

NO. 70656-0-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

HUARD SEPTIC DESIGN AND MONITORING, LLC.,

Appellant,

v.

PRESTIGE CUSTOM BUILDERS,

Respondent

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Laura Middaugh

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The two contract documents in this case (the Master Subcontract and the Project Subcontract) contain *three* attorneys' fee provisions. Prestige argues that Huard is not entitled to a fee award under any of them.

Prestige wrote the Master Subcontract and included *two* attorneys' fee provisions in it: Articles XVI and XIX. And yet Prestige insists that Article XVI is "the only vehicle" for attorney fee recovery. Moreover, Prestige refuses to even admit that either of these two fee provisions is susceptible of two rational interpretations, thereby seeking to avoid the rule that ambiguous contractual language is construed against the drafter.

Prestige falsely contends that Huard did not raise its RCW 4.84.330 argument in the court below. At the same time, Prestige blithely raises an argument which it never raised below and asks this Court to consider it.

Huard respectfully submits that it is entitled to a fee award under all three contractual attorneys' fees provisions.

II. ARGUMENT IN REPLY

A. Huard is Entitled to Fees Because RCW 4.84.330 Transforms Prestige's Unilateral Fee Provision Into a Bilateral Provision.

1. RCW 4.84.330 Was Clearly Raised Below by Huard.

Prestige incorrectly asserts that "the Superior Court never considered Huard's argument that the indemnity provision in the Master Subcontract is a prevailing party attorneys' fee provision subject to RCW 4.84.330,

because Huard did not raise this argument in the trial court.” *Brief of Respondent* (“BOR”), at 1, *ll.* 16-19. Prestige further erroneously states that Huard’s briefing in the trial court was “devoid of any reference to Section XIX [of the Master Subcontract] or the reciprocity principle stated in RCW 4.84.330.” *Id.* at 8, *ll.* 3-4.

But Huard clearly *did* raise this argument below. On the very first page of its motion for an award of fees Huard cited to RCW 4.84.330:

Pursuant to the Master Subcontract Agreement (“Master Subcontract”) between . . . Prestige Custom Builders, Inc. . . . and . . . Huard Septic Design and Monitoring . . . , as well [as] the Project Subcontract addendum thereto, the Court’s May 31, 2013 Order of Summary Judgment, **and RCW 4.84.330**, Huard respectfully requests that this Court enter an Order awarding Huard its attorneys’ fees and costs incurred in this litigation.

CP 61-62 (emphasis added). Huard then cited to the statute two more times. First, Huard described the “Issue Presented” as follows:

Pursuant to the Master Subcontract and Project Subcontract **and RCW 4.84.330**, should this Court enter an Order against Prestige awarding attorneys’ fees and costs incurred by Huard in litigating this matter?

CP 63 (emphasis added). Further down on the same page cited the statute yet again. CP 63.

In its trial court reply brief, Huard again explicitly referenced the statute and the legislative policy of transforming all unilateral contract provisions for attorneys’ fees into bilateral fee provisions. Under a

caption subheading that began by stating “*Attorney Fee Rights* Cannot Be Waived *Under RCW 4.84.330*,” Huard argued that Prestige’s construction of the Master Subcontract “would contradict *the even-handed nature of RCW 4.84.330*, which provides that attorney fee rights in a contract may not be waived.” CP 161, *ll.* 9-10 (emphasis added).

In the Superior Court Prestige did not address Huard’s arguments based on RCW 4.84.330 and never once mentioned the statute in its brief in opposition. See CP 133-141. Thus, Prestige *chose not to respond* to Huard’s RCW 4.84.330 argument. But it cannot be said that Huard failed to raise the argument when Huard expressly cited the statute no less than six times. CP 61 (once), 63 (two more times), 161 (three more times).

2. Prestige is the One That Is Raising Arguments for the First Time on Appeal. This Court Should Not Consider Them.

Prestige notes that “appellate courts generally do not consider arguments or theories not presented to the lower court.” *BOR* at 7, citing *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (refusing to consider plaintiff’s disparate treatment theory because it was “never even mentioned” in the trial court. And yet Prestige now seeks appellate court consideration of arguments that it never mentioned below.

Prestige now argues that “Washington Courts repeatedly have rejected efforts to recover prevailing party attorneys’ fees under indemnity provisions.” *BOR*, at 9. In support of this argument, Prestige cites to

Jones v. Strom Construction Co., 84 Wn.2d 518, 527 P.2d 1115 (1974) and *Jacobs Meadow Owners Association v. Plateau*, 44 II, 139 Wn. App, 743, 162 P.3d 1153 (2007), and discusses these cases at length. BOR at 8-10. But an examination of Prestige’s trial court brief in opposition reveals that Prestige never raised this argument in the court below, and that the cases Prestige now cites in its appellate brief were “never even mentioned” in its trial court brief in opposition to an award of attorneys’ fees. See CP 133-141.

3. By Asking the Court to Rule That Huard’s Fee Request Was Excessive, Prestige Acknowledged That the Fees Sought Were Not An Element of Damages, as They Were in *Jacobs*.

For the first time on appeal, Prestige argues that trial courts can *never* award attorneys’ fees to the prevailing party in an indemnity clause action. In a sweeping caption heading that purports to state a uniform rule, Prestige globally asserts: “Indemnity Clauses do not Provide for Prevailing Party Attorneys’ Fees.” BOR, at 8. In support of this broad (and incorrect) statement, Prestige cites to *Jacobs Meadow* where this Court drew a “distinction between attorneys’ fees as costs of maintaining or defending an action and attorneys’ fees recoverable as damages incurred as a result of prior actions by the adverse party which have exposed the claimant to litigation with a third party.” BOR at 8-9, citing *Jacobs*, 139 Wn. App. at 760.

Prestige accurately states that *Jacobs* holds that “[a]ttorney fees recoverable pursuant to a contractual indemnity provision are an element of damages rather than costs of suit.” *Id.* at 9, quoting *Jacobs* at 760. But from there Prestige goes seriously astray when it asserts: “Applying this principle” – the principle that fees as damages and fees as costs of suit are different – Washington courts repeatedly have rejected efforts to recover prevailing party attorneys’ fees under indemnity provisions.” *BOR* at 9.

In fact, the *Jacobs* decision simply holds that when an indemnitee is seeking attorneys’ fees as an element of its damages -- attorneys’ fees that it incurred in defending against a first party claim – then it must prove that element of its case to the satisfaction *of a jury*.

As an element of damages, the measure of the recovery of attorney fees pursuant to the indemnification provision must be determined by the trier of fact. When trial is to a jury, therefore, the measure of such damages is a jury question.

The right to a jury trial is provided for by article I, section 21 of the Washington Constitution. A party has a constitutional right to a jury determination of the amount of damages to which the plaintiff is entitled. Thus, if trial is to a jury, the determination of the amount of damages to which the plaintiff is entitled is within the jury’s province.

Jacobs, 139 Wn. App. at 760 (citations omitted).

On the other hand, *Jacobs* holds that when an *indemnitee* seeks an award of fees for prevailing in an action against the indemnitor (as Huard did here), the indemnitee may seek an award of such fees from a judge:

The case law regarding attorney fees awardable as costs of an action is well-developed. When authorized, the determination of a reasonable attorney fee award is a matter within the discretion of the trial court. A party is not, therefore, entitled to have such a determination made by a jury.

Jacobs, 139 Wn. App. at 759 (citations omitted).

In *Jacobs* a general contractor paid to settle a claim made against it by a developer, and then sued a subcontractor for contractual indemnity seeking reimbursement of the attorneys' fees that it had incurred in defending against the developer's suit. A jury found in favor of the general contractor, but the jury did not decide whether the amount of attorneys' fees incurred while defending the first suit was reasonable. Instead, the trial judge determined the amount of a reasonable attorney fee award. This Court held that the trial court usurped the role of the jury because "[s]uch fees are an element of damages . . . the measure of which must be determined by the trier of fact, in this case, the jury." *Id.* at 751.

These principles, recognized in *Jacobs*, simply have no application to this case. In *Jacobs* the general contractor prevailed on its indemnification claim. In this case the subcontractor, Huard, prevailed on the indemnification claim. In *Jacobs* the general contractor sought an award of fees as damages. In this case the subcontractor never sought any award of fees as damages, but sought only fees incurred as the costs of defending against Prestige's indemnification claim. *Jacobs* recognizes that when a

fee award is authorized by a statute, as it is in this case by RCW 4.84.330, “the determination of a reasonable attorney fee award is a matter within the discretion of the trial court.” *Id.* at 759. Thus, Huard properly asked the Superior Court judge to make such an award in this case.

Although Prestige chose to ignore RCW 4.84.330, Prestige affirmatively endorsed the idea that a determination of the amount and the reasonableness of any fee award was for the Superior Court judge to make. Prestige asked the judge to trim Huard’s fee request, arguing that “Huard’s Attorney Fee Request is Excessive.” CP 139. Prestige argued that if Huard was entitled to an award of attorneys’ fees, that “the court should exercise reduce [sic] the fee award to appropriately account for excessive rates and duplication of effort.” CP 141. Thus, Prestige itself recognized that nothing in the *Jacobs* case precluded the Superior Court for awarding fees to Huard. The fees sought by Huard were not fees incurred as an element of damages, so the holding of *Jacobs* cited by Prestige on appeal is simply irrelevant to this case.

4. Prestige’s Reliance on *Strom Construction* Is Misplaced. *Strom* Merely States That In The Absence of Express Contractual Terms, a Prevailing Indemnitee Cannot Recover Attorneys’ Fees Incurred In a Suit That Established Its Indemnification Right. *Strom* Doesn’t Say Anything About the Right of a Prevailing Indemnitor to Recover Fees When He Defeats a Claim of Indemnification.

Prestige asserts that “Indemnity Clauses do not Provide for

Prevailing Party Attorneys' Fees,” and makes the global statement that “Washington courts repeatedly have rejected efforts to recover prevailing party attorneys’ fees under indemnity provisions.” *BOR* at 8-9. Prestige attempts to rely on *Strom* as support for its contention that there is a uniform rule that a party to a suit to enforce an indemnification contract can simply never get an award of attorneys’ fees. But *Strom* does not recognize such an inflexible rule. Indeed, as Prestige belatedly admits, *Strom* merely holds that “in the absence of express contractual terms to the contrary, an indemnitee may not recover legal fees in establishing his right to indemnification.” *BOR* at 10, quoting *Strom*, 84 Wn.2d at 523.

This sentence from *Strom* makes two things clear. First, it states a rule that applies only to the right of a prevailing *indemnitee* to obtain an award of attorneys’ fees. It has no application to a prevailing *indemnitor’s* right to fees. *Strom* states a rule that *protects indemnitors from indemnitees*, but *Strom* says nothing about an indemnitor’s right to recover fees incurred in a successful effort to defeat a claim of indemnification.

Second, *Strom* recognizes that the key to determining *whether a prevailing indemnitee* is entitled to an award of fees is whether a right to such an award is clearly manifested. In the absence of “express contractual terms” which recognize that the indemnitee has such a right, no such right exists. The reason for such a drafting rule is obvious: the

language of most indemnification contracts is written by the indemnitee. As the drafter, the indemnitee is in a position to include “express contractual terms” recognizing its right to a fee award if it prevails. If it doesn’t include a right to an award of fees for establishing its right to indemnification in such “express contractual terms,” then the indemnitor will not be liable for such fees. In this case, as in most cases where a party states a claim for indemnity, the indemnitee (Prestige) wrote the indemnification provision. That provision explicitly states that if Prestige prevails then Huard’s obligations to defend, indemnify and hold Contractor [Prestige] harmless “*shall include contractor’s reasonable attorney’s fees, court costs, and all other claim related expenses.*” CP 237 (italics added). Therefore, under *Strom*, if Prestige had prevailed it would have been entitled to recover the fees that it incurred in *establishing* its right to indemnification. But *Strom* says **nothing** that precludes a prevailing indemnitor like Huard to its fees when it succeeds in *defeating* an indemnification claim.

5. The Language of the Indemnification Clause In *Strom* Limited Attorneys’ Fees Recovery to Fees “Arising Out of . . . the Subcontractor’s Performance of This Subcontract.” The Indemnification Clause in this Case Is Different, and Does Not Place Any Restriction On Attorney Fee Liability, and Expressly Includes “Reasonable Attorneys’ Fees, Court Costs and All Other Claim Related Expenses.”

There are significant differences between the language of the

attorneys' fee provision in the *Strom* indemnification agreement and the language of the attorneys' fees provision in this case. In *Strom*, the indemnity clause states that the subcontractor agrees:

To indemnify and save harmless the CONTRACTOR from and against any and all suits, claims, actions, losses, costs, penalties, and damages, of whatsoever kind or nature, including attorney's fees, ***arising out of, in connection with, or incident to the subcontractor's performance of this subcontract.***

Strom, 84 Wn.2d at 521 (emphasis added).

This language expressly *limits* the subcontractor's obligation to indemnify the contractor for attorneys' fees incurred. The *only* attorneys' fees covered are those "arising out of, in connection with, or incident to, the "performance of the subcontract." But fees "arising out of" or "incident to" the bringing of an action to establish the contractor's right to indemnification *are not covered*. Such fees do *not* arise from the subcontractor's performance of the subcontract.

But Article XIX, the indemnification provision of the Master Subcontract in this case is *not* so limited. Indemnification is covered in ¶1 and ¶4 of the Article. No mention is made of fees that "arise" out of the "performance of the subcontract." Article XIX, ¶4 explicitly provides that Huard must indemnify Prestige for *all* reasonable attorneys' fees:

Subcontractor's obligations to defend, indemnify, and hold harmless ***shall include Contractor's*** personnel related costs, ***reasonable attorneys' fees***, court costs, ***and all other***

claim related expenses.

CP 37 (emphasis added). See Appendix A (showing all of Article XIX) & Appendix B (comparing the language of Article XIX to the language of the indemnification provision in *Strom*). This indemnification provision, unlike the one in *Strom*, contains no restriction as to the type of attorneys' fees which are subject to indemnification.

6. Prestige Ignores The Fact That *Strom* Was Decided Before RCW 4.84.330 Ever Existed. The Enactment of the Statute in 1977 Changed The Legal Landscape By Prohibiting Unilateral Attorney Fee Provisions.

Although it never actually says so, Prestige implies that the decision in *Strom* precludes the application of RCW 4.84.330 to an indemnification case. Prestige argues under *Strom* a defendant in an indemnification case can never get an award of attorneys' fees for successfully defending the case and that RCW 4.84.330 is simply irrelevant. But *Strom* does not contain any holding about the application of RCW 4.84.330 to indemnification actions. *Strom* is completely *silent* on the subject of RCW 4.84.330. This is not surprising since RCW 4.84.330 did not even exist when *Strom* was decided in 1974. The statute was not even enacted until 1977 and the very first sentence of the statute limits its application to actions to enforce contracts which were "entered into after September 21, 1977." RCW 4.84.330. Before 1977, the legislative prohibition against unilateral attorneys' fees provisions did not exist. The indemnification

contract in this case was entered into on April 17, 2006. CP 38. Therefore, RCW 4.84.330 does apply.

The statute eliminated the ability of a general contractor like Prestige to use its superior bargaining power to make a subcontractor agree to a one-way attorneys' fee provision that only benefited the contractor. The combined effect of *Strom* and the statute, therefore, is as follows.

Strom holds that if a contractor prevails in a suit to establish an indemnification right, the contractor is not entitled to an award of attorneys' fees for fees incurred in that enforcement suit, *unless* the contractor's right to such fees was spelled out in "express contract terms." *Strom*, at 523. But if the contractor's right to such fees was stated in "express contractual terms," then the subcontractor is automatically entitled to an award of fees if it prevails in the suit, because RCW 4.84.330 makes *every* unilateral attorneys' fee provision into a bilateral attorneys' fee provision which cannot be waived.

7. Prestige Is Estopped From Denying that the Master Subcontract Provided It With a Unilateral Right to Attorneys' Fees In "Express Contractual Terms." RCW 4.84.330 Makes that Unilateral Fee Provision Bilateral.

Prestige cannot deny that the Master Subcontract meets the *Strom* requirement of stating Prestige's right (the indemnitee's right) to recover attorneys' fees if Prestige is the prevailing party. This right *is* stated in "express contractual terms." Article XIX, ¶4 expressly states:

Subcontractor's obligations to defend, indemnify, and hold harmless *shall include Contractor's* personnel related costs, *reasonable attorneys' fees*, court costs, and all other claim related expenses.

CP 37 (emphasis added). In addition, Article XIV contains *another* unilateral fee provision favoring Prestige. It expressly states:

If Subcontractor [Huard] . . . breaches this Agreement, then Contractor [Prestige] shall have the right . . . to remedy the breach . . . *All of the costs, including* reasonable overhead, profit and *attorneys' fees incurred by Contractor shall be charged to Subcontractor.*

CP 37 (emphasis added).¹

Equally important, in its third-party complaint containing its claim against Huard for indemnification, Prestige explicitly sought to recover “[a]n award of *attorneys' fees* and costs *incurred herein*, pursuant to the terms of the applicable contracts.” CP 13 (emphasis added).² Having specifically taken the position in the trial court that it was entitled to an award of attorneys' fees “incurred herein” – incurred in the action to enforce the indemnification agreement – Prestige is judicially estopped from taking a different position in this appellate court. *In re Smaldino*,

¹ In addition, Article XVI contains a *bilateral* attorneys' fee provision that entitled the prevailing party to fees if it prevailed in “disputes and arbitration.” See section C, *infra*.

² Moreover, when Prestige “tender[ed] defense and indemnification” of the Keiths' claim to Huard, Prestige's attorney went out of his way to remind Huard's Registered Agent that the indemnification article (Article XIX) in the Master Subcontract Agreement contained *two* references to indemnification. Prestige's attorney quoted *both* indemnification references in his tender letter to Huard, including the provision in the fourth paragraph of Article XIX which explicitly mentions all “reasonable attorneys' fees” without limiting liability to any particular kind of fees. CP 154. See Appendix A.

151 Wn. App. 356, 363, 212 P.3d 579 (2009).

Since the Master Subcontract contains “express contractual terms” that give Prestige the right to recover fees incurred if it establishes its right to indemnification, RCW 4.84.330 automatically transforms such a unilateral fee provision into a bilateral fee provision. Under the statute Huard is entitled to recover its fees because it prevailed in an action to enforce a contract which was entered into after September 21, 1977.

8. Even if Prestige’s Article XIX Right to Fees Is Invalid Because It Isn’t Expressed Clearly Enough, Huard Still Has the Right to a Fee Award Under RCW 4.84.330 Because The Statute Applies Even When the Other Party’s Right to Fees Is Invalid.

In its third-party complaint, Prestige asserted that it was entitled to recover “an award of attorneys’ fees and costs incurred herein pursuant to the terms of the applicable contracts.” CP 13. Thus Prestige asserted that the Master Subcontract gave it the right to recover fees that it incurred in the indemnification action. But even if Prestige was wrong about this – that is to say, even if the Master Subcontract did not meet the *Strom* requirement of stating Prestige’s right to recover attorneys’ fees in “express contractual terms” – RCW 4.84.330 is *still* triggered by the Master Subcontract’s one way attorneys’ fee provision.

As noted in Huard’s opening brief, several cases hold that even an *invalid* contractual agreement that contains a unilateral attorneys’ fee

provision triggers RCW 4.84.330.³ Prestige makes no effort to distinguish any of these cases, preferring instead to ignore them, just as it attempts to ignore RCW 4.84.330 by falsely claiming that Huard never raised the issue of the applicability of this statute in the Superior Court.

B. Huard is Entitled to A Fee Award Under the Terms of the Project Subcontract.

1. In Violation of Basic Contract Interpretation Principles, Prestige Tries to Rewrite The Conflict Clause In Article I.

The Project Subcontract contains a bilateral fee provision which, on its face, entitles Huard to a fee award as the prevailing party. CP 41. But Prestige claims that this provision of the Project Subcontract is inapplicable. According to Prestige, pursuant to the following language of Article I of the Master Subcontract, if *any* contract document language conflicts with the Master Subcontract, the Master Subcontract controls:

If any terms and conditions on any preprinted written form from the Contractor conflicts with the Master Agreement, the terms of this Master Agreement apply and supersede any other term to the contrary.

CP 34 (emphasis added). But in making this argument, Prestige is forced to ignore the actual language of the contract, as well as established canons of contract construction.

³ See *Labriola v. Pollard Group*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004); *Herzog Aluminum Inc. v. General American Window Corp.*, 39 Wn. App. 188, 196-97, 692 P.2d 867 (1984); *Yuan v. Chow*, 96 Wn. App. 909, 915-18, 982 P.2d 647 (1999); *Stryken v. Pannell*, 66 Wn. App. 566, 572-73, 832 P.2d 890 (1993); *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 789, 197 P.3d 710 (2008).

“In construing a contract, every word and phrase must be presumed to have been employed with a purpose, and must be given a meaning and effect whenever reasonably possible.” *Ball v. Stokely Foods*, 37 Wn.2d 79, 85, 221 P.2d 832 (1950). Prestige ignores this principle by simply ignoring the phrase “on any preprinted written form from the Contractor.” Prestige reads this provision of the Master Subcontract *as if* it read:

If *any* terms and conditions conflicts with the Master Agreement, the terms of this Master Agreement apply and supersede any other term to the contrary.

But that is not how it reads. It contains the limiting phrase “on any preprinted written form from the Contractor” but Prestige seeks to persuade this Court that those words should *not* be given any effect at all.⁴

As with statutes, the maxim “*expressio unius, exclusio alterius*” applies to contracts. *Port Blakely Mill v. Springfield Fire & Marine Ins., Co.*, 59 Wash. 501, 512, 110 P. 36 (1910). In the present case the Master Subcontract does *not* refer to all terms and conditions that conflict with the Master Subcontract. It *only* refers to conflicting terms “on any preprinted

⁴ The Court rejected a similar argument in *Stokely Foods*. There the contract stated, “When these peas are ready for harvest, it is understood and agreed that the peas sold hereunder shall be moved hauled to viners and vined by buyer . . .” *Id.* at 82. The Seller of the peas argued that this contract language did not fix the time for harvesting the peas but merely identified who was to do the harvesting. The Court rejected this argument on the ground that if such a construction of the contract were accepted then “the opening clause would be no more than surplusage.” The same is true here. Prestige’s construction of the contract would render meaningless the Master Subcontract’s words “*on any preprinted written form from the Contractor.*”

written form from the Contractor.” CP 34. By referring solely to contract terms that are on preprinted forms from Prestige, it excludes all other contract terms and conditions. Prestige simply ignores this principle.

If Prestige had intended to make the terms of the Master Subcontract control over any and all conflicting terms in any other document, it could easily have drafted Article I so that it said that. It did not do so. It is well settled “that contract language subject to interpretation is construed most strongly against the party who drafted it, or whose attorney prepared it.” *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966). Prestige ignores this contract interpretation principle as well.

In sum, the “conflict” provision in the Master Subcontract is not applicable to contract provisions in the Project Subcontract. Therefore, Huard is entitled to fees under the bilateral provision in the Project Subcontract (CP 41) that entitles the prevailing party to an award of fees.

2. For the First Time on Appeal Prestige Argues That the Project Subcontract Was Not Incorporated Into the Master Subcontract By Reference.

Prestige acknowledges, as it must, that the Master Subcontract Agreement references the Project Subcontract. But it now argues on appeal that the Master Subcontract “is not a wholesale incorporation” of all of the terms contained in the Project Subcontract. *BOR*, at 17.

Prestige never advanced this argument in the Superior Court. See CP

133-141. Prestige never argued that the attorneys' fee provision of the Project Subcontract was not "incorporated" by the Master Subcontract Agreement. Instead, it argued solely that the terms of the Master Subcontract superseded any conflicting provision of any other contract document. Having pointed out that appellate courts will not review a theory or argument which was not presented at the trial court level, *BOR* at 7, citing *Lindblad*, 108 Wn. App. at 207, Prestige ignores this principle and proceeds to raise this argument about lack of incorporation of the Project Subcontract for the first time on appeal.

3. The Cases Cited By Prestige Demonstrate That the Master Subcontract Does Incorporate the Project Subcontract.

Citing to *Seventh Day Adventists v. Ferellgas*, 102 Wn. App. 488, 494, 7 P.3d 861 (2000), Prestige argues that the Master Subcontract did not clearly incorporate the Project Subcontract. *BOR* at 17. Prestige notes:

The Huard bid letter was sent to Prestige on April 10, 2006.
It is not signed by Huard (as contemplated by the defined term "Project Subcontract") or by Prestige. [FN2].

BOR, at 19 (emphasis added). But *Ferellgas* explicitly held that "Incorporation by reference allows the parties to incorporate contractual terms by reference to a separate agreement to which they are not parties, and including a separate document which is unsigned." 102 Wn. App. at

494 (italics added).⁵ Thus, under *Ferregellas* the fact that Prestige was not a named party to the Project Subcontract agreement between Huard and the homeowners (the Keiths) is simply not relevant. Moreover, under *Ferregellas* even if Prestige had never signed⁶ the Project Subcontract, Prestige would *still* be bound by it because when parties “clearly and unequivocally incorporate by reference into their contract some other document, that document becomes part of their contract.” *Washington v.*

⁵ In *Ferregellas* an architect entered into an agreement (the Owner/Architect Agreement) with the Seventh Day Adventists to design a church, and that agreement specified that the architect would prepare a Project Manual and specifications. *Id.* at 491. The Church also entered into an agreement with a contractor to build the church, and the contractor entered into a “Trade Contract” with a subcontractor (Art & Sons) to install a furnace in the church. The “Trade Contract” between the contractor and the subcontractor incorporated by reference the Project Manual and specifications which was referenced in the contract between the church and the architect. *Id.* at 493. Finally, the Project Manual incorporated yet another document, AIA Document A201, which stated that the church, the contractor and all subcontractors waived their subrogation rights against each other. *Id.* But neither the Project Manual nor A201 was attached to the Trade Contract between the contractor and the subcontractor. *Id.*

Despite the fact that (1) the Church had no direct contractual relationship with the subcontractor (Art & Sons), and (2) the fact that the Church never signed the Trade Contract between the contractor and the subcontractor, the appellate court affirmed the trial court’s ruling “grant[ing] the [subcontractor’s] motion for summary judgment, concluding that the trade contract incorporated the Project Manual, and the Project Manual incorporated AIA Document A201.” *Ferrellegas*, 102 Wn. App. at 493, 498-99.

⁶ Prestige asserts that although Huard sent the Project Subcontract (Appendix C) to Prestige on April 10, 2006, it was not signed by anyone from Prestige. *BOR*, at 18-19. Prestige asserts that “The bid letter does appear to contain initials next to an interlineation relating to the price of the septic design. CP 40. There is nothing in the record identifying the initials or the circumstances in which they were added.” *BOR* at 19, n.2.

This is not accurate. In fact, right next to the initials that Prestige refers to, the signature of Terry Landberg appears. CP 40. In addition, the bid letter is addressed to Prestige and begins with the greeting “Dear Terry.” CP 40. Landberg’s work e-mail address at Prestige is given on the same page as terry@PrestigeCustomBuilders.com. CP 40. Finally, the record on appeal includes attorney invoices which identify Terry Landberg as “project superintendent for Prestige Custom Builders.” CP 121. So directly contrary to what Prestige says on appeal, someone – Terry Landberg – *did* sign the Project Subcontract on behalf of Prestige.

Huber, Hunt & Nichols, 176 Wn.2d 502, 517, 296 P.3d 821 (2013).

4. In Any Event, There Is No Conflict Between the Project Subcontract Fees Provision and the Master Subcontract.

Even if the conflict provision of the Master Subcontract did apply to conflicts between the Master Subcontract and the Project Subcontract, it would not matter because there is no conflict between the attorneys' fees provisions in the two agreements. According to Prestige the Project Subcontract's fee provision conflicts with Article XVI of the Master Subcontract because Article XVI *restricts* attorney fee awards to situations where the prevailing party prevails *in an arbitration*.

But nothing in Article XVI says that fee awards are restricted to this situation. Article XVI does not contain the word "only." Nor does it contain any other language that implies that attorney fee awards are precluded in other situations. In fact, the existence of another attorneys' fee provision in Article XIX of the Master Subcontract demonstrates that the language in Article XVI cannot possibly be construed as limiting fee awards to only the situation where a party prevails in an arbitration.

5. Since the Project Subcontract Was the Second Agreement, Even if There Were A Conflict Between It and The Master Subcontract, The Project Subcontract Would Control.

In a last and desperate attempt to defeat Huard's right to a fee award under the Project Subcontract, Prestige argues that "where two contracts between the same parties address the same subject matter, the

second agreement prevails if there are any inconsistencies.” *BOR* at 19, citing *Durand v. HMC Corp.*, 151 Wn. App. 818, 830, 214 P.3d 189, rev. denied, 168 Wn.2d 1020 (2009). This contention is premised on the supposition that the Master Subcontract was the second contract. Prestige notes that the parties signed the Master Subcontract on April 12 (Huard) and April 17 (Prestige). *BOR*, at 19. Prestige also notes that Huard mailed the Project Subcontract to Prestige on April 10. *BOR* at 18. Prestige asserts (falsely) that no one from Prestige ever signed the Project Subcontract, and treats it as if it took effect on April 10th. Since the Master Subcontract did not take effect until Huard signed it on April 17th, Prestige argues that the Master Subcontract controls if there are any inconsistencies between it and the Project Subcontract. *BOR* at 19.

But the Master Subcontract Agreement *is not* the second agreement to take effect. The Project Subcontract was a three-way agreement between Prestige, Huard *and the Owners*. Although he did not date his signature, since a copy bearing Terry Landberg’s signature was faxed on April 13 we know that Landberg signed it sometime between April 10 and April 13. The Owners did not sign it until April 26 when Lois Keith signed it. CP 42. The Master Subcontract, on the other hand, between Prestige and Huard, took effect on April 17 when Huard signed it (Prestige having already signed it on April 10). Since April 26 comes *after* April 17, the

Project Subcontract is the second agreement, not the Master Subcontract. So even if there was a conflict between the two contracts, under the case cited by Prestige, the Project Subcontract would still control.

C. Huard Is Entitled to Fees Under the “Disputes and Arbitration” Provision of the Master Subcontract.

The “Disputes and Arbitration” provision in the Master Subcontract contains eight sentences. Prestige discusses only the last sentence and refuses to even consider the possibility that the preceding seven sentences provide any context for interpreting the last sentence, which provides:

In any *such* arbitration proceeding, the prevailing party shall in all cases be awarded his or her reasonable attorney’s fees regardless of *whether* the dispute is resolved *through settlement or arbitration*.

CP 37 (italics and bold emphasis added).

Prestige stubbornly insists that a “victory” that “occur[s] in the context of an arbitration proceeding” is the *only* vehicle for recovery of attorneys’ fees under the contract.” *BOR* at 23. Yet Prestige makes no attempt to reconcile this interpretation with the words that recognize a right to fees when the dispute is resolved through either “settlement *or* arbitration.” If a party can be entitled to fees if it prevails through settlement then obviously prevailing through arbitration is *not* the only vehicle.

In any event the reference to “arbitration proceeding” is preceded by the word “such.” Prestige ignores the function of that word. The word “such” signals that things of the same type or class that was previously

described are also included. *See, e.g.*, RCW 9A.40.060(1). The second of the seven preceding sentences in Article XVI recognizes that “either party may file suit in a court of competent jurisdiction” and directs that “if suit is filed” that it shall be decided according to the Mandatory Arbitration Rules. Thus suits in court for court supervised arbitration are included within the phrase “any such arbitration proceeding.”

Prestige ignores the provisions of MAR 1.3 which provide that (1) such arbitration proceedings “remain under the jurisdiction of the superior court in all stages of the proceeding including arbitration,” and (2) that the rules of civil procedure apply until a case is assigned to an arbitrator. Indeed, Prestige must ignore these rules, and must ignore the preceding seven sentences of Article XVI, in order to avoid the conclusion that Huard is entitled to fees because it prevailed in a suit governed by the Mandatory Rules of Arbitration. Huard won because Prestige failed to raise a genuine material issue of fact for anyone to decide. Therefore, arbitration by an arbitrator was simply unnecessary. In “such an arbitration proceeding,” Huard is entitled to fees under Article XVI.

Prestige relies upon *In re Murray Industries*, 114 B.R. 749 (Bank. Ct. 1990). There the plaintiff sought fees pursuant to a contractual provision stating that “the prevailing party in any such arbitration proceeding . . .

shall be entitled to recover . . . attorneys' fees." *Id.* at 753.⁷ The bankruptcy judge denied fees on the ground that the plaintiff did not prevail *in an arbitration proceeding*. But this decision was *reversed* sub. nom *Schleicher v. Murray Industries*, 130 B.R. 113 (M.D. Fla. 1991).

There never was any arbitration hearing because the defendant filed for bankruptcy which stayed any arbitration. The court noted that if the dispute *had* been arbitrated, the plaintiff would have won, and would have been entitled to a fee award. Thus, the court held that the plaintiff should not be denied fees simply because no such arbitration ever took place:

The Court concludes that the bankruptcy judge's literal reading of [the fees provision] disserves the intent of the parties in light of the stay of arbitration. The [contract] shows a clear intent to allow Appellant to collect fees on certain types of disputes subject to arbitration.

Schleicher, 130 B.R. at 116. The same is true in this case.

D. Contractual Ambiguity Is Construed Against the Drafter.

Huard submits that it is clearly entitled to attorneys' fees under Article XVI because Prestige "file[d] suit in a court of competent jurisdiction," and Huard prevailed when the dispute was "decided according to the Mandatory Arbitration Rules." Article XVI states that "[i]n any such

⁷ Although it did contain the phrase "in any such arbitration proceeding," the rest of contract language in *Murray Industries*, was actually quite different from that drafted by Prestige in this case. The *Murray* contractual provision did not have seven other sentences preceding the one sentence that Prestige quotes. Nor did it contain any references to "litigation" in "a court of competent jurisdiction." Nor did it state any entitlement to fees if the "dispute" was "resolved through settlement."

arbitration proceeding, the prevailing party shall in all cases be awarded his or her reasonable fees . . .”

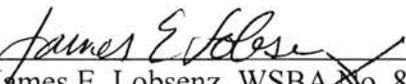
If this Court is not convinced that Huard’s reading of Article XVI is clearly correct, at the very least Huard’s reading of the provision is one of two rational interpretations and therefore the language of this provision is ambiguous. *American Star Ins., Co. v. Grice*, 121 Wn.2d 869, 880, 854 P.2d 622 (1993). Since ambiguous contractual provisions are construed against the drafter, Huard’s interpretation of Article XVI is the one that must be used. *See, e.g., Lietz v. Hansen Law Offices*, 166 Wn. App. 571, 271 P.3d 899 (2012). Prestige drafted Article XVI poorly and used the terms “litigation,” “arbitration proceedings,” and even “settlement,” interchangeably. Since any ambiguity must be construed against Prestige, Huard is entitled to fees under Article XVI as the prevailing party.

III. CONCLUSION

Appellant Huard asks this Court to hold that it is entitled to a fee award for work performed in the trial court and in this court.

Respectfully submitted this 4th day of June, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By 
James E. Lobsenz, WSBA No. 8787
John R. McDowall, WSBA No. 25128
Jay Terry, WSBA No. 28448
Attorneys for Appellant

CERTIFICATE OF SERVICE

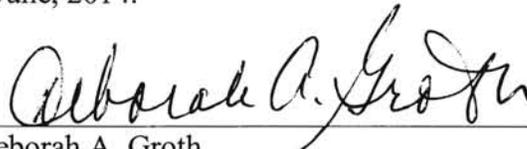
The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

- Email and first-class United States mail, postage prepaid, to the following:

Attorneys for Respondent

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DATED this 4th day of June, 2014.



Deborah A. Groth
Legal Assistant to James E. Lobsenz

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 JUN -4 PM 3:04

APPENDIX A

Indemnification Provision
Language in the case of
Jones v. Strom Construction,
84 Wn.2d 518 (1974)

Indemnification Provision
In First and Fourth Paragraphs
Of Article XIX in the Master
Subcontract In This Case

<p>[The Subcontractor agrees:]</p> <p>“To indemnify and save harmless the CONTRACTOR from and against any and all suits, claims, actions, losses, costs, penalties, and damages, of whatsoever kind or nature, <i>including attorney’s fees, arising out of, in connection with, or incident to the subcontractor’s performance of this subcontract.</i>”</p> <p><i>Strom</i>, 84 Wn.2d at 521 (emphasis added).</p>	<p><u>First Paragraph</u> (at CP 37):</p> <p>“Subcontractor agrees to defend, indemnify and hold Contractor harmless from any and all claims, losses, and liabilities to or by third parties resulting from services performed for the Contractor by Subcontractor, Subcontractor’s employees or agents, Subcontractor’s lower-tier subcontractors or lower-tier subcontractor employees or agents to the fullest extent permitted by law and subject to the limitations provided below.”</p> <p><u>Fourth Paragraph</u> (at CP 37):</p> <p>“<i>Subcontractor’s obligations</i> to defend, indemnify and hold Contractor harmless <i>shall include Contractor’s</i> personnel related costs, <i>reasonable attorneys’ fees</i>, court costs <i>and all other claim related expenses.</i>”</p> <p>(Emphasis added).</p>
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APPENDIX B

Ex. 32

I. MASTER SUBCONTRACTOR AGREEMENT

The parties hereto agree that from the date hereof until this Master Agreement is terminated that Prestige Custom Builders, Inc., the "Contractor", may contract with Head Seattle Design + Monitoring, the "Subcontractor", for the furnishings of materials and/or the performance of various work on projects being constructed by the Contractor. The parties further agree that this Master Agreement shall control their respective rights and privileges, which arise out of the Subcontractor furnishing any materials and/or performing any work on the Contractor's construction projects.

It is the intent of the parties that these terms and conditions apply to any provision of services by the Subcontractor regardless of whether these terms and conditions are referenced in any purchase order, subsequent contract memo, etc. during the term of this contract.

Entering into this Master Agreement shall not obligate either the Contractor or the Subcontractor to agree to any subsequent request for services or to any volume of business during the term of this Master Agreement. The intent is that if any services are procured and agreed by both parties during the term of this Agreement, the terms and conditions of this Master Agreement shall apply. If any terms and conditions on any preprinted written form from the Contractor conflicts with this Master Agreement, the terms of this Master Agreement apply and supercede any other terms to contrary.

Each individual project conducted with the Subcontractor will be described in a separate addendum agreement called a Project Subcontract. Your signed proposal or quote, including specific details on Project Scope of Work, Price, Schedule, and Payment Terms and exclusions, constitutes a Project Subcontract.

II. LOWER-TIER & ASSIGNED SUBCONTRACTS

In the event that any terms of another agreement are in conflict with this agreement, the Subcontractor shall be obligated to follow this Master Subcontract. Subcontractor agrees not to assign or subcontract its performance without prior written consent with the Contractor. If the Subcontractor enters into any other agreement or assigns or subcontracts for work covered by the Master Subcontract or Project Subcontract, this Master Subcontract shall govern. Subcontractor assumes full responsibility for all actions, for the quality of all workmanship and timeliness of any work performed by any lower-tier subcontractors engaged by Subcontractor in connection with work for Contractor.

III. SCOPE OF WORK

Subcontractor agrees to perform, supply and finish in a "professional workmanlike manner" all work as described in Project Subcontracts and that all work will be performed at the "highest standard of the industry" according to specifications included in Project Subcontracts and to the reasonable satisfaction of Contractor. Contractor agrees to provide applicable drawings, blueprints, specifications, and selection schedules for each project with adequate time for Subcontractor to review prior to submitting Project Subcontracts.

IV. PRODUCT & LABOR WARRANTY

If a defect in material or workmanship occurs, Contractor will notify the Subcontractor of such defect. Upon receipt of such notice, the Subcontractor shall promptly and at its expense satisfactorily repair and/or replace the defective material and/or workmanship and/or systems. The Subcontractor, at its own expense, shall participate in any mediation and arbitration procedures established under any contracts between Contractor and Contractor's customer. The term of the Subcontractor's warranty shall be for the same duration as the term of Contractor's warranty to Contractor's customer.

Subcontractor warrants that labor performed and materials supplied shall be new and installed in conformance with code requirements, free from defects and fit for the particular purpose the material was intended for a period of two years from date of completion of the work by the Subcontractor. Contractor and homeowners shall be afforded full and free access to the construction site for the purpose of inspection and to determine the general progress and acceptability of Subcontractor work according to approved specifications, drawings, and selection schedules. Contractor will notify Subcontractor in writing, or optionally by phone or FAX, any failures or defects for repair action to be taken. Subcontractor agrees to reply within 24 hours to notification and to initiate repair action within two weeks for routine work or immediately for repairs deemed emergency by the Contractor.

V. COMPLIANCE WITH LAWS & REGULATIONS

Subcontractor agrees to operate in conformance with all applicable codes, regulations, and ordinances at its own expense including all applicable federal, state and local jurisdictions. In the event of any liability assessed against the Contractor because of Subcontractor failure to comply with such regulations, Subcontractor shall pay Contractor for such amounts. Contractor may set aside one hundred and fifty percent (150%) of the amount of such assessed liabilities to Contractor against amounts owing to Subcontractor.

VI. REQUIRED EQUIPMENT, TOOLS & PERMITS

Subcontractor agrees to provide all necessary equipment, tools, utilities, machinery, scaffolding, safety devices and required permits at its own expense, except as specifically described in Scope of Work in the Subcontract, for all work covered by this Master Subcontract and Project Subcontracts.

VII. CLEANUP & HOUSEKEEPING

Subcontractor agrees to keep the site orderly, clean and clear of rubbish and debris resulting from its work and do so as work progresses and at least on a daily basis. The cost for cleanup and debris removal will be included in Project Subcontract costs unless specifically described otherwise in the Scope of Work. In the event that Subcontractor fails to perform its own cleanup, Contractor may remove refuse and clean the site and charge all costs to the Subcontractor, provided Subcontractor is given 24 hours prior notice. If Contractor determines there is an emergency situation or a safety hazard exists, Contractor may proceed without prior notice.

VIII. SAFETY PROGRAMS

Subcontractor is responsible for maintaining a safe jobsite, safe work performance measures, and the safety of all employees within Subcontractor's and lower-tier subcontractor's scope of work. Subcontractor and its lower-tier subcontractors agree to comply with all applicable OSHA/WISHA requirements and all WAC Codes pertaining to Construction & General Industry.

Subcontractor has liability for operating at risk from hazards related to Fall Protection, Electrical and Fire Hazards, exposure to Hazardous Materials or any other hazards requiring a separate Safety Plan under WISHA regulations. Subcontractor will submit and maintain a Site Specific Safety Plan to Contractor prior to any risk exposure. Subcontractor agrees to have all its employees, and its lower-tier subcontractor's employees, attend the Contractor's weekly Safety Meetings, when present at project site during the meeting time. Subcontractor and all lower-tier subcontractors shall furnish all required safety equipment and ensure all of their employees are properly trained and have and wear Personal Protective Equipment in compliance with applicable OSHA/WISHA requirements. This includes, but is not limited to: hearing, breathing and vision protection, gloves, hard hats, boots, fall protection devices, and properly grounded power cords. Contractor has authority to issue warnings, citations and to stop operations of Subcontractor and lower-tier subcontractors, at the Subcontractor's expense, if unsafe operations are discovered.

IX. CHANGES TO SCOPE OF WORK

Contractor reserves the right to increase and/or change the Scope of Work subject to mutual agreement with the Subcontractor. Contractor reserves the right to reduce the Scope of Work without obtaining agreement with the Subcontractor, providing all costs incurred by the Subcontractor to date for that portion of work reduced or eliminated is compensated by the Contractor. Only the Contractor's Lead Carpenter, Project Superintendent or Project Manager is authorized to issue change orders to the Subcontractor; homeowners or any other party must submit change order requests to the Contractor prior to the Subcontractor performing work.

Subcontractor will submit written Change Orders for any work caused by unforeseen conditions, damage caused by others, changes, additions or omissions in design or scope caused by others. All costs for changes in Scope of Work shall be negotiated, in writing, and must be approved and agreed to by the Contractor and Subcontractor prior to any work being performed or materials purchased. Upon completing all work as agreed in Change Orders, Subcontractor will submit for payment according to terms as described below for regular contract work.

X. PAYMENT TERMS

Subcontractor will submit for approval by Contractor written price quotes and proposals with Scopes of Work to describe work to be performed as part of each Project Subcontract. *Proposals must be approved prior to Subcontractor performing any work.* All labor, materials, rentals, equipment costs, permit fees, and all other project costs will be included along with any required deposits for material or special order items.

Upon completion of work, Subcontractor will submit written invoices to be paid against original Project Subcontract proposals or approved Change Orders. Each invoice or change order will have a unique number. Subcontractor agrees to submit all final invoices no later than 30 days after work is complete. Contractor agrees to pay all approved Subcontractor invoices within 30 days of receipt date.

To make application for payment, the Subcontractor shall submit to Contractor an approved invoice by the 10th of the month to be paid on the 22nd of the month or submit an approved invoice by the 25th of the month to be paid on the 10th of the following month. Contractor shall pay Subcontractor's invoice less any offsets or deductions, following receipt of the Subcontractor's invoice and following completion of said work and furnishing of materials by the Subcontractor, provided that the Subcontractor has complied with the following conditions precedent:

- A. Subcontractor has complied with all the provisions of this Agreement.
- B. Subcontractor's invoice has been received by Contractor no later than close of business on the 10th day or 25th day of the month, following the month in which work is completed.
- C. Work is fully completed and to the satisfaction of Contractor or is partially completed to a stage commensurate with the Subcontractor's invoice.
- D. Contractor's office has a current W-9.
- E. Contractor's office has received and approved of all items listed in the liability insurance section.

Contractor may deduct and withhold from any payment to the Subcontractor any sums due under this Master Agreement for one or more of the following reasons:

- F. Failure to perform its work;
- G. Loss or damage to persons or property caused by the Subcontractor to the Owner, Contractor or others to whom the Contractor may be liable;
- H. Failure to properly pay for labor, materials, equipment or supplies furnished in connection with the Subcontractor's work;
- I. Rejected, nonconforming or defective work which has not been corrected in a timely fashion;
- J. Reasonable evidence of delay in performance of the work such that the work will not likely be completed within Contractor's schedule;
- K. Reasonable evidence that the unpaid balance of the subcontract price may not be sufficient to offset the liquidated or actual damages that may be sustained by Contractor as a result of the anticipated delay caused by the Subcontractor;
- L. Reasonable evidence that the unpaid balance of the Subcontract price may be insufficient to cover the cost to complete the Subcontractor's work;

- M. Third party claims involving the Subcontractor or the reasonable evidence demonstrating that third party claims are likely to be asserted, unless and until the Subcontractor furnishes Contractor with adequate security in the form of a surety bond, letter of credit, or other collateral or commitment which are sufficient to discharge such claims if established.

XI. LIEN RELEASES, CLAIM WAIVERS & CONDITIONS

Contractor reserves the right to condition payment on receipt of satisfactory partial lien releases and claim waivers for work performed to date. Final payment may also be conditioned upon Subcontractor paying for all its obligations to lower-tier subcontractors and material suppliers of any tier, and the Subcontractor furnishing a final lien release. Contractor may also condition final payment on receipt of all required documentation, operation and maintenance manuals, required testing, inspections and certification of any and all equipment and materials.

All payments accepted by Subcontractor shall constitute a trust fund in favor of laborers, materialmen, governmental authorities, and all others who are legally entitled to claim a lien on the premises covered by Project Subcontract or otherwise file a claim against any retainage or payment bond. Payments shall first be used to satisfy obligations owed by Subcontractor for work associated with Project Subcontract before paying on other contracts or for any other purpose. Subcontractor shall provide, when requested by Contractor, written statement of current amounts due third parties that could constitute claims against the Project property or the Contractor. If Contractor determines in good faith that Subcontractor is obligated to Contractor or anyone else for labor, fringe benefits, taxes, supplies, materials, equipment rental or other proper charges against the work covered by this Subcontract, the amount of such obligation may be deducted by Contractor from any payment until Contractor receives satisfactory release of all lien and waiver rights.

XII. SCHEDULING & NOTIFICATION

Subcontractor agrees to perform work within the Contractor's Project Schedule and as specified in the Project Subcontract. Contractor agrees to notify Subcontractor of any changes to project schedule and to have all relevant project conditions reasonably ready for Subcontractor to begin work on time. Subcontractor waives any right to damages for delays reasonably experienced on a project of the type and complexity described in Project Subcontract. Subcontractor agrees to inquire with Contractor regularly to exchange information about conditions and work progress that might affect the project schedule and to notify Contractor promptly if any changes develop.

XIII. REQUIRED NOTICE OF CLAIMS

Subcontractor must provide Contractor with written notice of all claims for adjustment or interpretation of contract terms and conditions, cost changes and payment of money, extension of time, damages, or other relief within 10 days after occurrence of the event related to the claims. If Subcontractor fails to submit written timely notice, such claims will be deemed waived.

XIV. DEFAULT, TAKEOVER & TERMINATION TERMS

Subcontractor agrees to maintain the project schedule, make prompt payment of its job-related obligations, correct faulty or defective work, and to obey and follow the laws, ordinances, rules and regulations and orders of any public authority having jurisdiction. If Subcontractor fails to meet these terms or files for bankruptcy or breaches this agreement, then Contractor shall have the right, without prejudice to any rights or remedies otherwise available to it, to remedy the breach for the Subcontractor's work using whatever means Contractor deems prudent providing Contractor gives Subcontractor 24 hours notice of such actions. All of the costs, including reasonable overhead, profit and attorneys' fees, incurred by Contractor shall be charged to Subcontractor. Contractor may deduct such costs from the monies due Subcontractor, who shall be liable for all amounts in excess of the unpaid balance of the Project Subcontract price.

Contractor may also terminate the Project Subcontract for convenience, without any default by Subcontractor, in which case Subcontractor shall submit a final invoice for the work completed to date of termination within 10 days of termination notice. Subcontractor will receive payment from Contractor for that portion of work completed, based on the schedule of values established in the Project Subcontract.

XV. INSURANCE

All components of Subcontractor insurance must be up to date and in force prior to beginning any work under each Project Subcontract. Subcontractor shall procure and maintain in force the following:

- Worker's Compensation Insurance
- Employer's Liability Insurance
- Comprehensive General Liability Insurance
- Automobile Liability Insurance, including owned, non-owned, and hired vehicles

Subcontractor's Worker's Compensation Insurance and Employer's Liability Insurance, also known as Washington State Stop Gap, shall include coverage for Subcontractor, all employees of Subcontractor, lower-tier contractors and lower-tier subcontractor employees. If Subcontractor is a sole proprietor, worker's compensation coverage for the sole proprietor shall be provided in accordance with the worker's compensation laws in Washington State. Subcontractor and Contractor agree that Subcontractor is an independent contractor and is not an employee of the Contractor. Subcontractor will withhold from its payrolls as required by law or government regulation and shall have full and exclusive liability for the payment of any and all taxes and contributions for unemployment insurance, workers' compensation, and retirement benefits that may be required by federal or state governments.

Limits of Subcontractor's General Liability for Premises/Operations and Products/Completed Operations shall be equal to or greater than the Contractor's limits of \$1 Million per Occurrence/\$2 Million Aggregate (example shown below):

Comprehensive General Liability

\$1,000,000 Per Occurrence Limit
 \$2,000,000 Products/Completed Operations Aggregate
 \$2,000,000 General Annual Aggregate

Comprehensive Automobile Liability

1. Bodily Injury	\$ 1,000,000	Each Person
	\$ 1,000,000	Each Occurrence
2. Property Damage	\$ 1,000,000	Each Person

Certification of Insurance coverage shall be written on a Comprehensive General and Automobile Liability form and shall include insurance applicable to Subcontractor's indemnification, defense, and hold harmless obligations pursuant to this Master Subcontract. Products and Completed Operations insurance shall be in force for one year after substantial completion of the Project. Contractor shall be added as an additional named insured under Subcontractor's Comprehensive Liability Policy, and coverage under such policy shall be primary with Contractor's insurance being secondary and excess over the Subcontractor's coverage.

Certificates of Insurance deemed acceptable by Contractor shall name Contractor as an additional named insured and shall be filed with Contractor before starting any work; *no payments will be made until the Certificates are received.* The Additional Insured status is verified by the inclusion/attachment of the additional Insured form (CG2010 or equivalent) to the certificate of insurance. Subcontractor shall have in force, and maintain during all operations of Project Subcontracts, insurance as described above and shall notify Contractor at least 30 days in advance of any cancellation or change in Comprehensive Insurance.

Subcontractor's indemnification and defense obligations hereunder shall extend to Claims occurring after this Agreement is terminated as well as while it is in force, and shall continue until it is finally adjudicated that any and all actions against the Indemnified Parties for such matters which are indemnified hereunder are fully and finally barred by applicable Laws.

XVI. DISPUTES & ARBITRATION

If any dispute arises between the parties, the parties will make a good faith effort to first resolve without resort to litigation. If a dispute cannot be resolved between the parties, then either party may file suit in a court of competent jurisdiction. If suit is filed, the dispute will be decided according to the Mandatory Arbitration Rules regardless of the amount in dispute. Each party expressly waives the dollar limits currently in effect and the arbitrator may issue an award in any dollar amount. The arbitrator shall have the authority to determine the amount, validity and enforceability of a lien. The parties agree to accept the arbitrator's award as final and binding. The parties each waive their right to file any appeal for trial de novo in Superior Court. In any such arbitration proceeding, the prevailing party shall in all cases be awarded his or her reasonable attorney's fees regardless of whether the dispute is resolved through settlement or arbitration.

XVII. PRIVACY & CONFIDENTIALITY

Subcontractor recognizes that it may be working on projects in which Property Owners or the Contractor requires absolute privacy and confidentiality. Subcontractor agrees not to divulge or share any information pertaining to the project or the Owners to any third party and that it will instruct all its employees, subcontractors and materialmen as to this privacy and confidentiality requirement.

XVIII. WAIVER OF SUBROGATION

Contractor's failure at any time to require performance of any provisions of this Master Subcontract or related Project Subcontracts shall in no way affect Contractor's rights hereunder to enforce the same, nor shall such failure be considered in any respect a waiver by Contractor of any breach of this agreement. Payment of any nature by Contractor shall likewise not be construed as a waiver of any rights of Contractor under this agreement.

XIX. INDEMNIFICATION

Subcontractor agrees to defend, indemnify and hold Contractor and homeowners harmless from any and all claims, losses and liabilities to or by third parties resulting from services performed for the Contractor by Subcontractor, Subcontractor's employees or agents, Subcontractor's lower-tier subcontractors or lower-tier subcontractor employees or agents to the fullest extent permitted by law and subject to the limitations provided below.

Subcontractor's duty to indemnify Contractor may be limited from liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the concurrent negligence of (A) Contractor or Contractor's agents or employees and (B) Subcontractor or Subcontractor's agents or employees.

Subcontractor specifically and expressly waives any immunity that may be granted under the Washington State Industrial Insurance Act, Title 51 RCW. This indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable to or for any third party under Worker's Compensation Acts, Disability Benefits Acts, or other Employee Benefits Acts provided Subcontractor's waiver of immunity by the provisions of this paragraph extends only to claims against Subcontractor by Contractor and does not include or extend to any claims by Subcontractor's employees directly against Subcontractor.

Subcontractor's obligations to defend, indemnify and hold Contractor harmless shall include Contractor's personnel related costs, reasonable attorney's fees, court costs and all other claim related expenses.

Subcontractor's indemnification and defense obligations hereunder shall extend to Claims occurring after this Agreement is terminated as well as while it is in force, and shall continue until it is finally adjudicated that any and all actions against the Indemnified Parties for such matters which are indemnified hereunder are fully and finally barred by applicable Laws.

XX. SIGNATURES & DATES

CONTRACTOR

PRESTIGE CUSTOM BUILDERS, INC.

License #: PRESTCB114P4
7914 Seward Park Avenue South
Seattle, WA 98118

Dave Guard
Printed Name

[Signature]
Signature
4-12-06
Date

SUBCONTRACTOR

Howard Septic Design & Monitoring LLC

License No.: 601-886-434

Address: PO Box 2243 North Bend WA
98045

LESA KELLER
Printed Name

Lesia Keller
Prestige Custom Builders
Signature
April 17, 2006
Date

APPENDIX C

Ex. 33

paid on 27 Apr 2006

Huard Septic Design & Monitoring, LLC
PO BOX 2243 North Bend, WA 98045 Phone 425.831.1781 Fax 425.888.2866
www.septicdesign.net

RECEIVED
APR 13 2006
BY:

April 10, 2006

Prestige Custom Builders
7914 Seward Park Ave S
Seattle, WA 98118

RE: Site Evaluation Study of Parcel #

Dear Terry,

The project is to conduct a site evaluation of the above referenced property to determine the feasibility of supporting an on-site sewage system for residential use.

- An initial site evaluation will be completed at a cost of \$750.00 which will determine possible actions for the design phase.
- Payment of the site evaluation fee is required prior to scheduling of work.
- A written report of findings will be provided upon completion of site visit.
- If owner proceeds directly to design phase (within 60 days of completion of site evaluation) this fee will be applied to final design invoice.
- Design fee will be ~~\$2000.00~~ ^{\$1750} per system. *J. H. H.*
- Design fee is due upon billing.
- All fees must be paid in full prior to submission of application package to King County.
- This design fee does not include as built and inspection fees (due prior to release of installation permit).
- King County Review fees: A check payable to KCHD (King County Health Dept.) will be required prior to submission of the design package. This fee is \$545.00 dollars per system.

The following information is required for your project:

- Tax Parcel number 321650-0040
- Number of bedrooms (or other uses) 3
- Water supply (e.g. private well, water district) Woodinville water
- Approximate house footprint and location (if known) approx 6,000 sq ft
- Your contact information:
 - Primary Phone Number: 206-719 4036
 - Secondary Phone Number: 425 702 8928
 - Email Address: terry@PrestigeCustomBuilders.com

Contract is null and void if not accepted within 30 days.

CHANGE ORDERS OR EXTRA WORK. The Owner at any time may request changes or modifications in the scope of the work. All such requests shall be in writing, and the charge for such work shall be agreed upon in advance.

Rotane Fee => \$600-

Huard Septic Design & Monitoring, LLC

PO BOX 2243 North Bend, WA 98045 Phone 425.831.1781 Fax 425.888.2866
www.septicsdesign.net

KING COUNTY FEES. The Owner shall be responsible for the cost of all King County Fees that are necessary for the Project including without limitation, fees for revisions.

EXTRA WORK REQUIRED BY A PUBLIC AUTHORITY OR UNFORESEEN CONDITIONS. In the event that the applicable public authority or government agency requires modifications or corrections in the Project, or if the applicable public authority or government agency, or other unforeseen conditions necessitate extra work to be performed by HSDM beyond that which was expected or contemplated at the time the work was commenced, the contract price shall be adjusted as contemplated in paragraph ("Change Order"). These modifications or corrections may include, without limitation, the following:

- Staking and stringing drain field and reserve areas.
- Dealing with problems resulting from soil type discrepancies or sensitive areas, such as slopes greater than 40%, wetlands, streams and the like.
- Conducting winter water table review.
- Arranging for third party lots costs for soil type verification.
- Working to bring existing water system into compliance.
- Any other steps required or requested by County Sanitation that are above and beyond what would customarily be included in a typical design.

Unless and until the parties agree to a change order as contemplated in paragraph ("Change Order"), HSDM shall not be responsible for the performance of any such changes or extra work.

SCHEDULING. It is the responsibility of Owner to schedule HSDM's work under this contract. If HSDM arrives at the work site at the scheduled date and time to find it is not ready for HSDM to perform the services contemplated in this Agreement, then Owner agrees to pay for the expense of the non-productive trip.

INTEREST. The owner agrees that any amounts unpaid when due shall bear interest at the rate of the lesser of one and one half percent per month or the highest rate then allowed by law until paid.

WARRANTY. HSDM warrants that, upon final payment by Owner of the charges set forth in this agreement, all charges for labor, materials and taxes, which it has incurred in the Project shall be paid for, and HSDM shall permit none of its subcontractors, employees or taxing authorities to lien the subject property. Further, HSDM warrants that it shall perform all of its work in a workmanlike manner and that there will be no defects in the performance of its work **THIS WARRANTY IS FOR A PERIOD OF ONE YEAR FROM THE DATE OF THE FINAL CONTRACT INVOICE, AND IS IN LIEU OF ALL OTHER EXPRESS OR IMPLIED WARRANTIES OF FITNESS, MERCHANTABILITY OR HABITABILITY OTHERWISE PROVIDED UNDER THE LAWS OF THE STATE OF WASHINGTON AND THE UNITED STATES OF AMERICA.**

DISPUTES. Unless settled between Owner and HSDM, all disputes, including labor and/or material man's liens, shall, be decided according to the Mandatory Arbitration Rules of the Superior Court of the county in which is located the subject property, regardless of whether the amount in dispute exceeds the maximum amount then provided for mandatory arbitration in such county. In event of such dispute, the party prevailing shall be entitled to recover his/her/their/its reasonable attorney's fees and court costs.

CORRECTIVE WORK. HSDM shall have the right to perform any and all corrective work identified by Owner unless HSDM declines to do so following receipt from Owner of a detailed written list of corrective work which is, in the opinion of the Owner, necessary for the Project. If Owner fails to permit HSDM the ability to perform corrective work, and/or if Owner hires another contractor to perform

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www.hsdm.com

corrective work, then Owner agrees to accept HSDM's work as is, and thereby waives any and all claims, of whatever nature, against HSDM, including warranty claims.

BONDING INFORMATION. HSDM is registered with the State of Washington, registration number HUARDSD992B3, as a contractor, and has posted with the state a bond of \$12,000.00 for the purpose of satisfying claims against HSDM for negligent or improper work, or breach of contract in the conduct of HSDM's business. The expiration date of HSDM's registration is 05/15/2006. This bond may not be sufficient to cover a claim which might arise from the work done under this contract. If any supplier or materials used in your project or any employee of HSDM or any of its subcontractors is not paid by HSDM or the subcontractor, your property may be liened to force payment. HSDM is required to provide you with further information about lien release documents if you request it. General information is also available from the Department of Labor and Industries.

If HSDM fails to pay its subcontractors, suppliers or laborers, or neglects to make other legally required payments, those who are owed money can look to your property for payment, even if you have paid HSDM in full.

Under Washington law, those who work on your property and are not paid have a right to enforce their claims for payment against your property. This claim is known as a construction lien. Persons who supply labor or material ordered by your contractor are permitted by law to file a lien only if they do so within 90 days of cessation of performance or delivery of materials. The time frame is spelled out in R.C.W. 60.04.060. If you enter into a contract to buy a newly built home, you may not receive notice of a lien based on a claim by a contractor or material handler. Be aware that a lien may be claimed even though you have not received notice. You have final responsibility for seeing that all bills are paid even if you have paid your contractor in full. If you receive a notice to enforce a lien, take it seriously. Let your contractor know you have received the notice. Find out what arrangements are being made to pay the contractor. ~~Reader of the notice: Prior to making the final payment on the project, have a lien release completed by~~ each of the contractors and material suppliers. When in doubt, or if you need more details, consult your attorney. When and how to pay your contractor is a decision that requires serious consideration. If you are dealing with a lending institution, ask your loan officer what precautions the institution takes to verify that subcontractors and material suppliers are being paid when mortgage money is paid to your contractor. Request lender supervision when dealing with a lending institution that provides interim or construction financing. See R.C.W. 60.04.200-210. Ask the contractor to disclose all potential lien claimants as a condition of payment. A current statement of labor costs or materials delivered to your property from each party shall be provided to you by law (R.C.W. 60.06). Accordingly, you should determine whether the appropriate payments are being made. Make your check payable jointly. Name the contractor and the subcontractor or supplier as payees. Ask your contractor for a lien waiver from each party who has sent you Notice of the Right to Lien. Consider using an escrow agent to protect your interests. Find out whether your escrow agent will protect you against liens when disbursing payments. If you are interested in this alternative, consult your attorney. Request that your contractor post a performance bond in the amount of the projected costs. That will give you recourse in the event the contractor fails to complete the building agreement.

Dated This 26 day of April 2006, Owner: *Lin Anne Smith*

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