

Furthermore, there can be little if any dispute that the Martin family's tort claims relate to the Business, originally operated by WSH, then merged into Fletcher General, and subsequently acquired by General Construction. Accordingly, the Martin family's claims are Assumed

Liabilities.⁸

2. The definition of Excluded Liabilities does not apply to the Martin family's claims.

For the same reasons that the Martin family's claims satisfy the definition of Assumed Liabilities, they cannot be considered Excluded Liabilities. Excluded Liabilities is also a specially defined phrase, referring to "all liabilities of Seller and the Business that are not specifically included within the definition of Assumed Liabilities." CP 2477-78. The remainder of the definition of Excluded Liabilities is "conditioned" on this understanding. CP 2478. In light of this condition, the fact that the Martin family's claims fall within the definition of Assumed Liabilities precludes them from being considered as Excluded Liabilities.

⁸ It appears that General Construction has all but conceded that the Martin family's claims satisfy the definition of Assumed Liabilities. *See, e.g.*, CP 1255 (stating whether the Martin family's claims meet the definition of Assumed Liability "is ultimately irrelevant").

3. At closing, General Construction assumed all Assumed Liabilities, as defined by the Stock Purchase Agreement, via the Memorandum of Assumption of Liabilities corresponding to the Closing Date and required by the Stock Purchase Agreement.

At closing, General Construction executed and delivered the Memoranda of Assumption of Liabilities. CP 2691 & 2745. These memoranda, including their specific form and contents, were required under the terms of the Stock Purchase Agreement. CP 2486 (Article III, § 3.02(a)(vii)-(viii)). Both memoranda unequivocally provide that General Construction “does hereby assume and accept” the Assumed Liabilities, without limit or qualification. CP 2691 & 2745. Because the Martin family’s claims fall within the definition of Assumed Liabilities, liability for their claims was assumed by General Construction upon execution and delivery of these memoranda.

4. The assumption of liabilities during the organizational phase of the transaction does not differ from, nor does it negate, the definition of Assumed Liabilities or the two Memoranda of Assumption of Liabilities.

General Construction argues that it assumed “a strictly limited subset” of the Assumed Liabilities, based on language contained in Article II of the Stock Purchase Agreement, entitled “Organization of General Construction Company.” CP 1255 (quoting Article II, § 2.01, CP 2485.) This provision refers to “the assumption by General of all of the Assumed Liabilities *to which Seller was subject* as of the Organizational

Date” and “to which Seller becomes subject between the Organization Date and the Closing Date.” CP 2485 (italics added). General Construction reasons the Seller could not have been “subject to” liability for Donald Martin’s death before the Organization or Closing Dates because he did not die until afterward. CP 1255-57. This reasoning is premised on an unduly restrictive definition of the phrase “subject to,” and it conflicts with the definition of Assumed Liabilities and both Memoranda of Assumption of Liabilities.

General Construction does not attempt to define “subject to,” but its apparent understanding of the phrase is narrower than the ordinary meaning. The ordinary meaning includes both “suffering a particular liability or exposure” and being “contingent on or under the influence of some later action.” Merriam-Webster Online, *s.v.* “subject” (adjective definitions 2(a) and 3; viewed May 3, 2012). Interpreting the “subject to” language as referring to inchoate or contingent future liabilities is at least equally plausible as the interpretation offered by General Construction since the ordinary meaning of the phrase encompasses both.⁹

⁹ If the court finds that the meaning of the phrase “subject to” is material, any ambiguity should be construed against General Construction as the drafter. *See Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797, 405 P.2d 58 (1965); *Berg v. Hudesman*, 115 Wn.2d 657, 677, 801 P.2d 222 (1990). As noted above, the principals of General Construction chose the structure for the asset purchase transaction, and assumed responsibility for any liability resulting from the choice of structure. CP 2473. When assumption of liabilities is not intended by the parties, it is the easiest type of successor liability to avoid, given that it is based on the language of relevant transaction documents. *See Kuney, supra*, at 23.

However, in the context of the Stock Purchase Agreement and the transaction between the parties, it is not necessary to read the “subject to” language either narrowly or broadly because the assumption of liabilities that occurred during the organizational phase was superseded by assumption of liabilities at closing. CP 2745-51 (Memorandum of Assumption of Liabilities, dated October 17, 1996). Whatever the scope of the assumption might have been on the Organization Date or between the Organization and Closing Dates is merely academic because the assumption of liabilities at closing is expansive and unequivocal.

In any event, the Stock Purchase Agreement must be read as a whole, and contract provisions that are seemingly in conflict must be harmonized in a manner that gives effect to each of them. *See Certain Underwriters at Lloyd’s London v. Travelers Property Cas. Co.*, 161 Wn.App. 265, 278, 256 P.2d 368 (2011); *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn.App. 841, 849, 158 P.3d 1265 (2007), *rev. denied*, 163 Wn.2d 1020 (2008). General Construction’s narrow interpretation of the “subject to” language conflicts with the definition of Assumed Liabilities in the Stock Purchase Agreement and the Memoranda of Assumption of Liabilities. The definition of Assumed Liabilities encompasses “[a]ll extraordinary liabilities . . . incurred . . . after July 1, 1996.” CP 2474, 2692 & 2746. Under General Construction’s interpretation, not all

liabilities incurred after July 1, 1996, would be assumed, but rather only those incurred between July 1, 1996, and the Organization Date, i.e., October 10, 1996, or the Closing Date, i.e., October 17, 1996.

General's interpretation of the "subject to" language also creates a direct and unavoidable conflict between the organizational phase assumption of liabilities described in Article II, § 2.01, of the Stock Purchase Agreement and the Memorandum of Assumption of Liabilities coinciding with the Organization Date, required by Article III, § 3.02(a)(vii). CP 2486. The Organization Date Memorandum of Assumption of Liabilities is based on the definition of Assumed Liabilities. It provides for the assumption of all liabilities so defined, and does not limit the assumption to only those liabilities incurred between July 1, 1996, and the Organization or Closing Dates. CP 2691-97.

In order for the court to accept General Construction's interpretation, it would have to ignore the definition of Assumed Liabilities and both Memoranda of Assumption of Liabilities. To harmonize these provisions of the agreement and give effect to all of them, the provision of the Stock Purchase Agreement on which General Construction relies (Article II, § 2.01) should be understood as applying to the organizational phase of the transaction rather than closing (*see* Article

III, § 3.02(a)(vii)-(viii)), and the meaning of the phrase “subject to” should be understood as including both existing and future liabilities.

B. The superior court erred in concluding that the Martin family’s claims against FCCNA were barred by the statute of limitations.

The statute of limitations is an affirmative defense on which a defendant such as FCCNA has the burden of proof. *See* CR 8(c); *Haslund v. Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976); *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008). A summary judgment order based on the statute of limitations is reviewed de novo. *See Unruh v. Cacchiotti*, 172 Wn.2d 98, 106, 257 P.3d 631 (2011).

In this case, the superior court erred in dismissing the Martin family’s claims against FCCNA on several independent grounds. The Martin family’s claims against FCCNA did not accrue until its identity was discovered. The statute of limitations was tolled after service of the summons and complaint on the other defendants. The amendment merely corrected a misnomer in the name of the defendant responsible for installing the machinery that killed Donald Martin rather than adding a new party. The amendment would relate back to the date of the original complaint for statute of limitations purposes in any event. Any one of these grounds is sufficient to reverse the superior court’s summary judgment order in favor of FCCNA.

1. The Martin family's claims against FCCNA did not accrue until they discovered its identity as WSH's successor.

The applicable limitations period does not begin to run until a claim accrues, and a claim does not normally accrue until the plaintiff discovers or should have discovered all facts giving rise to the claim. *See generally* 16 David K. DeWolf & Keller W. Allen, Wash. Prac., Tort Law & Practice § 9.2 (3d ed.). In particular, “knowledge or imputed knowledge of a particular defendant’s identity is necessary for the plaintiff’s cause of action against that defendant to accrue.” *Orear v. International Paint Co.*, 59 Wn.App. 249, 796 P.2d 759 (1990), *rev. denied*, 116 Wn.2d 1024 (1991); *see also Allyn v. Boe*, 87 Wn.App. 722, 736, 943 P.2d 364 (1997) (citing *Orear* with approval for the proposition that “[t]he statute does not begin to run until the plaintiff knows or with reasonable diligence should know that the defendant was the responsible party”; applying rule in timber trespass case where defendant denied cutting down trees), *rev. denied*, 134 Wn.2d 1020 (1997); *Brown v. ProWest Transport Ltd.*, 76 Wn.App. 412, 422, 886 P.2d 223 (1994) (finding it unnecessary to address, but not otherwise discounting, argument that discovery rule tolled statute of limitations for automobile accident where defendant-driver could not be located).

The plaintiff in *Orear* alleged product liability claims, although the case involved the general personal injury statute of limitations, RCW 4.16.080(2), as well as the product liability statute of limitations, RCW 7.72.060, because the relevant events occurred both before and after the effective date of the Washington Product Liability Act. *See* 59 Wn.App. at 252 & nn. 1-2. In addition, the court relied on Washington precedent within and without the product liability context, noting “the compelling reasons” for adoption of the discovery rule in *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969), also applying RCW 4.16.080(2). *See Orear*, at 253-54. Whatever the context, the discovery rule is necessary to strike a balance between the harm suffered by plaintiffs whose claims would otherwise be barred by the statute of limitations before they had enough information to file suit, as compared to the interest of defendants in avoiding stale claims. *See Ruth*, 75 Wn.2d at 665-66.

In applying the discovery rule, the court in *Orear* cited with approval both product liability and non-product liability cases from other jurisdictions, where discovery of the identity of the defendant was held to be necessary for accrual of a claim. *See* 59 Wn.App. at 255-56 (collecting cases). For example, in *Spitler v. Dean*, 436 N.W.2d 308, 310 (Wis. 1989), the court based accrual upon discovery of the identity of an individual defendant who committed assault and battery, stating “[t]he public policy

justifying the accrual of a cause of action upon the discovery of the injury and its cause applies equally to the discovery of the identity of the defendant in this case.” *Accord Shortess v. Touro Infirmary*, 520 So.2d 389, 391-92 (La. 1988) (basing accrual upon discovery of identity of blood bank supplying blood from which plaintiff contracted transfusion hepatitis, reasoning that “one is not bound to do the impossible,” i.e., sue an unknown defendant); *Meyers v. Larreategui*, 509 N.E.2d 971, 972-73 (Ohio App. 1986) (basing accrual upon identity of assistant surgeon who injured plaintiff); *Adams v. Oregon State Police*, 611 P.2d 1153, 1156 (Or. 1980) (basing accrual upon discovery of the identity of the party responsible for injury, in a case against police for taking plaintiff’s vehicle without his knowledge).

Moreover, the court in *Orear* specifically disapproved of the reasoning of non-product liability cases declining to base accrual upon discovery of the defendant’s identity. *See* 59 Wn.App. at 256 n.4 (disapproving *Smith v. Sinai Hosp.*, 394 N.W.2d 82 (Mich. App. 1986), and *Guebard v. Jabaay*, 381 N.E.2d 1164, 1167 (Ill. App. 1978), both involving medical malpractice claims). The extent to which the court relied on non-product liability authority, and the fact that it specifically disapproved of non-product liability cases declining to apply the discovery rule to the defendant’s identity, both confirm that its holding is not limited

to product liability cases only, although it certainly applies to product liability claims such as those alleged by the Martin family.

The rationale for basing accrual upon discovery of the identity of the defendant is that the connection between the plaintiff's injury and the particular defendant is often difficult to trace. *See Orear*, at 256-57. This rationale is equally applicable in cases such as this one, involving a series of complex and non-public mergers and acquisitions over an extended period of time, as it is in cases involving latent injuries or fungible products. In any of these contexts, the identity of a defendant may be obscure, justifying accrual based on discovery of the defendant's identity.

Here, the Martin family did not discover the identity of FCCNA as WSH's successor until General Construction filed its motion for summary judgment in December 2009. Under *Orear*, their claim against FCCNA did not accrue until that time. Within a matter of weeks (notwithstanding the Christmas and New Year's holidays), they moved to amend their complaint. As a result, the statute of limitations poses no impediment to their claims against FCCNA.¹⁰

¹⁰ In the superior court, FCCNA claimed that the line of successorship from WSH was a matter of public record. However, the records to which the company refers do not actually trace the successorship from WSH to FCCNA, and contain a number of gaps. CP 384-447 & 719-739.

2. The statute of limitations was tolled after the Martin family filed their summons and complaint and served the other defendants named therein.

The applicable limitations period stops running when an action has been commenced. *See* RCW 4.16.170.¹¹ Filing the summons and complaint with the court tolls the statute of limitations for 90 days to accomplish service. *See id.* Service on one defendant within that time frame effectively commences the action, and tolls the statute of limitations beyond 90 days as to all remaining defendants. *See Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 329-30, 815 P.2d 781 (1991) (interpreting RCW 4.16.170). This rule gives plaintiffs in multi-defendant actions extra protection from the harsh effects of the statute of limitations, and it avoids the unfairness that would result from requiring them to serve all defendants within a set limitations period. *See id.*, 117 Wn.2d at 330.

The foregoing rule was applied with respect to named defendants in *Sidis*, and the Court indicated that it would also apply to unnamed or fictitiously named “John Doe” or “ABC Corporation” defendants “if identified with reasonable particularity.” 117 Wn.2d at 331; *see also Bresina v. Ace Paving Co.*, 89 Wn.App. 277, 281-82, 948 P.2d 870 (1997) (assuming “that a plaintiff can toll the period for suing an unnamed defendant by filing and serving a named defendant—if, but only if, the

¹¹ The full text of the current version of RCW 4.16.170 is reproduced in the Appendix to this brief.

plaintiff identifies the unnamed defendant with ‘reasonable particularity’” in reliance on *Sidis*), *rev. denied*, 135 Wn.2d 1010 (1998).¹²

While the “reasonable particularity” standard of *Sidis* is admittedly dicta, it is nonetheless the best indication of the rule that would be applied by the Supreme Court, and it should be applied here. Naming a corporation that has been merged into another as a defendant should satisfy the requirement of identifying the successor with reasonable particularity. As a matter of corporate law, “[w]hen a merger takes effect . . . [e]very other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases[.]” and “[t]he surviving corporation has all liabilities of each corporation party to the merger[.]” RCW 23B.11.060(1)(a), (c).¹³ Where a proceeding is currently pending against any corporation involved in a merger, the proceeding “may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation whose existence

¹² In *Iwai v. State*, 76 Wn.App. 308, 312, 884 P.2d 936 (1994), *aff’d*, 129 Wn.2d 84, 915 P.2d 1089 (1996), the Court of Appeals stated “Mrs. Iwai urges us to extend the holding in *Sidis* to unnamed “John Doe” defendants We decline to do so.” However, as the court observed in *Bresina*, 89 Wn.App. at 281-82, it is unclear whether this remark means that the court rejected the *Sidis* dictum in *Iwai* or whether it assumed the validity of the dictum while holding that its requirements were not met.

¹³ The full text of the current version of RCW 23B.11.060 is reproduced in the Appendix to this brief. The parties did not question the applicability of Washington corporate law in the superior court. Fletcher General was a Washington corporation. CP 2473. Although FCCNA appears to be a Delaware corporation, Delaware law appears to be in accord with Washington law on this point. *See* Del. Code Ann., Title 8, § 259.

ceased[.]” RCW 23B.11.060(1)(d). These provisions confirm the identity of interest between the merged corporation and its successor, so that following merger, naming the merged corporation in a lawsuit is equivalent to describing the surviving corporation with reasonable particularity.

In this case, the description and naming of WSH as a defendant in the Martin family’s original complaint was sufficiently particular to allow General Construction to identify Fletcher General as a successor, and to tender the defense of the lawsuit. CP 62-63. It was also sufficiently particular for FCCNA to recognize its potential liability and forward the tender from General Construction to its insurer. CP 401-02. Under these circumstances, because the complaint was sufficiently particular for FCCNA to recognize its own potential liability as a successor, it satisfies the requirements of RCW 4.16.170 and *Sidis* for tolling the statute of limitations.

3. The amendment identifying FCCNA as WSH’s successor relates back to the date of the original complaint for purposes of the statute of limitations.

Because the Martin family’s claims against FCCNA did not accrue until they discovered its identity as WSH’s successor, and because the statute of limitations was tolled under RCW 4.16.170 and *Sidis*, as noted above, it is not necessary for the court to decide whether the Martin

family's amendment to their complaint relates back to the date of their original filing for purposes of the statute of limitations under CR 15(c). *See Orear*, 59 Wn.App. at 257 (stating “[g]iven our decision, relation back under CR 15(c) is unnecessary”).

Nonetheless, the Martin family's amendment does satisfy the requirements of CR 15(c) for relation back. The rule provides:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.¹⁴

Under this rule, the standard for relation back hinges upon whether the amendment “change[es] the party against whom a claim is asserted.” If an amendment does *not* change parties, then CR 15(c) merely requires the amendment to “ar[i]se out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading” in order to relate back. If, on the other hand, the amendment *does* change parties, then

¹⁴ The full text of the current version of CR 15 is reproduced in the Appendix to this brief.

CR 15(c)(1) and (2) also require notice of the lawsuit and actual or constructive knowledge that the party was mistakenly omitted. Case law has imposed an additional requirement for relation back of a party amendment, based on a lack of “inexcusable neglect.” *See Perrin v. Stensland*, 158 Wn.App. 185, 197-202, 240 P.3d 1189 (2010).

The amendment identifying FCCNA as the successor corporation to WSH, already a named defendant, does not change the parties against whom a claim is asserted, and it relates back to the date of the original complaint because it arises out of the same occurrence. However, assuming for the sake of argument that the amendment identifying FCCNA as a successor could be construed as a party amendment, the requirements for relation back are satisfied. Accordingly, the superior court’s summary judgment based on the statute of limitations is in error.

While the superior court’s decision whether to grant leave to amend is discretionary and subject only to review for an abuse of discretion, the question of whether the amendment relates back is a question of law reviewed de novo. *See Perrin*, 158 Wn.App. at 192-93. This is especially so in the context of summary judgment proceedings on a statute of limitations defense.

- a. **The amendment identifying FCCNA as the corporate successor to WSH, which was already a named defendant, does not change the parties against whom a claim is asserted.**

An amendment identifying the corporate successor to a merged defendant involves correction of a misnomer rather than the addition of a new party. Under these circumstances, the amendment merely corrects the existing defendant's name by identifying the successor, and the requirements of CR 15(c)(1) and (2) for change or addition of parties are inapplicable. *See, e.g., Bailey v. Innovative Mgmt. & Inv., Inc.*, 890 S.W.2d 648, 651 (Mo. 1995); *Mitchell v. CFC Financial LLC*, 230 F.R.D. 548, (E.D. Wis. 2005).

In *Bailey*, the plaintiff sued "Bostitch Manufacturing Company," the manufacturer of a nail gun that caused him to suffer injury. *See* 890 S.W.2d at 650. However, at some point after manufacture of the nail gun, Bostitch Manufacturing Company merged into another company known as "Stanley-Bostitch, Inc." *See id.* The plaintiff sought to amend his complaint to amend to identify the successor corporation, but only after the limitations period expired. *See id.* In holding that an amendment identifying Stanley-Bostitch, Inc., as successor corporation related back for purposes of the statute of limitations, the court stated "[b]ecause this was simply a misnomer rather than adding or changing the name of a

party, the plaintiff was not required to meet the notice requirements of [Missouri’s counterpart to CR 15(c)].” *Id.*

Similarly, in *Mitchell*, the plaintiff sued “CFC Financial LLC” for violations of the federal Fair Debt Collection Practices Act (“FDCPA”). *See* 230 F.R.D. at 549. Between the date of the alleged violations of the FDCPA and the filing of plaintiff’s lawsuit, CFC Financial LLC merged into another company known as “Asset Acceptance LLC.” *See id.* Plaintiff sought to amend his complaint to identify the successor corporation after the limitations period expired. *See id.* In holding that the amendment related back, the court recognized that the plaintiff was merely seeking “to amend to correct a mistake in naming a defendant *already before the court,*” and noted that “[c]ourts consistently allow relation back when plaintiffs make mistakes of this type because *the correct defendant is already before the court,* is aware that it is being sued, and will suffer no prejudice from the amendment.” *Id.* at 550 (italics added). Even though the court in *Mitchell* analyzed the requirements of the federal counterpart to CR 15(c), the recognition that the correct defendant was already before the court seemed to be dispositive.

In this case, as in *Bailey* and *Mitchell*, the correct defendant was already before the court when the Martin family’s original complaint

named WSH. The amendment identifying FCCNA as WSH's corporate successor merely corrected a misnomer.

While Washington courts have not had the opportunity to squarely address the issue presented here, the results in *Bailey* and *Mitchell* are entirely consistent with and supported by existing Washington law. The fact that the correct defendant is already before the court is confirmed by Washington corporate law, discussed above, regarding the nature and effect of a merger. See RCW 23B.11.060. Furthermore, in *DeSantis v. Angelo Merlino & Sons, Inc.*, 71 Wn.2d 222, 222-25, 427 P.2d 728 (1967), the Court held that an amendment correcting the name of a corporate defendant erroneously identified as a proprietorship related back for purposes of the statute of limitations under the predecessor rule to CR 15(c), relying on the "identity of interest" between the principals of the alleged proprietorship and the corporate defendant. See *North St. Ass'n v. Olympia*, 96 Wn.2d 359, 368, 635 P.2d 721 (1981) (describing *DeSantis* as involving a case of "mistaken capacity, misnomer or oversight"), *disapproved in part on other grounds, Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 331-32, 815 P.2d 781 (1991); see also *Mitchell*, 230 F.R.D. at 550 (relying on cases "where a plaintiff misstates the name of a corporation"). In light of this Washington law, the same result should be reached in this case as in *Bailey* and *Mitchell*.

- b. Assuming for the sake of argument that the amendment identifying FCCNA as the corporate successor to WSH is a change of parties, the requirements for relation back under CR 15(c) are nonetheless satisfied.**

It cannot be disputed that FCCNA had notice of the Martin family's complaint within the limitations period, even if their claim against the company had accrued prior to discovery, and was not tolled after filing and service on the other defendants. CP 62-63 & 401-02. This satisfies the notice requirement of CR 15(c)(1).

Likewise, based on the naming of its predecessor WSH as a defendant in the original complaint, the tender of defense by General Construction, and FCCNA's forwarding the tender letter to its insurer, it cannot be disputed that FCCNA had at least constructive knowledge that it was mistakenly omitted from the original complaint. CP 62-63 & 401-02. This satisfies the requirement of CR 15(c)(2).

The final requirement for relation back, based on an absence of "inexcusable neglect," is also satisfied here. In *Perrin*, this court recognized that inexcusable neglect is limited to cases where the failure to name a defendant is likely the result of "a strategic choice rather than a mistake." 158 Wn.App. at 201-02 (synthesizing and harmonizing Washington case law regarding "inexcusable neglect"). The court held that a plaintiff who failed to name the estate of a deceased defendant did not

act with inexcusable neglect because he did not know that the decedent was, in fact, dead, even though he received prior notice of the death in the return of service and interrogatory answers. *See id.* at 190. In the absence of such knowledge, the failure to name the estate as a defendant could not be considered a strategic choice.

As in *Perrin*, the failure to identify FCCNA as the corporate successor to WSH in the original complaint filed by the Martin family in this case was not the result of a strategic choice. The Martin family did not know that FCCNA was a successor, given the complex series of non-public mergers and acquisitions over an extended period of time. When the motion for summary judgment filed by General Construction alerted them to the identity of FCCNA, they immediately sought to amend their complaint. Under these facts there can be no inexcusable neglect.

VII. CONCLUSION

Based on the foregoing argument and authority, Plaintiffs-Appellants Nina L. Martin, individually and as Personal Representative of the Estate of Donald R. Martin, Russell L. Martin, Thaddeus J. Martin, and Jane Martin, respectfully ask the Court to grant the following relief:

1. Reverse and vacate the superior court's summary judgment and reconsideration orders in favor of General Construction

and grant summary judgment in their favor on the issue of successor liability; and

2. Reverse and vacate the superior court's summary judgment and reconsideration orders in favor of FCCNA on its statute of limitations defense.

Submitted this 7th day of May, 2012.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On May 7, 2012, I served the document to which this is annexed by First Class Mail, postage prepaid, as follows:

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Signed on May 7, 2012 at Moses Lake, Washington.



Shari M. Canet, Paralegal

APPENDIX

CR 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated "proposed" and unsigned, shall be attached to the motion. If a motion to amend is granted, the moving party shall thereafter file the amended pleading and, pursuant to rule 5, serve a copy thereof on all other parties. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or

occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

(e) Interlineations. No amendments shall be made to any pleading by erasing or adding words to the original on file, without first obtaining leave of court.

[Amended effective September 1, 2005.]

RCW 4.16.170. Tolling of statute--Actions, when deemed commenced or not commenced

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

[1971 ex.s. c 131 § 1; 1955 c 43 § 3. Prior: 1903 c 24 § 1; Code 1881 § 35; 1873 p 10 § 35; 1869 p 10 § 35; RRS § 167, part.]

RCW 23B.11.060. Effect of merger or share exchange

(1) When a merger takes effect:

(a) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;

(b) The title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment;

(c) The surviving corporation has all liabilities of each corporation party to the merger;

(d) A proceeding pending against any corporation party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation whose existence ceased;

(e) The articles of incorporation of the surviving corporation are amended to the extent provided in the plan of merger; and

(f) The former holders of the shares of every corporation party to the merger are entitled only to the rights provided in the articles of merger or to their rights under chapter 23B.13 RCW.

(2) When a share exchange takes effect, the shares of each acquired corporation are exchanged as provided in the plan, and the former holders of the shares are entitled only to the exchange rights provided in the articles of share exchange or to their rights under chapter 23B.13 RCW.

[1989 c 165 § 136.]

STOCK PURCHASE AGREEMENT
dated as of
October 17, 1996
among
GC Investment Co.
and
Fletcher General, Inc.
and
Fletcher Pacific Construction Co. Ltd.

GC00450

STOCK PURCHASE AGREEMENT

This STOCK PURCHASE AGREEMENT dated as of October 17, 1996 (this "Agreement") is entered into among GC Investment Co., a Washington corporation ("Buyer"), Fletcher General, Inc., a Washington corporation ("Seller"), and Fletcher Pacific Construction Co Ltd., a Hawaiian corporation ("Pacific"), with reference to the following facts:

RECITALS

A. Seller owns and operates a marine and civil construction company headquartered in Seattle, Washington (the "Business") from which Seller desires to withdraw. Buyer's Shareholders (as defined below) have formed Buyer for the purpose of acquiring a substantial portion of the Business through a management buy-out (the "MBO"). Seller has permitted Buyer to determine the transaction structure for the MBO, and the parties intend that Buyer shall be responsible for any liabilities arising by virtue of the structure selected for the transaction and for implementing that structure, except as otherwise expressed in this Agreement.

B. Subject to the foregoing, Buyer's Shareholders, in their capacity as the current senior management of Seller, have caused Seller to assign all of the tangible personal property assets and certain of the intangible personal property assets of the Business to General Construction Company, a Washington corporation ("General"), in exchange for all of the issued and outstanding shares of capital stock of General (the "Stock"). Buyer's Shareholders are also causing General to take all actions necessary to prequalify General to submit bids for public construction projects and to obtain contractor licenses in each jurisdiction in which the Business is operated, so that as of the Closing General will be qualified to operate its construction business and perform its obligations for Seller under the Management Agreement (as defined below).

C. Seller and Pacific are Affiliates of one another and are indirectly owned by Fletcher Construction Company North America.

D. Seller desires to sell, and Buyer desires to purchase from Seller, all of the Stock of General on the terms and conditions set forth in this Agreement.

NOW, THEREFORE, the parties hereto agree as follows:

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ARTICLE I
DEFINITIONS

1.01. Definitions. (a) The following terms, as used herein, have the following meanings:

"Affiliate" means, with respect to any Person, any Person directly or indirectly controlling, controlled by, or under common control with such other Person; provided that General shall not be considered an Affiliate of Seller.

"Assumed Liabilities" means the obligations, liabilities and expenses of Seller or General included in clauses (i) through (ix) below, except to the extent any such obligations, liabilities and expenses are covered by insurance, held by Seller with respect to events occurring prior to Closing, in which case they shall constitute Excluded Liabilities:

(i) All of Seller's obligations and liabilities arising on and after July 1, 1996 under all Unbonded Jobs (as such term is defined below), including, without limitation, (x) all claims with respect to the work performed on and after July 1, 1996 under all Unbonded Jobs, and (y) all of Seller's expenses for all project costs incurred on and after July 1, 1996 under all Unbonded Jobs determined in accordance with Seller's existing project accounting practices;

(ii) All general and administrative expenses of the Business arising in the ordinary course of business, which (x) are not expenses related to business activity prior to July 1, 1996, (y) are not third party expenses incurred by the Business after July 1, 1996 associated with winding down the remaining portion of the Business retained by Seller, (z) do not arise with respect to actions or activities of Seller occurring after the Closing with respect to the remaining portion of the Business retained by Seller, and (aa) are not accounted for as project costs under any Pre 7/23 Bonded Jobs or Post 7/23 Bonded Jobs (as such terms are defined below) in accordance with Seller's existing project accounting practices;

(iii) All extraordinary liabilities of Seller or General incurred outside the ordinary course of business of Seller or General after July 1, 1996 and that are not accounted for as project costs under any Pre 7/23 Bonded Jobs in accordance with Seller's existing project accounting practices, including, without limitation:

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(A) all liabilities and obligations arising out of, resulting from, or relating to claims, whether founded upon negligence, strict liability in tort, and/or other similar legal theory, seeking compensation or recovery for or relating to injury to person or damage to property with respect to the operation of the Business;

(B) all liabilities and obligations arising out of, resulting from, or relating to any violation of any statute, regulation or governmental order in connection with the use and ownership of the Included Assets by Seller or General after July 1, 1996 or the operation of the Business after July 1, 1996;

(C) All liabilities and obligations arising out of, resulting from, or relating to claims of infringement or other misappropriation of the Intellectual Property Rights of other Persons after July 1, 1996; or

(D) All liabilities and obligations arising out of, or resulting from, or relating to the employment of Seller's employees;

provided, that, the Assumed Liabilities shall not include any extraordinary liabilities of Seller incurred by Seller after the Closing with respect to the portion of the Business retained by Seller or any other activities of Seller unrelated to the Business;

(iv) The liability of Seller or General, if any, for sales or use tax arising with respect to the assignment and transfer of the Included Assets from Seller to General, provided that, with respect to any such tax relating to the transfer of the assets listed on Schedule 1.01(A)(iv), Seller shall have paid the sales or use tax required to be paid by Seller pursuant to Section 9.02(d) below;

(v) Seller's obligations with respect to any accrued employee benefits of the types described on Schedule 1.01(A)(v) arising prior to the Closing;

(vi) Seller's obligations under any employee health and welfare or other employee benefit plan, including, without limitation, any COBRA rights of any terminated employees of Seller, (x) to the extent such liabilities arise with respect to the employment of Seller's

employees on or after July 1, 1996 and would not constitute project costs in accordance with Seller's existing project accounting practices with respect to any Pre 7/23 Bonded Jobs or (y) in any event, to the extent that the expense for providing any such employee benefit is included in the Included Reserves (as defined below);

(vii) All liabilities and obligations of Seller arising out of, or resulting from, or relating to the termination of employment of Seller's employees in connection with the transition of the employment of Seller's workforce from Seller to General (including employees, if any, not hired by General) at or in anticipation of the Closing (provided, that the Assumed Liabilities shall not include any liabilities arising with respect to actions or events occurring prior to July 1, 1996, even if a claim concerning such actions or events occurring prior to July 1, 1996 is asserted in the context of a wrongful termination action) or, if they are subsequently employed by General or Buyer, upon the termination of employment of such employees by General or Buyer, including, without limitation, any liabilities arising under 29 U.S.C. §2101 et. seq.;

(viii) All liabilities incurred (x) by General or Seller in connection with the organization of General and (y) by General in connection with the operation of General from its organization through the Closing, except any liabilities that constitute project costs in accordance with Seller's existing project accounting practices with respect to any Pre 7/23 Bonded Jobs; and

(ix) The obligations and liabilities of Seller under the Included Leases and the Assumed Contracts that accrue, pursuant to the terms and conditions of the respective Included Leases and the Assumed Contracts, on and after the Closing Date.

"Buyer's Shareholders" means William F. Urban, Larry L. Worth, Gregg F. Woodward, James T. Dick and Thomas E. Sherman.

"CERCLA" means the Comprehensive Environmental Responses, Compensation and Liability Act of 1980, as amended.

"Closing Date" means the date of the Closing.

"Environmental Law" shall mean any current or future legal requirement pertaining to (a) the protection of health, safety, and the indoor or outdoor environment, (b) the conservation, management, or use of natural resources and wildlife, (c) the protection or use of surface water and

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groundwater, (d) the management, manufacture, possession, presence, use, generation, transportation, treatment, storage, disposal, release, threatened release, abatement, removal, remediation or handling of, or exposure to, any Hazardous Material or (e) pollution (including any release to air, land, surface water, and groundwater), and includes, without limitation, the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675, Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6991k, Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387, Clean Air Act, 42 U.S.C. §§ 7401-7671q, Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692, Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101-5127, Occupational Safety and Health Act, 29 U.S.C. §§ 651-678, Oil Pollution Act, 33 U.S.C. §§ 2701-2761, Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050, National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d, Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-11, Washington Model Toxics Control Act, Chapter 70.105D RCW, Washington Hazardous Waste Management Act, Chapter 70.105 RCW, Washington Water Pollution Control Act, Chapter 90.48 RCW, Washington Clean Air Act, Chapter 70.94 RCW, any similar, implementing or successor law, any amendment, rule, regulation, order, or directive issued thereunder, and any comparable or analogous state or local law or ordinance with their respective implementing regulations.

"Excluded Assets" means all assets of Seller that are not specifically included within the definition of Included Assets. The Excluded Assets include, without limitation:

- (i) All real property owned by Seller;
- (ii) All of Seller's interest in all Pre 7/23 Bonded Jobs (provided, that General shall be entitled to receive fees in accordance with the Management Agreement);
- (iii) All of Seller's interest in all Post 7/23 Bonded Jobs (provided, that General shall be entitled to receive fees in accordance with the Management Agreement);
- (iv) All of Seller's interest arising prior to July 1, 1996 in all Unbonded Jobs (including all accounts receivable arising with respect to work performed prior to July 1, 1996); and
- (v) All cash and cash equivalents of Seller that do not represent the proceeds of Included Assets.

"Excluded Liabilities" means all liabilities of Seller and the Business that are not specifically included within the

definition of Assumed Liabilities. As so conditioned, the Excluded Liabilities include, without limitation:

(i) All obligations or liabilities of the Business, Seller or any of its Affiliates of any nature whatsoever, arising with respect to any acts, actions, omissions or events occurring prior to July 1, 1996;

(ii) All liabilities incurred prior to July 1, 1996 with respect to any Unbonded Jobs (including any warranty or similar claims with respect to any work performed on any Unbonded Jobs prior to July 1, 1996);

(iii) All liabilities incurred with respect to any Pre 7/23 Bonded Jobs (including any warranty or similar claims), except as otherwise specifically provided in the Management Agreement;

(iv) All extraordinary liabilities of Seller or General (except as specifically covered as Assumed Liabilities above) incurred outside the ordinary course of business of Seller or General (x) prior to July 1, 1996 in any event or (ii) between July 1, 1996 and the Closing to extent covered by insurance held by Seller, including, without limitation:

(A) all liabilities and obligations arising out of, resulting from, or relating to claims, whether founded upon negligence, strict liability in tort, and/or other similar legal theory, seeking compensation or recovery for or relating to injury to person or damage to property with respect to the operation of the Business;

(B) all liabilities and obligations arising out of, resulting from, or relating to any violation of any statute, regulation or governmental order in connection with the use and ownership of the Included Assets by Seller or General prior to the Closing or the operation of the Business prior to the Closing;

(C) All liabilities and obligations arising out of, resulting from, or relating to claims of infringement or other misappropriation of the Intellectual Property Rights of other Persons prior to the Closing; or

(D) All liabilities and obligations arising out of, or resulting from, or relating to the employment of Seller's employees (except for any

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liabilities and obligations related to the termination of Seller's employees in connection with the Closing);

(v) All liabilities under Seller's present or former contracts with labor unions, including, without limitation, any unfunded pension or withdrawal liabilities or liabilities related to wrongful termination or unfair labor practices, to the extent such liabilities (x) arise from acts or actions occurring prior to July 1, 1996, (y) are covered by insurance held by Seller or (z) are of a nature that would constitute project costs in accordance with Seller's existing project accounting practices with respect to any Pre 7/23 Bonded Jobs;

(vi) All liabilities for or relating to any Hazardous Substances (i) located on or affecting any owned or leased real property of Seller prior to the Closing Date or (ii) generated, released, transported or disposed of by or on behalf of Seller prior to the Closing Date, to the extent such liabilities (x) arise from acts or actions occurring prior to July 1, 1996, (y) are covered by insurance held by Seller or (z) are of a nature that would constitute project costs in accordance with Seller's existing project accounting practices with respect to any Pre 7/23 Bonded Jobs; and

(vii) All liabilities of Seller under any employee health and welfare or other employee benefit plan, including, without limitation, any COBRA rights of any terminated employees of Seller, except to the extent the expense for providing any such employee benefit is included in the Included Reserves, provided, that, to the extent such liabilities arise with respect to the employment of Seller's employees on or after July 1, 1996 and are of a nature that would constitute routine general and administrative expenses for Seller's corporate employees or project costs in accordance with Seller's existing project accounting practices with respect to any Unbonded Jobs or any Post 7/23 Bonded Jobs, such liabilities shall constitute Assumed Liabilities.

"Guaranty" means the Guaranty in the form of Exhibit 1.01A attached hereto to be given by the Buyer's Shareholders and their spouses with respect to the indemnification obligations of the Buyer to Seller for any claims that Seller might incur with respect to the Post 7/23 Bonded Jobs; provided, that, with respect to each of the Buyer's Shareholders and their respective spouses the amount of the total liability of such Buyer's Shareholder and spouse under the Guaranty will be limited to the

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following percentages of the total guaranteed liability: William F. Urban and his spouse: 93%; Thomas E. Sherman and his spouse: 17.1%; Gregg F. Woodward and his spouse: 14.25%; James T. Dick and his spouse: 14.25%; and Larry L. Worth and his spouse: 11.4%.

"HSR Act" means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

"Hazardous Material" shall mean any substance, chemical, compound, product, solid, gas, liquid, waste, byproduct, pollutant, contaminant, or material which is hazardous, toxic or radioactive, and includes, without limitation, (a) asbestos, polychlorinated biphenyls, lead-based paints and petroleum (including crude oil or any fraction thereof) and (b) any such material classified or regulated as "hazardous," "toxic" or "dangerous" pursuant to any Environmental Law.

"Included Assets" means:

(i) All rights of Seller that accrue on and after July 1, 1996 under all Unbonded Jobs, including, without limitation, all revenue earned with respect to work done under such Unbonded Jobs from and after July 1, 1996, all determined in accordance with Seller's existing project accounting practices;

(ii) Seller's fixed assets, including without limitation all plant, floating plant, construction equipment, vehicles, vessels, machinery, equipment, lifting tackle, tools, fixtures, dies, supplies, furniture, furnishings and other items of personal property owned by Seller, but excluding (A) any item booked as of June 30, 1996 as unrealized salvage in accordance with Seller's existing project accounting practices with respect to any of the Unbonded Jobs, and (B) any items booked at any time as unrealized salvage in accordance with Seller's existing project accounting practices with respect to any of the Pre 7/23 Bonded Jobs;

(iii) Seller's interest as lessee or charterer under the leases and charters of personal and real property (the "Included Leases") more fully described on Schedule 1.1(B) (iii);

(iv) Seller's interest in, to and under all contracts, commitments and purchase orders (the "Assumed Contracts") made in the ordinary course of business of Seller, but excluding (A) the Pre

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7/23 Bonded Jobs, (B) the Post 7/23 Bonded Jobs, (C) any interest of Seller under any Unbonded Jobs arising with respect to work done prior to July 1, 1996, and (D) the contracts, commitments, purchase orders and other agreements identified on Schedule 1.01(B)(iv) attached hereto (the "Excluded Contracts");

(v) Cash equal to the net aggregate amount (the "Reserve Net Amount") comprised of (x) all reserves accrued on the books of Seller as of the Closing Date with respect to certain reserve accounts more fully described on Schedule 1.01(B)(v)(a) (the "Included Reserves"), reduced by (y) an amount equal to the balances on the books of the Seller as of the Closing Date of certain prepaid expenses accounts which are more fully described on Schedule 1.01(B)(v)(b);

(vi) To the extent assignable, all rights and choses in action, if any, of Seller against third parties and relating to the Included Assets, including, without limitation, all rights under manufacturers' and vendors warranties;

(vii) To the extent assignable, all of Seller's Intellectual Property Rights relating to the Business (except to the extent arising under Excluded Contracts), including, without limitation the copyrights, ASME Certificates, trade names, trademarks and service marks used in the Business and described on Schedule 1.01(B)(viii); provided, that, with respect to the JD Edwards software license to operate the MIS System, Buyer and Seller will use their good faith efforts to arrange for JD Edwards to issue a separate license to General with respect to the services provided to General under the MIS Agreement, with the fee for division of the current license being paid by Seller; provided further, that Seller shall retain a license to use such Intellectual Property to the extent necessary to wind up its remaining business; and provided further, that to the extent that any Affiliate of Seller is presently using any such Intellectual Property and desires to continue to use any such Intellectual Property in the future, Seller and Buyer will negotiate in good faith an agreement

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by which Seller's Affiliates may continue to use such Intellectual Property; and

(viii) All books, records, files and papers of Seller and its subsidiaries related to the Included Assets, whether in hard copy or computer format, including, without limitation, all bid records, cost reports, engineering information, equipment records, maintenance histories, project reports, job completion reports, related manuals and catalogs, lists of present and former suppliers, lists of present and former customers, personnel and employment records, and any information relating to an taxes imposed on the Included Assets that is in the control and possession of Seller.

"Intellectual Property Right" means any trademark, service mark, registration thereof or application for registration thereof, trade name, invention, patent, application, trade secret, know-how, copyright, copyright registration, application for copyright registration, or any other similar type of proprietary intellectual property right, in each case which is owned or licensed and used or held for use by Seller or any subsidiary of Seller.

"Knowledge," "Known" or similar terms as used in this Agreement with respect to Seller, means the actual knowledge of Malcolm Hope, Graham Duff, Graeme Hawkins, Mark Binns and Jack Craig, or any of them. "Knowledge," "Known" or similar terms as used in this Agreement with respect to Buyer, means the actual knowledge of William Urban, Larry Worth, Gregg Woodward, Thomas Sherman, James Dick and Alan Larson, or any of them.

"Lease" means the Lease in the form of Exhibit 1.01(B) attached hereto covering a portion of Seller's real property located on the Duwamish waterway in Seattle, Washington, as legally described therein.

"Lien" means, with respect to any asset, any mortgage, lien, pledge, charge, security interest or encumbrance of any kind in respect of such asset.

"Management Agreement" means that certain Management Agreement in the form of Exhibit 1.01(C) attached hereto, between Seller and General.

"Management Information System" means Seller's management information system, including Seller's current computer system, software and support.

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"Material Adverse Change" means a material adverse change in the Business, assets, condition (financial or otherwise), result of operations or prospects of Seller.

"Material Adverse Effect" means a material adverse effect on the condition (financial or otherwise), business, assets, results or operations or prospects of Seller.

"MIS Agreement" means the Management Information Systems Agreement in the form of Exhibit 1.01(D) attached hereto with respect to the use and operation of the Management Information System.

"Note" means a subordinated promissory note of Buyer, the Buyer's Shareholders and their spouses in the principal amount of \$2,250,000 in substantially the form of Exhibit 1.01(E) hereto evidencing a portion of the Subordinated Debt; provided, that, with respect to each of the Buyer's Shareholders and their respective spouses the amount of the total liability of such Buyer's Shareholder and spouse under the Note will be limited to the following percentages of the total obligations outstanding under the Note: William F. Urban and his spouse: 93%; Thomas E. Sherman and his spouse: 17.1%; Gregg F. Woodward and his spouse: 14.25%; James T. Dick and his spouse: 14.25%; and Larry L. Worth and his spouse: 11.4%.

"Person" means an individual, a corporation, a partnership, an association, a trust or other entity or organization, including a government or political subdivision or an agency or instrumentality thereof.

"Pre 7/23 Bonded Jobs" means those construction jobs of Seller listed on Schedule 1.01(C) attached hereto for which Seller has posted a bond that were bid and won by Seller on or prior to July 23, 1996.

"Post 7/23 Bonded Jobs" means those construction jobs of Seller listed on Schedule 1.01(D) attached hereto for which Seller has posted a bond that were bid and won by Seller after July 23, 1996 (Schedule 1.01(D) will be updated as of the Closing).

"Short-Term Subordinated Note" means a subordinated promissory note of Buyer and General in the principal amount of \$1,750,000 in substantially the form of Exhibit 1.01(F) hereto evidencing a portion of the Subordinated Debt.

"Subordinated Debt" means the indebtedness evidenced by the Note and the Short-Term Subordinated Note, which shall be subordinated to (x) the indebtedness of Buyer and General to Key Bank of Washington in the original principal amount of up to \$25,000,000, with such subordination effected pursuant to a

subordination agreement in the form of Exhibit 1.01(G) attached hereto (the "Bank Subordination Agreement") (or any replacement indebtedness that is of equal or lower principal amount and subject to terms and conditions in no material respect more onerous to Buyer and General than the indebtedness covered by the Bank Subordination Agreement, and with the subordination of such indebtedness subject to a subordination agreement in no respect more onerous to Seller than the Bank Subordination Agreement); and (y) the indemnity obligations of Buyer and General to Fireman's Fund (or a substitute surety) with respect to bonds issued by Fireman's Fund between the Closing Date and the stated maturity of the Note and while William F. Urban maintains the power to elect a majority of the members of the board of directors of Buyer, with such subordination effected pursuant to a subordination agreement in the form of Exhibit 1.01(H) attached hereto (the "Bonding Company Subordination Agreement") (or pursuant to a substitute subordination agreement in no respect more onerous to Seller than the Bonding Company Subordination Agreement).

"Unbonded Jobs" means those construction jobs of Seller listed on Schedule 1.01(E) attached hereto for which Seller has not been required to post a bond.

(b) Each of the following terms is defined in the Section set forth opposite such term:

<u>Term</u>	<u>Section</u>
Act	5.05
Amended Plan	8.06
Buyer Non-competition Covenant	12.06
Closing	3.02
Closing Cash Payment	3.01
Closing Transfer Documents	3.02(a)
Damages	10.02
Dispute	12.06
ERISA	6.03
Organization Date	2.01
Indemnified Party	10.03
Indemnifying Party	10.03
PBGC	6.03
Old Plan	8.06
Organization Transfer Documents	3.02(a)
Pension Plan	6.03
Purchase Price	3.01
Seller's Books and Records	8.08
Seller Non-competition Covenant	12.06

ARTICLE II

ORGANIZATION OF GENERAL CONSTRUCTION COMPANY

2.01. Organization of General. Effective on October 10, 1996 (the "Organization Date") and in order to permit General to obtain licensing and pre-qualification authority necessary to operate the Business as of the Closing, Buyer's Shareholders, acting in their capacity as the senior management of Seller, caused Seller to capitalize General by assigning to General all of the Included Assets held by Seller as of the Organization Date in exchange for the issuance of the Stock by General to Seller and the assumption by General of all of the Assumed Liabilities to which Seller was subject as of the Organization Date. In connection with the transfer of assets to General, General has provided Seller with a resale certificate for state tax purposes covering the 42' Clyde Crane and the Todd Whirely equipment. In addition, at the Closing (i) Seller shall transfer and assign to General all additional Included Assets acquired by Seller between the Organization Date and the Closing Date that are held by Seller as of the Closing Date and (ii) General shall assume from Seller all additional Assumed Liabilities to which Seller becomes subject between the Organization Date and the Closing Date.

ARTICLE III

PURCHASE AND SALE

3.01. Purchase and Sale. Upon the terms and subject to the conditions of this Agreement, Seller agrees to sell to Buyer, and Buyer agrees to purchase from Seller, the Stock at the Closing. The purchase price for the Stock (the "Purchase Price") is \$22,500,000, comprised of (a) \$20,250,000.00 in cash (the "Closing Cash Payment"), and (b) \$2,250,000.00 evidenced by the Note; provided, that, the Purchase Price and the Closing Cash Payment shall be increased by the amount of all capital assets (exclusive of capital assets treated as job costs in accordance with Seller's existing project accounting practices) purchased by Seller on and after July 1, 1996. The Purchase Price shall be paid as provided in Section 3.02.

3.02. Closing. The closing (the "Closing") of the purchase and sale of the Stock hereunder shall take place at the offices of Bogle & Gates P.L.L.C., Two Union Square, Suite 5100, Seattle, Washington as soon as possible, but in no event later than 5 business days after satisfaction of the conditions set forth in Article X, or at such other time or place as Buyer and Seller may agree. At the Closing,

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(a) Buyer shall deliver to Seller:

(i) The Closing Cash Payment by wire transfer in accordance with instructions to be provided not fewer than two Business Days prior to the Closing by Seller;

(ii) the Note, duly executed by Buyer, the Buyer's Shareholders and their spouses;

(iii) the Guaranty, duly executed by the Buyer's Shareholders and their spouses;

(iv) the Lease, duly executed by Buyer;

(v) the MIS Agreement, duly executed by Buyer;

(vi) the Management Agreement, duly executed by General;

(vii) a Memorandum of Transfer of Assets for Capital Contribution Purposes in substantially the form of Exhibit 3.02(a)(vii)(A) attached hereto, signed by Seller and covering the assignment of the Included Assets as of the Organization Date, and a Memorandum of Assumption of Liabilities in substantially the form of Exhibit 3.02(a)(vii)(B) attached hereto, signed by Seller and covering the assumption of the Assumed Liabilities by General as of the Organization Date (collectively, the "Organization Transfer Documents");

(viii) a Memorandum of Transfer of Assets for Capital Contribution Purposes in substantially the form of Exhibit 3.02(a)(viii)(A) attached hereto, signed by Seller and covering the assignment of any additional Included Assets acquired by Seller between the Organization Date and the Closing Date, and a Memorandum of Assumption of Liabilities in substantially the form of Exhibit 3.02(a)(viii)(B) attached hereto, signed by Seller and covering the assumption by General of any additional Assumed Liabilities arising between the Organization Date and the Closing Date (collectively, the "Closing Transfer Documents"); and

(ix) the Short-Term Subordinated Note, duly executed by Buyer and General.

(b) Seller shall deliver to Buyer (or General, as directed by Buyer):

(i) a payment by wire transfer to General of the amount estimated by Buyer and Seller in good faith owing by Seller to General with respect to the revenue derived by Seller from Included Assets prior to the Closing less the expenses incurred by Seller for the Assumed Liabilities prior to the Closing, plus the estimated Reserve Net Amount, plus the estimated fees and other amounts owing by Seller to General as of the Closing under the terms of the Management Agreement, plus the principal amount of the Short-Term Subordinated Note;

(ii) the certificate evidencing the Stock accompanied by an assignment separate from certificate with respect thereto duly endorsed by Seller in blank;

(iii) the Lease, duly executed by Seller;

(iv) the MIS Agreement, duly executed by Seller;

(v) the Management Agreement, duly executed by Seller;

(vi) the Bank Subordination Agreement and the Bonding Company Subordination Agreement;

(vii) the Organization Transfer Documents and the Closing Transfer Documents, each signed by General; and

(viii) a subordination agreement in the form of Exhibit 3.02(b) (viii) attached hereto, executed by Fletcher Construction Company North America, a Delaware corporation, and Fletcher Construction Company Hawaii Limited, a Hawaii corporation.

3.03. Post Closing Adjustment. Within 30 days following the Closing Seller and General shall meet and reconcile the accounting for (i) the division of revenue between the Included Assets and the Excluded Assets, (ii) the division of expenses between the Assumed and the Excluded Liabilities, (iii) the amount of the Reserve Net Amount, and (iv) the management fees and other expenses arising under the Management Agreement, for the period ending as of the Closing.

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ARTICLE IV

REPRESENTATIONS AND WARRANTIES OF SELLER AND PACIFIC

Seller and Pacific hereby represent and warrant to Buyer that:

4.01. Authority The execution and delivery of this Agreement and the consummation of the transactions contemplated by it have been duly and validly authorized by all necessary corporate action on the part of Seller and Pacific, and this Agreement is a valid and binding obligation of each of Seller and Pacific, enforceable in accordance with its terms.

4.02. Governmental Authorization; Consents. Except as set forth on Schedule 4.02 or Schedule 5.03, to the Knowledge of Seller, the execution, delivery and performance by Seller of this Agreement require no action by or in respect of, or filing with, any governmental body, agency, official or authority.

4.03. Equity Investments. To the knowledge of Seller, no corporation, partnership, joint venture or other entity other than Seller or General has, directly or indirectly, any equity interest in the Included Assets.

4.04. Tax Matters. To the knowledge of Seller, as of Closing, no deficiency for any tax has been asserted or assessed against Seller relating to the Included Assets which remains unpaid.

4.05. Title. At the time of the transfer of the Included Assets to General, Seller had good and marketable title to all of the Included Assets free and clear of all Liens of any kind or character, except (i) those set forth in any Schedule to this Agreement, (ii) Liens for taxes not yet due and payable, (iii) Liens of lessors as provided for in Included Leases, and (iv) matters Known to Buyer.

4.06. Certain Contracts. (a) Except for the agreements, contracts, plans, leases, arrangements or commitments listed on Schedule 4.06 or otherwise within the Knowledge of Buyer, to the Knowledge of Seller neither Seller nor General is a party to or subject to:

(i) any partnership, joint venture or other similar contract arrangement or agreement; or

(ii) any contract or other document that substantially limits the freedom of Seller or General to compete in any line of business or with any Person or in any area or

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which would so limit the freedom of General or any subsidiary of General after the Closing Date (other than competition with the commercial building construction business conducted by Fletcher Wright Construction, Inc. as of the closing of the sale of its business to Howard S. Wright Construction Company or HSW, Inc.).

4.07. Brokers' or Finders' Fees Etc. To the knowledge of Seller, no agent, broker, investment banker, person or firm acting on behalf of Seller is or will be entitled to any broker's fee or finder's fee or any other commission or similar fee directly or indirectly from Buyer or General in connection with any of the transactions contemplated by this Agreement.

ARTICLE V

REPRESENTATIONS AND WARRANTIES OF BUYER

Buyer hereby represents and warrants to Seller and Pacific that:

5.01. Organization, Standing and Power. Buyer is a corporation duly organized, validly existing and in good standing under the laws of the State of Washington and has all requisite corporate power and authority to own, lease and operate its properties and to carry on its business as now being conducted.

5.02. Authority: No Violation, Etc. The execution and delivery of this Agreement and the consummation of the transactions contemplated by it have been duly and validly authorized by all necessary corporate action on the part of Buyer, and this Agreement is a valid and binding obligation of Buyer, enforceable in accordance with its terms. Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated by it, nor compliance with any of its provisions will (i) conflict with or result in a breach of any provision of Buyer's Articles of Incorporation or Bylaws, or (ii) violate any judgment, order, writ, injunction or decree of any court, administrative agency or governmental body applicable to Buyer. The execution of the Agreement will not give any person the right to prevent, delay or otherwise interfere with any of the transactions contemplated by this Agreement pursuant to any contract to which Buyer is a party or by which Buyer may be bound.

5.03. Governmental Authorization: Consents. Except as set forth on Schedule 5.03, to the Knowledge of Buyer, the execution, delivery and performance by Buyer of this Agreement require no action by or in respect of, or filing with, any governmental body, agency, official or authority. No filing is required by Seller, Buyer or any Affiliate of either under the HSR Act.

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5.04. Brokers' or Finders' Fees, Etc. No agent, broker, investment banker, person or firm acting on behalf of Buyer or under its authority is or will be entitled to any broker's or finder's fee or any other commission or similar fee directly or indirectly from any of the parties hereto in connection with any of the transactions contemplated by this Agreement.

5.05. Investment Purpose. Buyer is acquiring the Stock for its own account for investment only and not with a view to, for resale in connection with, or with an intent of participating directly or indirectly in, any distribution of the Stock within the meaning of the Securities Act of 1933, as amended ("Act"), Buyer understands and agrees that the sale of Stock to Buyer has not been registered under the Act or any state securities laws, and that the Stock may not be resold without registration under the Act or applicable state securities laws or an exemption therefrom.

5.06. Condition of Included Assets. Buyer and General accept the Included Assets in their "AS IS, WHERE IS" condition, and acknowledge and agree that Seller does not have and will have no liability whatsoever for the condition of the Included Assets.

5.07. Litigation. There is no pending proceeding that has been commenced against Buyer and that challenges, or may have the effect of preventing, delaying, making illegal, or otherwise interfering with, any of the transaction contemplated by the Agreement. To Buyer's knowledge, no such proceeding has been threatened.

ARTICLE VI

COVENANTS OF SELLER

Seller agrees that:

6.01. Resignations. Seller will deliver to Buyer at or prior to the Closing Date the resignations of all officers and directors of General who will be officers, directors or employees of Seller or any of its Affiliates after the Closing Date from their positions with General, except as provided in Section 7.03 below.

6.02. Environmental Assessment. Seller shall procure from an environmental engineering firm acceptable to Buyer in its reasonable judgement a Phase I or Level I environmental assessment with respect to the real property subject to the Lease as soon as possible but in any event not later than October 31,

1996 for purposes of establishing a baseline for responsibility between Seller and Buyer with respect to any Hazardous Substances affecting such property. If the Phase I environmental assessment report recommends further investigation and/or invasive testing and such investigation and/or testing is necessary in the reasonable judgment of Buyer to establish a reliable baseline with respect to the status of Hazardous Substances affecting the property, Seller will proceed to complete such further investigation and/or testing and provide a final report with respect to the results of such investigation or testing to Buyer.

6.03. Defined Benefit Pension Plan. Seller presently maintains a defined benefit pension plan (the "Pension Plan"). Seller will terminate the Pension Plan, effective October 31, 1996, in a manner that meets the requirements of all applicable law, preserves the qualified status of the Pension Plan under Section 401(a) of the Internal Revenue Code, and meets the requirements for a "standard termination" under Section 4041 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Buyer and General will not assume any liability for benefits accrued, or to be accrued, under the Pension Plan. Seller will retain the right to the reversion of any residual assets after the payment of all accrued benefits and satisfaction of all fees and expenses related to the administration and termination of the Pension Plan. Seller will be fully responsible for any and all costs and expenses (including any that result from participant claims or claims by the Pension Benefit Guarantee Corporation ("PBGC")) relating to the administration and termination of the Pension Plan, including costs related to the submission of the Pension Plan to the Internal Revenue Service for a determination that the termination, any related distributions, and any potential asset reversion to Seller, do not adversely affect the qualified status of the Pension Plan, and costs related to the notification to the PBGC regarding Seller's intent to terminate the Pension Plan (and any related costs and expenses resulting from the PBGC's issuance of a notice of noncompliance with Section 4041 of ERISA). In addition to other options and to the extent permitted under applicable law, Seller's employees who become employees of General at the Closing will be given an opportunity to roll over any accrued benefit in the Pension Plan into the General Construction Company 401(K) Plan (as defined in Section 8.06 below).

6.04. Noncompetition. (a) Seller and Pacific agree that for a period of three (3) full years from the Closing Date, neither they nor any of their Affiliates shall engage, either directly or indirectly, as a principal or for its own account or solely or jointly with others, or as stockholder in any corporation or joint stock association, in any business that competes with the Business as it exists on the Closing Date within the states of Alaska, Washington, Oregon or California or

in the coastal waters extending ten (10) miles offshore from such states; provided, that, nothing contained herein shall preclude Seller from completing the Pre 7/23 Bonded Jobs or the Post 7/23 Bonded Jobs in accordance with this Agreement and the Management Agreement;

(b) If any provision contained in this Section shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions of this Section, but this Section shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein. It is the intention of the parties that if any of the restrictions or covenants contained herein is held to cover a geographic area or to be for a length of time which is not permitted by applicable law, or in any way construed to be too broad or to any extent invalid, such provision shall not be construed to be null, void and of no effect, but to the extent such provision would be valid or enforceable under applicable law, an arbitrator pursuant to Section 12.06 below shall construe and interpret or reform this Section to provide for a covenant having the maximum enforceable geographic area, time period and other provisions (not greater than those contained herein) as shall be valid and enforceable under such applicable law. Seller and Pacific acknowledge that Buyer would be irreparably harmed by any breach of this Section and that there would be no adequate remedy at law or in damages to compensate Buyer for any such breach. Seller and Pacific agree that Buyer shall be entitled to injunctive relief requiring specific performance by Seller and Pacific of this Section, and Seller and Pacific consent to the entry thereof.

6.05 Tax Election. Seller and the consolidated group in which Seller is a part shall make the election described in Section 338(h)(10) of the Internal Revenue Code of 1986, as amended.

ARTICLE VII

COVENANTS OF BUYER

Buyer agrees that:

7.01. Access. For a period of seven (7) years after the Closing, Buyer will cause General to afford promptly to Seller and its agents reasonable access to General's properties, books, records, employees and auditors to the extent necessary to permit Seller to determine any matter relating to its rights and obligations hereunder or with respect to any matter concerning taxes of Seller or other issues concerning Seller for any period ending on or as of the Closing Date. Seller will hold, and will use its best efforts to cause its officers, directors, employees,

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accountants, counsel, consultants, advisors and agents to hold, in confidence, unless compelled to disclose by judicial or administrative process or by other requirements of law, all confidential documents and information concerning General provided to it pursuant to this Section 7.01. Notwithstanding the foregoing, neither Buyer nor General shall be required to hold or maintain any records of Seller or the Business that relate to matters more than ten (10) years old at any time. In addition, at the request of Seller, Buyer will make available to Seller during the term of the Management Agreement an office for an employee of Seller or an Affiliate of Seller.

7.02. Cease Using Fletcher Name. Except in its management of those Pre 7/23 Bonded Jobs and Post 7/23 Bonded Jobs being completed for Seller and otherwise in conjunction with the performance of its obligations under the Management Agreement, Buyer shall never utilize the names "Fletcher" or "Challenge," individually or in conjunction in any matter in its business after the Closing and shall utilize reasonable commercial efforts to delete or remove these two names from any of the Included Assets.

7.03. Resignations. Buyer will deliver to Seller at or prior to the Closing Date the resignations of all officers and directors of Seller who will be officers, directors or employees of Buyer or any of its Affiliates after the Closing Date from their positions with Seller; provided, that, for the term of the Management Agreement, Thomas R. Anderson, or another person mutually acceptable to Buyer and Seller, shall be elected Vice President and Assistant Secretary of Seller, with authority to execute such documents and make such filings with governmental agencies on behalf of Seller as are reasonably necessary in connection with the continued operation of the Business and General's performance under the Management Agreement.

7.04. Maintenance of Control. Until the later of (i) completion of each of the Post 7/23 Bonded Jobs, (ii) completion of each of the Pre 7/23 Bonded Jobs, (iii) termination of the Management Agreement and (iv) payment in full of the Subordinated Debt, Buyer and General shall not issue any equity securities or enter into any other contractual arrangement that would result in William F. Urban not maintaining the power to elect a majority of the members of the board of directors of Buyer, and Buyer not maintaining the power to elect a majority of the members of the board of directors of General.

7.05. Noncompetition. (a) Buyer agrees that for a period ending on June 30, 2001, neither Buyer, General nor any of their Affiliates shall engage, either directly or indirectly, as a principal or for its own account or solely or jointly with others, or as stockholder in any corporation or joint stock association, in any business that competes with the commercial

building market in which Fletcher Wright, Inc. was operating on the date of the closing of the sale of a portion of its business to Howard S. Wright Construction a/k/a HSW, Inc.

(b) If any provision contained in this Section shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions of this Section, but this Section shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein. It is the intention of the parties that if any of the restrictions or covenants contained herein is held to cover a geographic area or to be for a length of time which is not permitted by applicable law, or in any way construed to be too broad or to any extent invalid, such provision shall not be construed to be null, void and of no effect, but to the extent such provision would be valid or enforceable under applicable law, an arbitrator pursuant to Section 12.06 below shall construe and interpret or reform this Section to provide for a covenant having the maximum enforceable geographic area, time period and other provisions (not greater than those contained herein) as shall be valid and enforceable under such applicable law. Buyer acknowledges that Seller would be irreparably harmed by any breach of this Section and that there would be no adequate remedy at law or in damages to compensate Seller for any such breach. Buyer agrees that Seller shall be entitled to injunctive relief requiring specific performance by Buyer and General of this Section, and Buyer consents to the entry thereof.

7.06. Negative Pledge. Until the later of (i) completion of each of the Post 7/23 Bonded Jobs, (ii) completion of each of the Pre 7/23 Bonded Jobs, (iii) termination of the Management Agreement and (iv) payment in full of the Subordinated Debt, Buyer and General (x) shall not subject any of the Included Assets to any liens or security interests except for liens and security interests in favor of Buyer and General's principal secured lender, and (y) shall not incur any indebtedness secured by liens or security interests covering the Included Assets in an amount greater than the amount of indebtedness that Seller has agreed shall be senior to the Subordinated Debt as provided in the definition of Subordinated Debt set forth in Section 1.01 above. At the Closing Buyer and General's principal secured lender shall be Key Bank of Washington.

ARTICLE VIII

COVENANTS OF BOTH PARTIES

The parties hereto agree that:

8.01. Confidentiality. None of the Parties to this Agreement will disclose the terms of the transactions contemplated by this Agreement, and all other related documents without the prior written consent of the other parties hereto, except to the extent such disclosure is required by law or is made to representatives and advisers of Buyer, Seller or Pacific or to Buyer's, Seller's or Pacific's board of directors or officers, or as may be required by any exchange on which the stock of any Affiliate of Seller is traded, or made to representatives and advisers to Seller, Pacific or Buyer, their respective boards of directors, officers, insurance companies or financial institutions.

8.02. Commercially Reasonable Efforts. Subject to the terms and conditions of this Agreement, each party will use its reasonable best efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary or desirable under applicable laws and regulations to consummate the transactions contemplated by this Agreement. Seller, Pacific and Buyer each agree, and Seller, prior to the Closing, and Buyer, after the Closing, agree to cause General, to execute and deliver such other documents, certificates, agreements and other writings and to take such other actions as may be necessary or desirable in order to consummate or implement expeditiously the transactions contemplated by this Agreement.

8.03. Certain Filings. Seller and Buyer shall cooperate with one another (a) in determining whether any action by or in respect of, or filing with, any governmental body, agency, official or authority is required, or any actions, consents, approvals or waivers are required to be obtained from parties to any material contracts, in connection with the consummation of the transactions contemplated by this Agreement and (b) in taking such actions or making any such filings, furnishing information required in connection therewith and seeking timely to obtain any such actions, consents, approvals or waivers.

8.04. Cooperation on Tax Matters. (a) Buyer and Seller shall cooperate fully, as and to the extent reasonably requested by the other party, in connection with any audit, litigation or other proceeding with respect to taxes. Such cooperation shall include the retention and (upon the other party's request) the provision of records and information which are reasonably relevant to any such audit, litigation or other proceeding and making employees available on a mutually

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convenient basis to provide additional information and explanation of any material provided hereunder.

(b) Buyer and Seller further agree, upon request, to use their reasonable best efforts to obtain any certificate or other document from any governmental authority or customer of Seller or General or any other Person as may be necessary to mitigate, reduce or eliminate any tax that could be imposed (including, but not limited to, with respect to the transactions contemplated hereby).

8.05. Insurance Matters. Between the date hereof and the Closing Buyer and Seller shall coordinate with their respective insurance broker, Willis Corroon Company of Seattle, to ensure that all necessary endorsements and subrogations to the existing policies of insurance of Seller and the new policies of insurance of General are obtained such that (i) any insurance held by Seller covering any liability assumed by General (that is not otherwise covered by General's insurance) will be available to General and Buyer (provided that General and Buyer will be responsible for the payment of any applicable deductible with respect to any claim concerning any such assumed liability), and (ii) any insurance held by Buyer or General covering any liability retained by Seller (that is not otherwise covered by Seller's insurance) will be available to Seller (provided that Seller will be responsible for the payment of any applicable deductible with respect to any claim concerning any such retained liability).

8.06. Seller's 401(K) Plan. Seller has maintained the Fletcher Construction and Affiliates 401(k) Plan ("Old Plan") for its employees, certain employees of Affiliates of Seller and their respective beneficiaries. Seller's management recently caused Seller to amend the Old Plan (the Old Plan, as so amended, being the "Amended Plan"), and either Affiliates of Seller or entities that have acquired a portion of the businesses of Affiliates of Seller have established one or more new plans. Seller and General will cooperate with the trustee of the Old Plan to transfer the account balances for certain Old Plan participants who will not become employees of General, from the Old Plan to other plans in accordance with the direction of Seller. As soon as practicable after the Closing Date, Seller will transfer the Amended Plan, with account balances through the Closing Date (and earnings thereon through the date of transfer), to General. The transfer will be effected in accordance with applicable law. Seller will indemnify and hold General harmless from and against any liability General may incur with respect to the Amended Plan in regard to events occurring on or before the date of transfer.

8.07. Notices of Certain Events. Seller and Buyer shall promptly notify one another of:

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(i) any notice or other communication from any Person alleging that the consent of such Person is or may be required in connection with the transactions contemplated by this Agreement;

(ii) any notice or other communication from any governmental or regulatory agency or authority in connection with the transactions contemplated by this Agreement; and

(iii) any actions, suits, claims, investigations or proceedings commenced or, to its Knowledge threatened against, relating to or involving or otherwise affecting Seller, General or Buyer that relate to the consummation of the transactions contemplated by this Agreement.

8.08 Books and Records of Seller. Buyer and Seller agree that following the Closing General shall hold free of charge to Seller all books, records, files and papers ("Seller's Books and Records") of Seller and its subsidiaries related to the Business that were not included as part of the Included Assets, whether in hard copy or computer format, including, without limitation, all bid records, cost reports, engineering information, equipment records, maintenance histories, project reports, job completion reports, related manuals and catalogs, lists of present and former suppliers, lists of present and former customers, personnel and employment records, and any information relating to an taxes that is presently in the control and possession of Seller. Notwithstanding the foregoing, General shall not be required to hold or maintain any of Seller's Books and Records that relate to matters more than ten (10) years old at any time, provided, that Buyer shall give Seller thirty (30) days advance written notice generally describing any materials that it intends to dispose of, and Seller shall be entitled to collect any such materials prior to expiration of such thirty (30) day period. Furthermore, Seller shall be entitled to review any of Seller's Books and Records at any time during normal business hours, and Seller shall be entitled to demand that Buyer and General make available any of Seller's Books and Records for collection by Seller, provided that Buyer and General shall have a reasonable time to make copies of any of Seller's Books and Records that Seller desires to collect from General. Buyer and General shall take all reasonable actions to maintain the confidentiality of all of Seller's Books and Records in General's possession.

8.09 Certain Equipment Expense. Seller agrees that it shall be responsible for the expenses with respect to certain equipment maintenance and repair items identified on Schedule 8.09 attached hereto. Except for expenses identified on Schedule 8.09, Seller shall have no further responsibility for any equipment maintenance or repair expenses incurred after July 1,

1996 (except for any such expenses that constitute job costs for any Pre 7/23 Bonded Jobs in accordance with Seller's present job accounting practices), and Buyer and General shall accept Seller's assets on the basis provided in Section 5.06 above.

8.10. Short-Term Subordinated Note. In order to cover the short-term working capital requirements of Buyer and General during the period immediately following the Closing while General performs its obligations with respect to the management of the completion of the Pre 7/23 Bonded Jobs and the Post 7/23 Bonded Jobs, Seller will advance to Buyer and General \$1,750,000.00 at Closing. Buyer and General shall repay this advance to Seller pursuant to the terms of the Short-Term Subordinated Note.

ARTICLE IX

CONDITIONS TO CLOSING

9.01. Conditions to the Obligations of Each Party. The obligations of Buyer and Seller to consummate the Closing are subject to the satisfaction of the following conditions:

(a) Any applicable waiting period under the HSR Act relating to the transactions contemplated hereby shall have expired or been terminated.

(b) No provision of any applicable law or regulation and no judgment, injunction, order or decree shall prohibit the consummation of the Closing.

(c) All actions by or in respect of or filings with any governmental body, agency, official or authority required to pre-qualify General to bid on any public jobs for which bids are anticipated to be made within four weeks after the Closing shall have been obtained and made, and General shall have obtained all licenses and permits required for it to operate the Business and complete the Unbonded Jobs, the Post 7/23 Bonded Jobs and perform its obligations under the Management Agreement.

9.02. Conditions to Obligation of Buyer. The obligation of Buyer to consummate the Closing is subject to the satisfaction of the following further conditions:

(a)(i) Seller and Pacific shall have performed in all material respects all of its obligations hereunder required to be performed by it on or prior to the Closing Date, (ii) the representations and warranties of Seller contained in this Agreement and in any certificate or other writing delivered by Seller pursuant hereto, shall be true at and as of the Closing Date, as if made at and as of such date with only such exceptions as would not in the aggregate reasonably be expected to have a

Material Adverse Effect and (iii) Buyer shall have received a certificate signed by an authorized representative of Seller to the foregoing effect.

(b) No court, arbitrator or governmental body, agency or official shall have issued any order, and there shall not be any statute, rule or regulation, restraining the effective operation by Buyer or General of the Business after the Closing Date, and no proceeding challenging this Agreement or the transactions contemplated hereby or seeking to prohibit, alter, prevent or materially delay the Closing shall have been instituted by any Person before any court, arbitrator or governmental body, agency or official and be pending.

(c) Buyer shall have received all of the documents and instruments to be delivered by Seller pursuant to Section 3.02(b) above.

(d) Seller shall have paid all Washington and California state and local sales and/or use tax on the assets listed on Schedule 1.01(A)(iv) required in connection with putting such equipment into use.

(e) Buyer shall have received (or shall receive simultaneous with the Closing) the proceeds of the loan(s) that Buyer will use to make the Closing Cash Payment to Seller and to provide working capital for General.

9.03. Conditions to Obligation of Seller. The obligation of Seller to consummate the Closing is subject to the satisfaction of the following further conditions:

(a) (i) Buyer shall have performed in all material respects all of its obligations hereunder required to be performed by it at or prior to the Closing Date, (ii) the representations and warranties of Buyer contained in this Agreement and in any certificate or other writing delivered by Buyer pursuant hereto shall be true in all material respects at and as of the Closing Date, as if made at and as of such date and (iii) Seller shall have received a certificate signed by the President of Buyer to the foregoing effect.

(b) No proceeding challenging this Agreement or the transactions contemplated hereby or seeking to prohibit, alter, prevent or materially delay the Closing shall have been instituted by any Person before any court, arbitrator or governmental body, agency or official and be pending.

(c) Seller shall have received all of the documents and instruments to be delivered by Buyer pursuant to Section 3.02(a) above.

ARTICLE X

SURVIVAL; INDEMNIFICATION

10.01. Survival. The covenants, agreements, representations and warranties of the parties hereto contained in this Agreement or in any certificate or other writing delivered pursuant hereto or in connection herewith shall survive the Closing.

10.02. Indemnification. (a) Seller and Pacific jointly and severally hereby indemnify Buyer and, effective at the Closing, without duplication, General against and agree to hold them harmless and defend them from any and all damage, loss, liability and expense (including without limitation reasonable expenses of investigation and reasonable attorneys, fees and expenses in connection with any action, suit or proceeding) ("Damages") incurred or suffered by Buyer, General or any of their Affiliates:

- (i) arising out of any misrepresentation or breach of warranty, covenant or agreement made or to be performed by Seller or Pacific pursuant to this Agreement;
- (ii) with respect to any of the Excluded Liabilities;
- (iii) any failure of Seller to perform its obligations under Section 8.02 of the Management Agreement; or
- (iv) any failure of Seller to pay or perform its obligations under Section 8.03(b) of the Lease.

(b) Buyer hereby indemnifies Seller and Pacific against and agrees to hold them harmless and defend them from any and all Damages incurred or suffered by Seller, Pacific or any of their Affiliates:

- (i) arising out of any misrepresentation or breach of warranty, covenant or agreement made or to be performed by Buyer pursuant to this Agreement;
- (ii) with respect to any of the Assumed Liabilities;
- (iii) arising by virtue of the transaction structure reflected in Section 2.01 above (the organization and capitalization of General prior to the Closing) that would not have been incurred by Seller had Seller simply assigned

the Included Assets to Buyer, and Buyer assumed the Assumed Liabilities from Seller, at the Closing;

- (iv) any failure of General to perform its obligations under Section 8.01 of the Management Agreement; or
- (v) any failure of General to pay or perform its obligations under Section 8.03(a) of the Lease.

10.03. Procedures; Exclusivity. (a) The party seeking indemnification under Section 10.02 (the "Indemnified Party") agrees to give prompt notice to the party against whom indemnity is sought (the "Indemnifying Party") of the assertion of any claim, or the commencement of any suit, action or proceeding by any third party in respect of which indemnity may be sought under such Section. The Indemnifying Party may at the request of the Indemnified Party participate in and control the defense of any such suit, action or proceeding at its own expense. The Indemnifying Party shall not be liable under Section 10.02 for any settlement effected without its consent of any claim, litigation or proceeding in respect of which indemnity may be sought hereunder.

(b) After the Closing, except for the right to seek injunctive relief provided in Section 6.04(b) and Section 7.05(b), Section 10.02 will provide the exclusive remedy for any misrepresentation, breach of warranty, covenant or other agreement or claim arising out of this Agreement or the transactions contemplated hereby.

10.04. Payment of Note Balloon into Escrow. If Buyer and/or General has asserted a claim for indemnification under Section 10.02(a) that has not been paid or that has not been resolved as of the maturity date of the Note, Buyer and Seller acting in good faith shall establish an escrow on reasonable and customary commercial terms with a mutually acceptable escrow agent and Buyer shall deposit with the escrow agent an amount equal to the Buyer's reasonable estimate of the amount of the Damages related to the claim (up to the outstanding balance due under the Note). The making of the deposit shall constitute a payment under the Note. Buyer shall pay to Seller the balance, if any, outstanding on the Note after making the deposit to cover the alleged Damages into escrow. The escrowed funds shall be invested in an interest bearing account. Upon resolution of the claim Buyer or General shall be entitled to a distribution from the escrowed funds in the amount of the Damages as agreed between the parties or as resolved pursuant to Section 12.06 below (any interest that has accrued on the escrowed funds shall be available for distribution to the extent of the agreed or

determined Damages payable to Buyer or General), and Seller shall be entitled to a distribution of the balance of the escrow funds (including accrued interest), if any. Any party receiving all or any portion of the interest that has accrued on the escrowed funds shall be liable for the taxes related to the interest distributed to such party. To the extent any escrowed funds are insufficient to compensate Buyer or General for any Damages, Seller and Pacific shall remain liable for the balance. If Buyer, General and Seller are unable to agree on an acceptable escrow or the terms of an escrow agreement, the determination of the escrow agent and the terms of the escrow agreement shall be made by an arbitrator selected pursuant to Section 12.06 below. Seller agrees that without Buyer's consent it shall not offset any obligation it may owe Buyer against Buyer and Buyer's Shareholders' obligations under the Note.

ARTICLE XI

TERMINATION

11.01. Grounds for Termination. This Agreement may be terminated at any time prior to the Closing:

(i) by mutual written agreement of Seller and Buyer;

(ii) by either Seller or Buyer if the Closing shall not have been consummated on or before November 1, 1996; or

(iii) by either Seller or Buyer if there shall be any law or regulation that makes consummation of the transactions contemplated hereby illegal or otherwise prohibited or if consummation of the transactions contemplated hereby would violate any nonappealable final order, decree or judgment of any court or governmental body having competent jurisdiction.

The party desiring to terminate this Agreement pursuant to clauses (ii) or (iii) shall give notice of such termination to the other party.

11.02. Effect of Termination. If this Agreement is terminated as permitted by Section 11.01, such termination shall be without liability of either party (or any shareholder, director, officer, employee, agent, consultant or representative of such party) to the other party to this Agreement; provided that if such termination shall result from the willful failure of either party to fulfill a condition to the performance of the obligations of the other party or to perform a covenant of this Agreement or from a willful breach by either party to this Agreement, such party shall be fully liable for any and all Damages incurred or suffered by the other party as a result of such failure or breach. The provisions of Section 8.01 shall survive any termination hereof pursuant to Section 11.01.

ARTICLE XII

MISCELLANEOUS

12.01. Notices. Except as otherwise required by applicable law, all notices, approvals, consents and other communications to Seller, Pacific or Buyer under or in connection with this Agreement shall be in writing and shall be sent via telephone facsimile transmission, via personal delivery or via express courier or delivery service, addressed to such party at such party's address or telephone facsimile number set forth below or at such other address or telephone facsimile number as shall be designated by such party in a written notice given to the other party complying as to delivery with the terms of this Section:

TO SELLER c/o The Fletcher Construction
 Company Limited
 585 Great South Road, Penrose
 Private Bag 92114
 Auckland, New Zealand
 Facsimile: 649-525-9205
 Attn: Mr. Malcolm Hope

With a copy to: Kenneth R. Kupchak
 Damon Key Bocken Leong Kupchak
 1001 Bishop Street
 1600 Pauahi Tower
 Honolulu, Hawaii 96813
 Facsimile: (808) 333-2242

TO PACIFIC Fletcher Pacific Construction Co.
 Ltd.
 707 Richards Street
 Suite 400
 Ocean View Center
 Honolulu, Hawaii 96813
 Facsimile: 808-533-5320
 Attn: Chief Financial Officer

With a copy to: Kenneth R. Kupchak
 Damon Key Bocken Leong Kupchak
 1001 Bishop Street
 1600 Pauahi Tower
 Honolulu, Hawaii 96813
 Facsimile: (808) 333-2242

TO BUYER: GC Investment Co.
2111 N. Northgate Way
Suite 305
Seattle, Washington 98133
Facsimile: (206) 368-9850
Attn: Mr. William Urban

With a copy to: Bruce A. King
Bogle & Gates P.L.L.C.
4700 Two Union Square
Seattle, Washington 98101
Facsimile: (206) 621-2660

All such notices, approvals, consents and other communications shall be deemed given (i) when given and receipted for (or upon the date of attempted delivery when delivery is refused), if sent via personal delivery or via express courier or delivery service or (ii) when received, if sent via telephone facsimile (confirmation of such receipt via confirmed telephone facsimile being deemed receipt).

12.02. Amendments; No Waivers. (a) Any provision of this Agreement may be amended or waived if, and only if, such amendment or waiver is in writing and signed, in the case of an amendment, by Buyer, Seller and Parent, or in the case of a waiver, by the party against whom the waiver is to be effective.

(b) No failure or delay by any party in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies herein provided shall be cumulative and not exclusive of any rights or remedies provided by law.

12.03. Expenses. Whether or not the transactions contemplated by this Agreement are consummated, Seller, Parent and Buyer shall each pay their own fees and expenses incident to the negotiation, preparation and execution of this Agreement, including fees and expenses of counsel, accounts, financial advisers and other experts.

12.04. Successors and Assigns. The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns; provided that neither party may assign, delegate or otherwise transfer any of its rights or obligations under this Agreement without the consent of the other party hereto.

12.05. Governing Law. The validity, construction, interpretation and enforceability of this Agreement shall be governed by the laws of the State of Washington and the federal

law as applied within the State of Washington as such law applies to the making, executing and performing of contracts solely within the State of Washington without reference to Washington's choice of law doctrine.

12.06. Dispute Resolution. Any controversy, claim or dispute of whatever nature arising out of or relating to this Agreement or the validity, enforceability, breach or termination of this Agreement, whether such controversy, claim or dispute is based upon statute, contract, tort, common law or otherwise, and whether such controversy, claim or dispute existed prior to or arises after the date of this Agreement (any such controversy, claim or dispute being a "Dispute"), shall be resolved in confidential proceedings and in accordance with the procedures set forth in this Section, which procedures shall be the sole and exclusive procedures for the resolution of any Disputes.

(a) Negotiations. Buyer and Seller, promptly and in good faith, shall attempt to resolve any Dispute by negotiation between the CEO of the Fletcher Challenge Construction sector, or his designee, on behalf of Seller and/or Pacific, and William Urban on behalf of Buyer. Any party to this Agreement may give to the other party to this Agreement written notice of any Dispute and, within seven (7) days after the giving of such notice, the recipient of such notice shall give a written response to the other party to this Agreement. Each notice of a Dispute and each response to any such notice shall include a statement of the position of the party giving such notice or response in respect of such Dispute and a summary of arguments supporting such position. Within fourteen (14) days after the giving of a notice of a Dispute under this subsection, the representatives of Seller (and Pacific) and Buyer shall meet at a mutually acceptable time and place, and thereafter as often as such persons reasonably deem necessary, to attempt to resolve such Dispute. All reasonable requests for information made by any party to this Agreement to any other party to this Agreement shall be honored. If any Dispute has not been resolved by negotiation pursuant to this subsection within twenty-eight (28) days after the giving of the notice of such Dispute, then any party to this Agreement may initiate arbitration of such Dispute pursuant to Section 12.06(b). All negotiations and arbitrations pursuant to this subsection shall be confidential and such negotiations shall be treated as compromise and settlement negotiations. Nothing said or disclosed, and no document produced, in the course of such negotiations which is not independently discoverable shall be offered or received as evidence or used for

impeachment or for any other purpose in any arbitration or litigation.

(b) Arbitration. If any Dispute has not been resolved by negotiation pursuant to Section 12.06(a), then such Dispute shall be determined by arbitration in San Francisco, California, in accordance with the Construction Industry Rules of the AAA then in effect if the Dispute relates primarily to one or more construction projects or the Commercial Arbitration Rules of the AAA then in effect if the Dispute relates primarily to other issues, in either case by a sole arbitrator who shall be neutral and impartial and who has had both training and experience as an arbitrator of general corporate and commercial matters between business entities of a net worth of \$20 million or more. If the parties to this Agreement cannot agree on an arbitrator, then the arbitrator shall be selected by AAA in accordance with the criteria set forth in the preceding sentence. The AAA shall look to the best person for the job and not restrict itself to selecting only from its regional panel as this is an international matter. The arbitrator shall decide any issue as to whether, or as to the extent to which, any Dispute is subject to the arbitration and other dispute resolution provisions in this Agreement. The arbitrator shall base his or her award on the provisions of this Agreement and shall render his or her award in a writing which shall include an explanation of the reasons for such award. Any arbitration pursuant to this subsection shall be governed by the substantive laws of the State of Washington applicable to contracts made and to be performed in that state, and by the federal Arbitration Act, Title 9 of the United States Code, and judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof. In the case of any Dispute based upon a statute, the arbitrator in any arbitration pursuant to this subsection shall be empowered to award any remedy authorized by such statute. The arbitrator in any arbitration shall provide in the arbitration award for the fees, costs and expenses of the counsel and witnesses of the prevailing party incurred in connection with any arbitration pursuant to this subsection to be by the other party. The statute of limitations of the State of Washington applicable to the commencement of a lawsuit shall apply to the commencement of an arbitration under this subsection, except that no defenses shall be available based upon the passage of time during any negotiation required pursuant to Section 12.06(a). Except as otherwise

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provided below, all fees, costs and expenses of the arbitrator, and all other costs and expenses of the arbitration, shall be shared equally by the parties to this Agreement unless such parties agree otherwise or unless the arbitrator in the award assesses such costs and expenses against one of such parties or allocates such costs and expenses other than equally among such parties. Notwithstanding anything to the contrary herein, the parties agree that the remedy of punitive or exemplary damages is hereby explicitly waived by each of them.

(c) Certain Remedies. No provision of, and no exercise of any rights under, this Section 12.06 shall limit the right of Buyer pursuant to Section 6.04 above (the "Seller Non-competition Covenant") to commence any judicial action or proceeding to obtain injunctive relief or specific performance. The exercise of a remedy by Buyer pursuant to the Seller Noncompetition Covenant or otherwise shall not constitute a waiver of the right of Buyer to resort to arbitration in accordance with this Section 12.06. Furthermore, no provision of, and no exercise of any rights under, this Section 12.06 shall limit the right of Seller pursuant to Section 7.05 above (the "Buyer Non-competition Covenant") to commence any judicial action or proceeding to obtain injunctive relief or specific performance. The exercise of a remedy by Seller pursuant to the Buyer Noncompetition Covenant or otherwise shall not constitute a waiver of the right of Seller to resort to arbitration in accordance with this Section 12.06.

12.07. Counterparts; Effectiveness. This Agreement may be signed in any number of counterparts, each of which shall be an original, with the same effect as if the signatures thereto and hereto were upon the same instrument. This Agreement shall become effective when each party hereto shall have received a counterpart hereof signed by the other party hereto.

12.08. Entire Agreement. This Agreement and the Management Agreement constitute the entire agreement between the parties with respect to the subject matter hereof and supersede all prior agreements, understandings and negotiations, both written and oral, between the parties with respect to the subject matter of this Agreement. No representation, inducement, promise, understanding, condition or warranty not set forth herein has been made or relied upon by either party hereto. Neither this Agreement nor any provision hereof is intended to confer upon any Person other than the parties hereto any rights or remedies hereunder.

12.09. Captions. The captions herein are included for convenience of reference only and shall be ignored in the construction or interpretation hereof.

12.10. No Third Party Beneficiary. The parties do not intend the benefits of this Agreement to inure to any third party, including, without limitation, any employee of Seller, Buyer or General.

IN WITNESS WHEREOF, the parties hereto here caused this Agreement to be duly executed by their respective authorized officers as of the day and year first above written.

FLETCHER PACIFIC CONSTRUCTION CO.
LTD.

By 
Title: authorized representative

FLETCHER GENERAL, INC.

By 
Title: authorized representative

GC INVESTMENT CO.

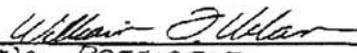
By 
Title: PRESIDENT

Exhibit 3.02(a) (vii) (A)

MEMORANDUM OF TRANSFER OF ASSETS
FOR CAPITAL CONTRIBUTION PURPOSES

1. Fletcher General, Inc., a Washington corporation, (the "Transferor"), by this Memorandum of Transfer of Assets for Capital Contribution Purposes ("Memorandum"), does hereby assign, transfer and convey to General Construction Company, a Washington corporation ("General"), and its successors and assigns all of its right, title and interest in and to the property described on the attached Schedule A (the "Transfer"; the assets described on attached Schedule A being the "Included Assets"), notwithstanding that the Included Assets may be conveyed by separate and specific transfer documents. Title to the Included Assets shall pass to General on the date set forth below.

2. The Transfer is being made as a capital contribution by Transferor to General, in consideration of which General is concurrently issuing to Transferor one or more stock certificates representing One Hundred (100) shares of the capital stock of General, constituting 100% of the outstanding capital stock of General, and assuming certain liabilities of Transferor more fully described in that certain Memorandum of Assumption of Liabilities as of even date herewith.

3. Transferor hereby covenants, agrees and warrants that:

3.1 It has good and marketable title to all of the Included Assets free and clear of all Liens of any kind or character, except (i) those set forth in any schedule to any stock purchase agreement entered into between Transferor and any purchaser of 100% of the stock of General, (ii) Liens for taxes not yet due and payable, (iii) Liens of lessors as provided for in leases and charters of personal and real property described on Schedule 1.1(B)(iii) and (iv) matters known to General.

3.2 The term "Lien" when used in this Memorandum shall mean, with respect to any asset, any mortgage, lien, pledge, charge, security interest or encumbrance of any kind in respect of such asset.

4. Transferor has done business under, and various assets are titled under, the following names: General Construction Co., General Construction, General Construction Co. a Division of Fletcher General Inc., General Construction Co. a Division of Fletcher General, Fletcher General Construction, General Construction Co. a division of Wright Schuchart Inc.,

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Fletcher Wright Inc. and Fletcher General Construction Inc. By executing this Memorandum, Transferor intends to transfer all Included Assets, including, without limitation, those titled under one of the foregoing fictitious names.

IN WITNESS WHEREOF, Transferor has executed and delivered this Memorandum as of October 10, 1996.

FLETCHER GENERAL, INC.

By: William F. Urban
William F. Urban, President

The transfer of the Included Assets is hereby accepted in their AS IS, WHERE IS condition, effective as of October 10, 1996. General acknowledges that Transferor does not have and will not have any liability whatsoever for the condition of the Included Assets.

GENERAL CONSTRUCTION COMPANY

By: William F. Urban
William F. Urban, President

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MEMORANDUM OF ASSUMPTION OF LIABILITIES

General Construction Company, a Washington corporation, ("General"), by this Memorandum of Assumption of Liabilities ("Memorandum"), does hereby assume and accept from Fletcher General, Inc., a Washington corporation ("Fletcher"), the liabilities and obligations described on the attached Schedule A (the "Assumption"; the liabilities and obligations described on attached Schedule A being the "Assumed Liabilities"). No assumption or acceptance of the liabilities or obligations described on attached Schedule B (the "Excluded Liabilities") is intended or is hereby effected. The Assumption shall be effective on the date set forth below.

IN WITNESS WHEREOF, General has executed and delivered this Memorandum as of October 10, 1996.

GENERAL CONSTRUCTION COMPANY

By: William F. Urban
William F. Urban, President

The assumption of the Assumed Liabilities by General is hereby confirmed by Fletcher General, Inc. effective as of October 10, 1996.

FLETCHER GENERAL, INC.

By: William F. Urban
William F. Urban, President

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SCHEDULE A

"Assumed Liabilities" means the obligations, liabilities and expenses of Fletcher or General included in clauses (i) through (ix) below, except to the extent any such obligations, liabilities and expenses are covered by insurance held by Fletcher with respect to events occurring prior to October 10, 1996 in which case they shall constitute Excluded Liabilities:

(i) All of Fletcher's obligations and liabilities arising on and after July 1, 1996 under all Unbonded Jobs, including, without limitation, (x) all claims with respect to the work performed on and after July 1, 1996 under all Unbonded Jobs, and (y) all of Fletcher's expenses for all project costs incurred on and after July 1, 1996 under all Unbonded Jobs determined in accordance with Fletcher's existing project accounting practices;

(ii) All general and administrative expenses of the Business arising in the ordinary course of business, which (x) are not expenses related to business activity prior to July 1, 1996, (y) are not third party expenses incurred by the Business after July 1, 1996 associated with winding down the remaining portion of the Business retained by Fletcher, (z) do not arise with respect to actions or activities of Fletcher occurring after October 10, 1996 with respect to the remaining portion of the Business retained by Fletcher, and (aa) are not accounted for as project costs under any Pre 7/23 Bonded Jobs or Post 7/23 Bonded Jobs in accordance with Fletcher's existing project accounting practices;

(iii) All extraordinary liabilities of Fletcher or General incurred outside the ordinary course of business of Fletcher or General after July 1, 1996 and that are not accounted for as project costs under any Pre 7/23 Bonded Jobs in accordance with Fletcher's existing project accounting practices, including, without limitation:

(A) all liabilities and obligations arising out of, resulting from, or relating to claims, whether founded upon negligence, strict liability in tort, and/or other similar legal theory, seeking compensation or recovery for or relating to injury to person or damage to property with respect to the operation of the Business;

(B) all liabilities and obligations arising out of, resulting from, or relating to any violation of any statute, regulation or governmental order in connection with the use and ownership of the Included Assets by Fletcher or General after July 1, 1996 or the operation of the Business after July 1, 1996;

(C) All liabilities and obligations arising out of, resulting from, or relating to claims of infringement

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or other misappropriation of the Intellectual Property Rights of other Persons after July 1, 1996; or

(D) All liabilities and obligations arising out of, or resulting from, or relating to the employment of Fletcher's employees;

provided, that, the Assumed Liabilities shall not include any extraordinary liabilities of Fletcher incurred by Fletcher after October 10, 1996 with respect to the portion of the Business retained by Fletcher or any other activities of Fletcher unrelated to the Business;

(iv) The liability of Fletcher or General, if any, for sales or use tax arising with respect to the assignment and transfer of the Included Assets from Fletcher to General, provided that, with respect to any such tax relating to the transfer of the assets listed on Schedule 1.01(A)(iv), Fletcher shall have paid all Washington and California state and local sales and/or use tax on such assets required in connection with putting such equipment into use.

(v) Fletcher's obligations with respect to any accrued employee benefits of the types described on Schedule 1.01(A)(v) arising prior to October 10, 1996;

(vi) Fletcher's obligations under any employee health and welfare or other employee benefit plan, including, without limitation, any COBRA rights of any terminated employees of Fletcher, (x) to the extent such liabilities arise with respect to the employment of Fletcher's employees on or after July 1, 1996 and would not constitute project costs in accordance with Fletcher's existing project accounting practices with respect to any Pre 7/23 Bonded Jobs or (y) in any event, to the extent that the expense for providing any such employee benefit is included in reserves accrued on the books of Fletcher as of October 10, 1996 with respect to certain reserve accounts more fully described on Schedule 1.01(B)(v)(a).

(vii) All liabilities and obligations of Fletcher arising out of, or resulting from, or relating to the termination of employment of Fletcher's employees in connection with the transition of the employment of Fletcher's workforce from Fletcher to General (including employees, if any, not hired by General) at or in anticipation of the transfer of assets to and the assumption of liabilities by General (provided that the Assumed Liabilities shall not include any liabilities arising with respect to actions or events occurring prior to July 1, 1996, even if a claim concerning such action or events occurring prior to July 1, 1996 is asserted in the context of a wrongful termination action) or, if they are subsequently employed by General, upon the termination of employment of such employees by General, including, without limitation, any liabilities arising under 29 U.S.C. §2101 et. seq.;

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(viii) All liabilities incurred by General or Fletcher in connection with the organization of General; and

(ix) The obligations and liabilities of Fletcher under the Included Leases and the Assumed Contracts that accrue, pursuant to the terms and conditions of the respective Included Leases and the Assumed Contracts, on and after October 10, 1996.

The defined terms used in the foregoing description of Assumed Liabilities, and in the description of Excluded Liabilities appearing below, shall have the following meanings:

"Affiliate" means, with respect to any Person, any Person directly or indirectly controlling, controlled by, or under common control with such other Person; provided that General shall not be considered an Affiliate of Fletcher.

"Assumed Contracts" means all contracts, commitments and purchase orders made in the ordinary course of business of Fletcher, but excluding (A) the Pre 7/23 Bonded Jobs, (B) the Post 7/23 Bonded Jobs, (C) any interest of Fletcher under any Unbonded Jobs arising with respect to work done prior to July 1, 1996, and (D) the contracts, commitments, purchase orders and other agreements identified on Schedule 1.01(B) (iv) attached hereto;

"Business" means the marine and civil construction company headquartered in Seattle, Washington which is owned and operated by Fletcher.

"Hazardous Material" shall mean any substance, chemical, compound, product, solid, gas, liquid, waste, byproduct, pollutant, contaminant, or material which is hazardous, toxic or radioactive, and includes, without limitation, (a) asbestos, polychlorinated biphenyls, lead-based paints and petroleum (including crude oil or any fraction thereof) and (b) any such material classified or regulated as "hazardous," "toxic" or "dangerous" pursuant to any current or future legal requirement pertaining to (a) the protection of health, safety, and the indoor or outdoor environment, (b) the conservation, management, or use of natural resources and wildlife, (c) the protection or use of surface water and groundwater, (d) the management, manufacture, possession, presence, use, generation, transportation, treatment, storage, disposal, release, threatened release, abatement, removal, remediation or handling of, or exposure to, any Hazardous Material or (e) pollution (including any release to air, land, surface water, and groundwater), and includes, without limitation, the Comprehensive Environmental Response,

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Compensation, and Liability Act, 42 U.S.C.
§§ 9601-9675, Solid Waste Disposal Act, 42 U.S.C.
§§ 6901-6991k, Federal Water Pollution Control Act, 33
U.S.C. §§ 1251-1387, Clean Air Act, 42 U.S.C.
§§ 7401-7671q, Toxic Substances Control Act, 15 U.S.C.
§§ 2601-2692, Hazardous Materials Transportation Act,
49 U.S.C. §§ 5101-5127, Occupational Safety and Health
Act, 29 U.S.C. §§ 651-678, Oil Pollution Act, 33 U.S.C.
§§ 2701-2761, Emergency Planning and Community
Right-to-Know Act, 42 U.S.C. §§ 11001-11050, National
Environmental Policy Act, 42 U.S.C. §§ 4321-4370d, Safe
Drinking Water Act, 42 U.S.C. §§ 300f to 300j-11,
Washington Model Toxics Control Act, Chapter 70.105D
RCW, Washington Hazardous Waste Management Act, Chapter
70.105 RCW, Washington Water Pollution Control Act,
Chapter 90.48 RCW, Washington Clean Air Act, Chapter
70.94 RCW, any similar, implementing or successor law,
any amendment, rule, regulation, order, or directive
issued thereunder, and any comparable or analogous
state or local law or ordinance with their respective
implementing regulations.

"Included Leases" means the leases and charters of
personal and real property more fully described on
Schedule 1.1(B) (iii);

"Intellectual Property Right" means any trademark,
service mark, registration thereof or application for
registration therefor, trade name, invention, patent,
patent application, trade secret, know-how, copyright,
copyright registration, application for copyright
registration, or any other similar type of proprietary
intellectual property right, in each case which is
owned or licensed and used or held for use by Seller or
any subsidiary of Seller.

"Person" means an individual, a corporation, a
partnership, an association, a trust or other entity or
organization, including a government or political
subdivision or an agency or instrumentality thereof.

"Pre 7/23 Bonded Jobs" means those construction
jobs of Seller listed on Schedule 1.01(C) attached
hereto for which Seller has posted a bond that were bid
and won by Seller on or prior to July 23, 1996.

"Post 7/23 Bonded Jobs" means those construction
jobs of Seller listed on Schedule 1.01(D) attached
hereto for which Seller has posted a bond that were bid
and won by Seller after July 23, 1996.

"Unbonded Jobs" means those construction jobs of
Seller listed on Schedule 1.01(E) attached hereto for
which Seller has not been required to post a bond.

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SCHEDULE B

EXCLUDED LIABILITIES

"Excluded Liabilities" means all liabilities of Fletcher and the Business that are not specifically included within the definition of Assumed Liabilities. As so conditioned, the Excluded Liabilities include, without limitation:

(i) All obligations or liabilities of the Business, Fletcher or any of its Affiliates of any nature whatsoever, arising with respect to any acts, actions, omissions or events occurring prior to July 1, 1996;

(ii) All liabilities incurred prior to July 1, 1996 with respect to any Unbonded Jobs (including any warranty or similar claims with respect to any work performed on any Unbonded Jobs prior to July 1, 1996);

(iii) All liabilities incurred with respect to any Pre 7/23 Bonded Jobs (including any warranty or similar claims), except as otherwise specifically provided by written agreement between Fletcher and General;

(iv) All extraordinary liabilities of Fletcher or General (except as specifically covered as Assumed Liabilities above) incurred outside the ordinary course of business of Fletcher or General (x) prior to July 1, 1996 in any event or (y) between July 1, 1996 and October 10, 1996, to extent covered by insurance held by Fletcher, including, without limitation:

(A) all liabilities and obligations arising out of, resulting from, or relating to claims, whether founded upon negligence, strict liability in tort, and/or other similar legal theory, seeking compensation or recovery for or relating to injury to person or damage to property with respect to the operation of the Business;

(B) all liabilities and obligations arising out of, resulting from, or relating to any violation of any statute, regulation or governmental order in connection with the use and ownership of the Included Assets by Fletcher or General prior to October 10, 1996 or the operation of the Business prior to October 10, 1996;

(C) All liabilities and obligations arising out of, resulting from, or relating to claims of infringement or other misappropriation of the

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Intellectual Property Rights of other Persons
prior to October 10, 1996; or

(D) All liabilities and obligations arising out of, or resulting from, or relating to the employment of Fletcher's employees (except for any liabilities and obligations related to the termination of Fletcher's employees in connection with the transfer of assets and assumption of liabilities on the date hereof;

(v) All liabilities under Fletcher's present or former contracts with labor unions, including, without limitation, any unfunded pension or withdrawal liabilities or liabilities related to wrongful termination or unfair labor practices, to the extent such liabilities (x) arise from acts or actions occurring prior to July 1, 1996, (y) are covered by insurance held by Fletcher or (z) are of a nature that would constitute project costs in accordance with Fletcher's existing project accounting practices with respect to any Pre 7/23 Bonded Jobs;

(vi) All liabilities for or relating to any Hazardous Substances (i) located on or affecting any owned or leased real property of Fletcher prior to October 10, 1996 or (ii) generated, released, transported or disposed of by or on behalf of Fletcher prior to October 10, 1996, to the extent such liabilities (x) arise from acts or actions occurring prior to July 1, 1996, (y) are covered by insurance held by Fletcher or (z) are of a nature that would constitute project costs in accordance with Fletcher's existing project accounting practices with respect to any Pre 7/23 Bonded Jobs; and

(vii) All liabilities of Fletcher under any employee health and welfare or other employee benefit plan, including, without limitation, any COBRA rights of any terminated employees of Fletcher, except to the extent the expense for providing any such employee benefit is included in the Included Reserves, provided, that, to the extent such liabilities arise with respect to the employment of Fletcher's employees on or after July 1, 1996 and are of a nature that would constitute routine general and administrative expenses for Fletcher's corporate employees or project costs in accordance with Fletcher's existing project accounting practices with respect to any Unbonded Jobs or any Post 7/23 Bonded Jobs, such liabilities shall constitute Assumed Liabilities.

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Exhibit 3.02(a) (viii) (B)

MEMORANDUM OF ASSUMPTION OF LIABILITIES

General Construction Company, a Washington corporation, ("General"), by this Memorandum of Assumption of Liabilities ("Memorandum"), does hereby assume and accept from Fletcher General, Inc., a Washington corporation ("Fletcher"), the liabilities and obligations described on the attached Schedule A (the "Assumption"; the liabilities and obligations described on attached Schedule A being the "Assumed Liabilities"). No assumption or acceptance of the liabilities or obligations described on attached Schedule B (the "Excluded Liabilities") is intended or is hereby effected. The Assumption shall be effective on the date set forth below.

IN WITNESS WHEREOF, General has executed and delivered this Memorandum as of October 17, 1996.

GENERAL CONSTRUCTION COMPANY

By: William F. Urban
William F. Urban, President

The assumption of the Assumed Liabilities by General is hereby confirmed by Fletcher General, Inc. effective as of October 17, 1996.

FLETCHER GENERAL, INC.

By: William F. Urban
William F. Urban, President

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SCHEDULE A

"Assumed Liabilities" means the obligations, liabilities and expenses of Fletcher or General included in clauses (i) through (ix) below, except to the extent any such obligations, liabilities and expenses are covered by insurance held by Fletcher with respect to events occurring prior to October 17, 1996, in which case they shall constitute Excluded Liabilities:

(i) All of Fletcher's obligations and liabilities arising on and after July 1, 1996 under all Unbonded Jobs, including, without limitation, (x) all claims with respect to the work performed on and after July 1, 1996 under all Unbonded Jobs, and (y) all of Fletcher's expenses for all project costs incurred on and after July 1, 1996 under all Unbonded Jobs determined in accordance with Fletcher's existing project accounting practices;

(ii) All general and administrative expenses of the Business arising in the ordinary course of business, which (x) are not expenses related to business activity prior to July 1, 1996, (y) are not third party expenses incurred by the Business after July 1, 1996 associated with winding down the remaining portion of the Business retained by Fletcher, (z) do not arise with respect to actions or activities of Fletcher occurring after October 17, 1996 with respect to the remaining portion of the Business retained by Fletcher, and (aa) are not accounted for as project costs under any Pre 7/23 Bonded Jobs or Post 7/23 Bonded Jobs in accordance with Fletcher's existing project accounting practices;

(iii) All extraordinary liabilities of Fletcher or General incurred outside the ordinary course of business of Fletcher or General after July 1, 1996 and that are not accounted for as project costs under any Pre 7/23 Bonded Jobs in accordance with Fletcher's existing project accounting practices, including, without limitation:

(A) all liabilities and obligations arising out of, resulting from, or relating to claims, whether founded upon negligence, strict liability in tort, and/or other similar legal theory, seeking compensation or recovery for or relating to injury to person or damage to property with respect to the operation of the Business;

(B) all liabilities and obligations arising out of, resulting from, or relating to any violation of any statute, regulation or governmental order in connection with the use and ownership of the Included Assets by Fletcher or General after July 1, 1996 or the operation of the Business after July 1, 1996;

(C) All liabilities and obligations arising out of, resulting from, or relating to claims of infringement

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or other misappropriation of the Intellectual Property Rights of other Persons after July 1, 1996; or

(D) All liabilities and obligations arising out of, or resulting from, or relating to the employment of Fletcher's employees;

provided, that, the Assumed Liabilities shall not include any extraordinary liabilities of Fletcher incurred by Fletcher after October 17, 1996 with respect to the portion of the Business retained by Fletcher or any other activities of Fletcher unrelated to the Business;

(iv) The liability of Fletcher or General, if any, for sales or use tax arising with respect to the assignment and transfer of the Included Assets from Fletcher to General, provided that, with respect to any such tax relating to the transfer of the assets listed on Schedule 1.01(A) (iv), Fletcher shall have paid all Washington and California state and local sales and/or use tax on such assets required in connection with putting such equipment into use.

(v) Fletcher's obligations with respect to any accrued employee benefits of the types described on Schedule 1.01(A) (v) arising prior to October 17, 1996;

(vi) Fletcher's obligations under any employee health and welfare or other employee benefit plan, including, without limitation, any COBRA rights of any terminated employees of Fletcher, (x) to the extent such liabilities arise with respect to the employment of Fletcher's employees on or after July 1, 1996 and would not constitute project costs in accordance with Fletcher's existing project accounting practices with respect to any Pre 7/23 Bonded Jobs or (y) in any event, to the extent that the expense for providing any such employee benefit is included in reserves accrued on the books of Fletcher as of October 17, 1996 with respect to certain reserve accounts more fully described on Schedule 1.01(B) (v) (a).

(vii) All liabilities and obligations of Fletcher arising out of, or resulting from, or relating to the termination of employment of Fletcher's employees in connection with the transition of the employment of Fletcher's workforce from Fletcher to General (including employees, if any, not hired by General) at or in anticipation of the transfer of assets to and the assumption of liabilities by General (provided that the Assumed Liabilities shall not include any liabilities arising with respect to actions or events occurring prior to July 1, 1996, even if a claim concerning such action or events occurring prior to July 1, 1996 is asserted in the context of a wrongful termination action) or, if they are subsequently employed by General, upon the termination of employment of such employees by General, including, without limitation, any liabilities arising under 29 U.S.C. §2101 et. seq.;

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(viii) All liabilities incurred by General or Fletcher in connection with the organization of General; and

(ix) The obligations and liabilities of Fletcher under the Included Leases and the Assumed Contracts that accrue, pursuant to the terms and conditions of the respective Included Leases and the Assumed Contracts, on and after October 17, 1996.

The defined terms used in the foregoing description of Assumed Liabilities, and in the description of Excluded Liabilities appearing below, shall have the following meanings:

"Affiliate" means, with respect to any Person, any Person directly or indirectly controlling, controlled by, or under common control with such other Person; provided that General shall not be considered an Affiliate of Fletcher.

"Assumed Contracts" means all contracts, commitments and purchase orders made in the ordinary course of business of Fletcher, but excluding (A) the Pre 7/23 Bonded Jobs, (B) the Post 7/23 Bonded Jobs, (C) any interest of Fletcher under any Unbonded Jobs arising with respect to work done prior to July 1, 1996, and (D) the contracts, commitments, purchase orders and other agreements identified on Schedule 1.01(B)(iv) attached hereto;

"Business" means the marine and civil construction company headquartered in Seattle, Washington which is owned and operated by Fletcher.

"Hazardous Material" shall mean any substance, chemical, compound, product, solid, gas, liquid, waste, byproduct, pollutant, contaminant, or material which is hazardous, toxic or radioactive, and includes, without limitation, (a) asbestos, polychlorinated biphenyls, lead-based paints and petroleum (including crude oil or any fraction thereof) and (b) any such material classified or regulated as "hazardous," "toxic" or "dangerous" pursuant to any current or future legal requirement pertaining to (a) the protection of health, safety, and the indoor or outdoor environment, (b) the conservation, management, or use of natural resources and wildlife, (c) the protection or use of surface water and groundwater, (d) the management, manufacture, possession, presence, use, generation, transportation, treatment, storage, disposal, release, threatened release, abatement, removal, remediation or handling of, or exposure to, any Hazardous Material or (e) pollution (including any release to air, land, surface water, and groundwater), and includes, without limitation, the Comprehensive Environmental Response,

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Compensation, and Liability Act, 42 U.S.C.
§§ 9601-9675, Solid Waste Disposal Act, 42 U.S.C.
§§ 6901-6991k, Federal Water Pollution Control Act, 33
U.S.C. §§ 1251-1387, Clean Air Act, 42 U.S.C.
§§ 7401-7671q, Toxic Substances Control Act, 15 U.S.C.
§§ 2601-2692, Hazardous Materials Transportation Act,
49 U.S.C. §§ 5101-5127, Occupational Safety and Health
Act, 29 U.S.C. §§ 651-678, Oil Pollution Act, 33 U.S.C.
§§ 2701-2761, Emergency Planning and Community
Right-to-Know Act, 42 U.S.C. §§ 11001-11050, National
Environmental Policy Act, 42 U.S.C. §§ 4321-4370d, Safe
Drinking Water Act, 42 U.S.C. §§ 300f to 300j-11,
Washington Model Toxics Control Act, Chapter 70.105D
RCW, Washington Hazardous Waste Management Act, Chapter
70.105 RCW, Washington Water Pollution Control Act,
Chapter 90.48 RCW, Washington Clean Air Act, Chapter
70.94 RCW, any similar, implementing or successor law,
any amendment, rule, regulation, order, or directive
issued thereunder, and any comparable or analogous
state or local law or ordinance with their respective
implementing regulations.

"Included Leases" means the leases and charters of
personal and real property more fully described on
Schedule 1.1(B) (iii);

"Intellectual Property Right" means any trademark,
service mark, registration thereof or application for
registration therefor, trade name, invention, patent,
patent application, trade secret, know-how, copyright,
copyright registration, application for copyright
registration, or any other similar type of proprietary
intellectual property right, in each case which is
owned or licensed and used or held for use by Seller or
any subsidiary of Seller.

"Person" means an individual, a corporation, a
partnership, an association, a trust or other entity or
organization, including a government or political
subdivision or an agency or instrumentality thereof.

"Pre 7/23 Bonded Jobs" means those construction
jobs of Seller listed on Schedule 1.01(C) attached
hereto for which Seller has posted a bond that were bid
and won by Seller on or prior to July 23, 1996.

"Post 7/23 Bonded Jobs" means those construction
jobs of Seller listed on Schedule 1.01(D) attached
hereto for which Seller has posted a bond that were bid
and won by Seller after July 23, 1996.

"Unbonded Jobs" means those construction jobs of
Seller listed on Schedule 1.01(D) attached hereto for
which Seller has not been required to post a bond.

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SCHEDULE B

EXCLUDED LIABILITIES

"Excluded Liabilities" means all liabilities of Fletcher and the Business that are not specifically included within the definition of Assumed Liabilities. As so conditioned, the Excluded Liabilities include, without limitation:

- (i) All obligations or liabilities of the Business, Fletcher or any of its Affiliates of any nature whatsoever, arising with respect to any acts, actions, omissions or events occurring prior to July 1, 1996;
- (ii) All liabilities incurred prior to July 1, 1996 with respect to any Unbonded Jobs (including any warranty or similar claims with respect to any work performed on any Unbonded Jobs prior to July 1, 1996);
- (iii) All liabilities incurred with respect to any Pre 7/23 Bonded Jobs (including any warranty or similar claims), except as otherwise specifically provided by written agreement between Fletcher and General;
- (iv) All extraordinary liabilities of Fletcher or General (except as specifically covered as Assumed Liabilities above) incurred outside the ordinary course of business of Fletcher or General (x) prior to July 1, 1996 in any event or (y) between July 1, 1996 and October 17, 1996, to extent covered by insurance held by Fletcher, including, without limitation:
 - (A) all liabilities and obligations arising out of, resulting from, or relating to claims, whether founded upon negligence, strict liability in tort, and/or other similar legal theory, seeking compensation or recovery for or relating to injury to person or damage to property with respect to the operation of the Business;
 - (B) all liabilities and obligations arising out of, resulting from, or relating to any violation of any statute, regulation or governmental order in connection with the use and ownership of the Included Assets by Fletcher or General prior to October 17, 1996 or the operation of the Business prior to October 17, 1996;
 - (C) All liabilities and obligations arising out of, resulting from, or relating to claims of infringement or other misappropriation of the Intellectual Property Rights of other Persons prior to October 17, 1996; or

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(D) All liabilities and obligations arising out of, or resulting from, or relating to the employment of Fletcher's employees (except for any liabilities and obligations related to the termination of Fletcher's employees in connection with the transfer of assets and assumption of liabilities on the date hereof;

(v) All liabilities under Fletcher's present or former contracts with labor unions, including, without limitation, any unfunded pension or withdrawal liabilities or liabilities related to wrongful termination or unfair labor practices, to the extent such liabilities (x) arise from acts or actions occurring prior to July 1, 1996, (y) are covered by insurance held by Fletcher or (z) are of a nature that would constitute project costs in accordance with Fletcher's existing project accounting practices with respect to any Pre 7/23 Bonded Jobs;

(vi) All liabilities for or relating to any Hazardous Substances (i) located on or affecting any owned or leased real property of Fletcher prior to October 17, 1996 or (ii) generated, released, transported or disposed of by or on behalf of Fletcher prior to October 17, 1996, to the extent such liabilities (x) arise from acts or actions occurring prior to July 1, 1996, (y) are covered by insurance held by Fletcher or (z) are of a nature that would constitute project costs in accordance with Fletcher's existing project accounting practices with respect to any Pre 7/23 Bonded Jobs; and

(vii) All liabilities of Fletcher under any employee health and welfare or other employee benefit plan, including, without limitation, any COBRA rights of any terminated employees of Fletcher, except to the extent the expense for providing any such employee benefit is included in the Included Reserves, provided, that, to the extent such liabilities arise with respect to the employment of Fletcher's employees on or after July 1, 1996 and are of a nature that would constitute routine general and administrative expenses for Fletcher's corporate employees or project costs in accordance with Fletcher's existing project accounting practices with respect to any Unbonded Jobs or any Post 7/23 Bonded Jobs, such liabilities shall constitute Assumed Liabilities.

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