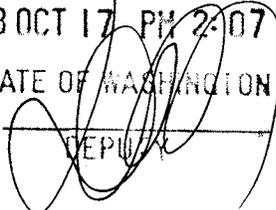


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WALDNER CONSULTING, INC.

Appellant

v.

MILLER CONTRACTING, INC.

Respondent

BRIEF OF RESPONDENT

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ORIGINAL

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BRIEF OF RESPONDENT

I. SUMMARY/OVERVIEW

Respondent Miller Contracting, Inc. contracted with Glenn Springs Holding, Inc. to construct a large containment cell for the disposal of contaminated soils dredged from the waterways in and around the historical industrial centers of Tacoma. The containment cell, known as the Blair Waterway Slip 1 Facility, was to be constructed on property owned by the Port of Tacoma.

Miller's contract with Glenn Springs included the supply, transport and placement of 204,424 tons of clean fill to be used to cap the contaminated materials placed in the containment cell. Miller agreed to a unit price for every ton of capping material supplied and transported to the containment cell. Importantly, the contract allowed Glenn Springs to change the quantity of capping material and provided a process by which Miller could pursue claims in the event such changes resulted in an adverse impact.

Miller subcontracted with Waldner to supply and transport the cap material at a unit price. The Subcontract clearly and unequivocally incorporates the Contract between Glenn Springs and Miller as well as the

conditions, specifications, schedules and any addendum. Moreover, by signing the Subcontract Waldner affirmed that it was fully informed of all relevant terms of the prime contract. Waldner therefore knew that it was obligated to: 1) Accept Glenn Spring's right to change the quantity of unit price work; 2) Provide timely evidence of any cost impact due to changes in the quantity of the unit price work; and 3) Commence a lawsuit within 180 days of substantial completion of the work if it believed that it had an unresolved claim arising from a change in the quantity of unit price work.

During the construction of the containment cell, Glenn Springs Holdings issued three change orders that, in the aggregate, reduced the amount of capping material to be supplied and transported by Miller by approximately half. As a substitute, Glenn Springs directed Miller to place an alternate capping material supplied and transported by the Port of Tacoma. This change allowed the Port of Tacoma to dispose of waste material that it otherwise would have had to dispose of off site. The Port of Tacoma also benefitted from the cost savings associated with not buying the capping material through the Miller contract.

Upon learning of the change orders, Waldner notified Miller that it considered the use of an alternate source of capping material to be a breach of the Subcontract. Miller notified Glenn Springs of Waldner's

claim and then facilitated several discussions and meetings with Glenn Springs and with Waldner in an attempt to resolve Waldner's claim. Miller also consulted with Waldner as to the type of information that it would need to present to support its claim and specifically reminded Waldner that it would need to comply with the claims provision of the prime contract between Miller and Glenn Springs.

Despite the efforts made by Miller, Waldner failed to provide sufficient supporting documents to support its claim, failed to appear at a meeting with Glenn Springs that had been arranged by Miller and then, failed to commence its lawsuit within the contract claim limitation period.

More than two years after Waldner first provided notice of a potential claim, it commenced its lawsuit against Miller. Miller, finding itself in the unfortunate position of being caught between Glenn Springs, who made a decision to change the contract, and its Subcontractor who alleges damages from that decision, joined Glenn Springs as a third party defendant. Glenn Springs moved for Summary Judgment to dismiss the third party claim brought by Miller and Miller moved by cross motion to have Waldner's claim dismissed as well.

Judge Beverly Grant of the Pierce County Superior Court found that Miller's lawsuit was not commenced within the contract claim

limitation period of 180 days and granted Glenn Springs' motion. Likewise, the court found that Waldner was also subject to the 180 day claim limitation period and granted Miller's cross motion, dismissing Waldner claim as untimely.

Inexplicably, Waldner slept on its rights for over two years and now wants this court to reinstate its right to pursue Miller for a claim that Miller would have passed through to Glenn Springs had it been timely pursued. Miller respectfully requests that Waldner's appeal is denied and the order dismissing Waldner's claim is affirmed.¹

II. RESPONDENTS STATEMENT OF THE CASE

A. Project Description

This dispute arises from construction contracts that were part of an environmental remediation project to remove contaminated sediments from the Hylebos Waterway at the Port of Tacoma and to construct the Blair Waterway Slip 1 Facility at the Port of Tacoma. CP 62.

Pursuant to a consent decree with the United States Environmental Protection Agency, the Port of Tacoma, and Occidental Chemical

¹ Miller filed a Cross Notice of Appeal to preserve its rights to challenge the trial court's dismissal of its claim against Glenn Springs in the event Waldner's appeal challenged the finding by the trial court that there was no waiver of the claims limitation period. Waldner's appeal presents a single issue that is unique to the Miller/Waldner Subcontract and does not implicate the trial courts decision to dismiss Miller's claim against Glenn Springs. Miller's Cross Notice of Appeal is therefore moot.

Corporation agreed to perform certain work to cleanup parts of the Hylebos Waterway at the Port of Tacoma. The work was contracted through Glenn Springs, an affiliated corporation of Occidental. CP 62.

The Blair Waterway Slip 1 Facility was designed as a large containment cell in which contaminated sediments from the Hylebos waterway could be placed and stored indefinitely. The design of the containment cell required that the contaminated sediments are capped with clean fill material and then paved for use by the Port of Tacoma.

B. The Prime Contract between Glenn Springs and Miller

On September 30, 2004, Glenn Springs and Miller executed Contract No. 026-8068 for the construction of Blair Waterway Slip 1 Facility (The "Prime Contract"). CP 232. The Prime Contract consists of specification, project plans and a 21 page Contract that was executed by the parties, CP 243 – 264. Important to the issues before the court, the 21 page contract includes Article 9 titled Changes, the contract clause that sets forth the process by which claims are to be pursued. Article 9 also requires the filing of a lawsuit within 180 days of substantial completion. CP 249 – 254.

Miller's work included the supply transport and placement of clean fill to be used as capping material. Specifically, Item D of the Main

Contract states: "Supply, Transport & Place Clean Fraser River Sand in Slip One," with an estimated quantity of 204,080 tons. CP 245. Miller was to be paid at a unit price of \$5.50 per ton to supply and transport the capping material and \$3.00 per ton to place it. CP 245.

The Prime Contract (specifically, Article 9 of the contract) allows Glenn Springs to change the quantity of unit price work and adjust the contract price pursuant to the agreed unit price. CP 250. If such changes results in the quantity of the unit price work falling below 80% of the estimated quantities, the Prime Contract provides a process by which the Contractor may request an adjustment in the unit price. CP 250.

Specifically, the Prime Contract states:

If the quantity of an item or unit price Work actually performed or to be performed is less than 80% of the bid quantity for that item, the Contractor or the Contracting Entity may request a Change Order revising the unit price for the item. Such request shall be accompanied by evidence to support the requested revision. The proposed revision will be evaluated by the Contracting Entity considering such factors as the change in actual costs to the Contractor of the item, and the share, if any, of the fixed expenses properly chargeable to the change in the quantity of that item.

CP 250, Article 9, par. B. 1.

The Prime Contract also contemplates that if the parties are in

agreement with changes to the unit price, a change order was to be executed; however, if the parties did not agree, Glenn Springs was to issue a change order directing the change in the work and Miller would proceed to implement the changes without prejudice to its rights to pursue a claim. CP 251.

The Prime Contract also sets forth a procedure for the protest by the Contractor. Specifically, the Prime Contract notes:

If the Contractor disagrees with any of the terms of the change order issued by the Contracting Entity, the Contractor shall give immediate oral notice of protest to the Contracting Entity prior to performing the work and shall submit a written protest to the Contracting Entity within ten (10) calendar days of the Contractor's receipt of the Change Order. The protest shall identify the point of disagreement, those portions of the Contract believed to be applicable, and an estimate of the quantities and costs involved in the change.

CP 253, Article 9, par. D. 2.

The Prime Contract also requires any legal suit arising from a claim to be "instituted within 180 days following substantial completion of the Work." CP 253 – 254, Article 9, par. F. The term "Work" is specifically defined in the Prime Contract to include the supply and transport of capping material identified as the Item D material, CP 243

through CP 245; however, the term “substantial completion” is not defined.

C. The Subcontract between Miller and Waldner

Miller executed a subcontract with Waldner, dated November 15, 2004, in which Waldner agreed to supply and transport the Item D material at a unit price of \$4.25 per ton (the “Subcontract”). CP 363 and 364. Waldner is a materials broker and had arranged to purchase the capping materials from a gravel pit owned by W.M. Dickson Co. Waldner’s Subcontract is a supply contract under which Waldner gets paid a unit price for every ton of capping material delivered to the project. CP 419.

Since the amount of capping material to be provided, transported and placed by Miller was an estimate quantity only, it was important for Miller to tie the Waldner Sub-Contract to the Prime Contract. In the event the Owner alters the design or determines it needs significantly more or less capping material, Miller needed to have the ability to alter the quantity of materials supplied through Waldner. The Subcontract itself does not provide an estimated quantity of material to be supplied by Waldner, instead it references and incorporates all terms and conditions of the Prime Contract between Glenn Springs and Miller. Specifically, the

Subcontract starts off by noting:

WHEREAS the Contractor has entered into a written Contract with the Glenn Springs Holdings, Inc.(hereinafter called the "Owner"), *which Contract, conditions, specifications, schedules and addenda are incorporated herein* and referred to as the "Prime Contract", to construct, install and complete

2004/2005 Construction Contract
No. 026-8068 Hylebos Waterway
Segment 3 & 4, Clean-Up Project
(Blair Slip 1 – Completion).

CP 363. Emphasis provided.

Then, the Subcontract states in paragraph 1:

WORK TO BE PERFORMED: The Sub-Contractor shall under the direction and to the satisfaction of the Contractor, provide the portion of the labour and materials and perform that portion of the work set out in the Prime Contract, namely:

Item D Supply, Transport and
Place Clean Fraser River
Sand in Slip One Up to
Plus 16 Foot Elevation

Subcontractor's Scope:

- Supply and Transport
(F.O.B. Site) Only
- Supply Approved
Alternate Pitrun
Gravel from Dickson
Pit

CP 363, par. 1.

Regarding payment terms, paragraph 2 of the Subcontract notes:

PAYMENT: In consideration of the covenants and Work of the Sub-Contractor, the Contractor agrees to pay to the Sub-Contractor and the Sub-Contractor agrees to receive and accept as full compensation for doing all the Work, furnishing all materials and supplies required or contemplated in this Agreement. the following prices:

Item D \$4.25 Per Ton (U.S.

Dollars)

CP 363, par. 2.

Under paragraph 5 of the Subcontract, all elements of the Prime Contract are further referenced and incorporated as follows:

The Sub-Contractor agrees to perform and comply with all of the covenants, obligations, terms and conditions binding on the Prime Contractor under the Prime Contract, in respect of the Work, together with any changes thereto and hereby expressly declares that he has fully informed himself of all such covenants, obligations, terms and conditions by reference to the Prime Contract. For purposes of incorporation of the Prime Contract and the interpretation of these contract documents, "Contractor" shall be deemed to mean "Sub-Contractor" in the Prime Contract.

CP 363, par. 5.

Waldner agreed that the Contractor may, at any time, order extra or changed work and that it would agree to accept payment for such changed

work as follows:

Payment for extra work or changed work shall be made at the unit price stipulated herein or, if not applicable, at unit prices and/or lump sums mutually agreed upon in writing by the Contractor and Sub-Contractor; PROVIDED, HOWEVER, if no agreement can be reached by the parties, the Sub-Contractor shall be paid the actual cost thereof received by the Contractor from the Owner plus a N/A percent of the mark up received by the Contractor from the Owner, as and when it is paid therefor by the Owner.

CP 364, par. 14.

Waldner also agreed that in the event of a pass-through claim, that it would provide all information and assistance needed for Miller to present the claim and that it would release Miller from any liability for its failure to comply with the terms of the Subcontract or the Prime Contract. Specifically, under paragraph 18, titled Controversies, the Subcontract states:

If the dispute or controversy involves . . . the liability of any third party, which third party has a contractual relationship with the Contractor but not the Sub-contractor, the Sub-contractor agrees to supply to the Contractor all information and assistance required by the Contractor for the purpose of negotiating or settling the third party claims or liability If the Contractor shall fail to collect any amount owing or claimed owing to the Sub-contractor as a result of the failure of the Sub-contractor to comply with

the terms of this Agreement, *including any documents incorporated herein*, the Contractor shall be fully released from any liabilities for such claims.

CP 364, par 18. Emphasis provided.

D. Changes in the Quantity of Capping Materials Supplied and Subsequent Meetings, Notices and Correspondence.

Waldner began delivering the capping material to the Project in November 2004. CP 232. From November 23, 2004 through February 8, 2005, the last day Waldner provided any materials to the project, Waldner delivered 111,447.6 tons of capping materials to the Blair Waterway Slip 1 Facility. CP 419, CP 451 and CP 452. Thereafter, the Port of Tacoma and Glenn Springs, having realized that they could achieve substantial savings if they substituted materials available through another construction project on the Port of Tacoma property, deducted the balance of the capping materials from the Prime Contract so that the Port of Seattle could supply and transport the remaining capping material. CP 63, CP 366, CP 375 and CP 387.

On January 24, 2005, Glenn Springs issued Change Order No. 14, which directed Miller to accept up to 20,000 cubic yards of substitute capping material (to be supplied and transported by the Port of Tacoma) and reduce the amount of capping material supplied and transported by

Waldner. CP 366.

Since Change Order No. 14 deducted less than 10% of the total estimated quantities of capping material from the Prime Contract, the quantity of capping material to be supplied by Miller did not fall below 80% of the estimated quantities. Therefore, Miller's right (as well as Waldner's right) to seek an adjustment in the unit price was not triggered by the issuance of Change Order No. 14. CP 233.

On February 7, 2005, Waldner sent a letter to Miller stating that reducing the amount of material supplied from the Dickson pit may lead to cost impacts for Waldner. CP 368 and CP 369.

Miller informed Glenn Springs of Waldner's concerns and immediately forwarded Waldner's letter to Glenn Springs. This resulted in several discussions between Glenn Springs and Miller including a conference call between Glenn Springs, the Port and Miller on February 9, 2005 in which contract issues concerning the use of the substitute capping material was discussed including Waldner's notice of potential cost impacts due to the use of substitute materials. CP 233, CP 371 and CP 412.

Miller then informed Waldner that it forwarded its letter of February 7, 2005 to Glenn Springs pursuant to the requirements of the

Prime Contract. CP 373.

On February 9, 2005, despite being informed of the potential cost impacts to Miller's Subcontractor, Glenn Springs issued its second change order, Change Order No. 16, which increased the amount of capping material supplied by the Port of Tacoma to 50,000 cubic yards. Change Order No. 16 specifically states that the amount of substitute capping material supplied by the Port "will be deducted from the quantity of primary cap previously expected from Miller's Dixon pit source." CP 375.

Miller provided Waldner with a copy of Change Order No. 16 under cover letter dated February 14, 2005. CP 377. Then, by letter dated February 15, 2005, Miller referenced a discussion with Waldner that occurred on site on Friday February 11, 2005, where Waldner made some mention of ongoing standby costs. Miller informed Waldner that it must be kept apprised of costs or other damages where Waldner intends to seek compensation. CP 379.

By letter dated March 15, 2005, Waldner provided formal notice to Miller of its intent to file a claim for cost impacts resulting from Change Orders No. 14 and No. 16. CP 381. By notice dated the same day, Waldner provided Glenn Springs with its Notice of Claim against

Contractor's Bond and Retainage Funds. CP 383.

Miller notified Glenn Springs and the Port of Tacoma of Waldner's formal notice of intent to file a claim in a conference call on March 16, 2005. CP 235 and CP 385. Miller then transmitted a copy of Waldner's claim to Glenn Springs on March 18, 2005. CP 235 and CP 389.

After being informed of Waldner's formal notice of its intent to file a claim, Glenn Springs issued a third change order, Change Order No. 21, dated March 17, 2005, which further increased the amount of substitute capping material supplied by the Port to a total of 114,700 tons. Again, the change order noted that the increased amount of substitute capping material will reduce the amount of material expected from the Dixon pit source. CP 235 and CP 387.

On March 22, 2005, Miller wrote Waldner to inform it of Change Order No. 21. Miller also confirmed its receipt of Waldner's Notice of Claim against Contractor's Bond and Retainage Funds dated March 15, 2005 and suggested that Waldner provide detailed backup of its claim. Moreover, Miller reminded Waldner that it must comply with the claims provisions of the Main Contract that was incorporated by reference into the Subcontract. CP 236 and CP 389.

Also on March 22, 2005, Miller provided written notice of

Waldner's cost impacts resulting from all three change orders in a letter to Glenn Springs. In this letter Miller recounts the brief history of notice and correspondence relative to the Waldner claim and asks Glenn Springs to present the claim to the Port of Tacoma for consideration. CP 392.

On April 12, 2005, Miller wrote Glenn Springs after receiving a request from Waldner for clarification of the backup required by Glenn Springs relative to the previously submitted claim. Miller sought clarification from Glenn Springs as to the "detailed backup" required to support the previously submitted claim. CP 395. Miller did not receive a response from Glenn Springs. CP 236 - 237.

Miller continued to provide labor, equipment and materials for the construction of the Slip 1 Facility throughout the summer of 2005. CP 236. Having completed the bulk of the work by August 2005, Miller provided Glenn Springs with Invoice No. 86HB, dated August 4, 2005, which requested a partial release of retention in the amount of \$262,246.48. CP 397 - 398. Because of the outstanding issue with Waldner, Miller was not seeking final payment and project closeout and so did not request the entire amount withheld as retainage. CP 236 - 237.

By letter dated September 6, 2005 Glenn Springs presented Miller with a check in the amount of \$240,187.83. The check noted that the

payment was for Miller's invoice number 86HB, however, the check was for \$19,444.45 less than the amount invoiced. CP 400 - 401. Glenn Springs' letter stated that Glenn Springs had deducted \$172,058.65 in "LRI charges," but did not explain what those charges were or provide documentation supporting the deduction. Moreover, the letter stated that the enclosed check constituted "[F]inal settlement of all claims under the Contract and related amendments." CP 400. The letter also referenced Article 8 of the contract, which states: "Acceptance of the final payment by the Contractor shall constitute a waiver of all claims by the Contractor against the Contracting Entity." CP 400.

Miller did not accept the payment as final payment and did not deposit the check. CP 237. Presently, final payment remains outstanding.

Seven months later, by letter dated April 13, 2006, Waldner requested that Miller take action to resolve the dispute that was set forth in its previous correspondence. CP 403. Miller responded through its counsel on May 1, 2006 and let Waldner know that it was attempting to set up a meeting with Glenn Springs to address outstanding issues. CP 237. By letter dated May 23, 2006, Miller notified Waldner of a meeting with Glenn Springs on Thursday May 25, 2006 and requested that Jeff Waldner be present to present Waldner's claim. CP 405. A representative

from Glenn Springs flew out from Lexington Kentucky to attend the meeting but Mr. Waldner failed to appear. CP 238.

Despite Waldner's absence from the May 25, 2006 meeting, Glenn Springs informed Miller that it should provide details of any claims relative to Change Orders 14, 16 and 21 to the Port of Tacoma since it was the Port that requested the use of the substitute capping materials. CP 238 and CP 412 – 413. Miller then contacted the Port of Tacoma and on August 29, 2006 forwarded to the Port's counsel copies of relevant contract language as well as Waldner's claim. CP 407 - 408. The Port of Tacoma responded by letter dated November 15, 2006 explaining that it requested information from Waldner "[o]ver one year ago" and Waldner never provided the requested information and therefore considers the matter closed. CP 410. Miller forwarded the Port's response to Waldner. CP 238 – 239.

E. Filing of the Complaint and Third Party Lawsuit

Waldner filed its complaint on February 15, 2007, more than two years after it last supplied and transported capping material to the project. CP 1 – 3. Miller indicates that it was notified by its registered agent that it was served with Waldner's complaint on April 25, 2007, CP 239; however, the court records does not contain proof of service and Miller's

Answer, filed on October 15, 2007, asserts the affirmative defense of “Insufficiency of process and/or service of process.” CP 50. Miller’s Answer also asserted a third party complaint against Glenn Springs. CP 46 – 54.

III. ARGUMENT

ISSUE Did the trial court err by granting summary judgment in favor of Miller Contracting against Waldner Consulting by concluding that Miller’s 180-day contract claim limitation with the prime contractor, Glenn Springs Holding, “flowed down” to bar Waldner’s claim?

The only issue before this court is whether the Subcontract incorporated the disputes provision of the Prime Contract such that Waldner was required to preserve its claim by filing a lawsuit within 180 days of substantial completion. The record is clear that there is no issue of law or fact that the Subcontract unequivocally incorporates all of the Prime Contract including the 180 day claim limitation clause. The trial court got it right when it dismissed Waldner’s claim as untimely and Miller respectfully requests that the trial court’s decision is affirmed.

A. The Subcontract Specifically and Unambiguously Incorporates the Contract between Glenn Springs and Miller, which includes Article 9 and the Claim Limitation Period.

As noted by Waldner, incorporation by reference allows the parties to a contract to incorporate contractual terms by reference to separate agreement to which they are not parties. To be effective, the incorporation provision must have a reasonably clear and ascertainable meaning. *Adventists v. Ferrellgas, Inc.* 102 Wn.App. 488, 7 P.3d 861 (2000), citing WILLISTON ON CONTRACTS § 30:25, at 233-34 (4th ed. 1999).

Here, the incorporation provisions of the Subcontract are clear and unambiguous. The Subcontract consists of a two pages term sheet. On its face, the Subcontract lacks any reference to the quantity of materials to be supplied or when the materials would be needed on site. Moreover, it is void of a disputes clause and fails to make any reference to jurisdiction and venue in the event of a dispute. Instead, it incorporates and references the Prime Contract and all of its components including: the Contract, conditions, specification, schedules, addenda, covenants, obligations and terms. It also limits Miller's liability to Waldner to those amounts that Miller successfully recovers from Glenn Springs.

The Subcontract has several incorporation clauses that are complimentary rather than contradictory. The first reference is made in the recitals, where Waldner is provided the specific contract number and description that identifies the agreement between Miller and Glenn

Springs. This section of the Subcontract specifically incorporates the Prime Contract, which consists of the “Contract, specifications, schedules and addenda”. CP 363. Importantly, the “Contract” that is referenced and unconditionally incorporated includes Article 9, which contains the procedure by which Waldner was to make and preserve any claims resulting from changes in the quantity of materials supplied. Article 9 also contains the requirement that a lawsuit be commenced within 180 days following substantial completion of the Work. There is no doubt that the 21 page contract between Glenn Springs and Miller (and all of its Articles, including Article 9) is specifically incorporated into the Subcontract.

On the same page of the Subcontract, in Paragraph 5, Waldner agrees to comply with the “covenants, obligations, terms and conditions” of the Prime Contract that are binding on Miller, in respect to Waldner’s Work, “together with any changes therein.” Paragraph 5 goes on to state that Waldner “expressly declares that he has fully informed himself of all such covenants, obligations, terms and conditions by reference to the Prime Contract.” CP 363. To eliminate any chance of ambiguity or confusion, Paragraph 5 goes on to state: “For the purposes of incorporation of the Prime Contract and the interpretation of these contract documents, “Contractor” shall be deemed to mean “Sub-Contractor” in

the Prime Contract. CP 363.

Waldner's argument set forth in its brief cherry picks and presents only a portion of the Subcontract language that incorporates the Prime Contract and only those portions that support its argument. Taken as a whole, however, there is no ambiguity in the contract language as to the intent of the parties to incorporate all aspect of the Prime Contract.

The case of *Sime Construction v. Washington Public Power Supply System*, 28 Wn.App. 10, 621 P.2d 1299 (1980) is directly on point. Similar to the Subcontract between Miller and Waldner, Sime's subcontract incorporated by reference the contract between the Owner and Contractor as well the general, special and other conditions. The trial court determined that Sime's subcontract entitled Sime Construction to damages for delay; however, it also found that Sime Construction failed to provide timely notice.

Like Waldner, Sime argued on appeal that the notice procedure of the prime contract was not incorporated by reference into the subcontract. Rather, it argued, the incorporation was for the special purpose and is therefore limited to that purpose. It contended that the purpose of the incorporation clause was to define the scope of work and to make it clear that the subcontractor was to perform its work according to the

specifications. The court rejected Sime's argument and found that the incorporation clause was general and unlimited and both the contract specifications and procedural provisions are incorporated by reference.

Applying the findings in Sime Construction, Waldner's Subcontract incorporates the "Contract, conditions, specification, schedules and addenda" without limitation. Such an incorporation clause would therefore be considered general and unlimited and Waldner would be subject to the procedural provisions of Article 9.

B. Even if the Incorporation Clause was Ambiguous, the Parties Acknowledged the Applicability of the Claim Procedures of the Prime Contract

Even if the court were to find the incorporation clause ambiguous, Miller and Waldner's communications after Glenn Springs issued Change Orders 14, 16 and 21, demonstrates an understanding that the claims procedures of the Prime Contract were applicable.

Washington courts use the "context rule" of contract interpretation. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). Under this rule, extrinsic evidence may be admissible to give meaning to the contract language. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96, 974 P.2d 836, *reconsideration denied* (1999) (citing *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 189, 840 P.2d 851 (1992) (extrinsic evidence

illuminates what was written, not what was intended to be written)). Thus, we determine intent “not only from the actual language of the agreement, but also from ‘viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.’ ” *Adventists v. Ferrellgas, Inc.* 102 Wn.App. at 866; *Northwest EnviroServices, Inc.*, 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993) (quoting *Berg*, 115 Wn.2d at 667, 801 P.2d 222 (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973))).

When Waldner learned of the first change order, Change Order 14 that removed up to 20,000 tons of material, it wrote Miller on February 7, 2005 and acknowledged that the Subcontract incorporates the Prime Contract. Specifically, Waldner notes: “The Subcontract incorporates Miller’s Slip One cap material obligations under Contract No. 026-8068 with Glenn Springs Holdings, Inc.” CP 368. A little more than a month later, Waldner again writes Miller and references the Prime Contract. CP 381. In response, Miller wrote Waldner on March 22, 2005 and suggested that Waldner provide full and detailed back up for its claim. Miller also reminder Waldner that it ”must comply with the claims provisions of the

main contract that was incorporated by reference into its contract with Miller. CP 389. Waldner did not disagree with this assertion. Also on March 22, 2005, Miller wrote Glenn Springs and presented Waldner's claim "Pursuant to Contract, Article 9 "Changes", paragraph C and asked that it be passed on the Port of Tacoma, Jeff Waldner was copied on the letter. CP 392 -393.

When the Subcontract language is viewed through the context of the parties' communications, there is no question that Waldner knew and accepted that the Subcontract incorporates all aspects of the Prime Contract and that it needed to comply with the claims provisions of the Prime Contract, including the 180 day claim limitation period.

C. Waldner Failed to Cooperate in Providing Requested Documents and Did Not Comply with the Terms of the Agreement

As noted above, the Subcontract requires Waldner to cooperate with Miller in the pursuit of any claims. If Miller fails to collect any amounts claimed owing by Waldner due to Waldner's failure to comply with the terms of the Subcontract, including any incorporated documents, Miller is to be fully released from any liabilities for such claims. CP 364, par. 18.

Despite its efforts, Miller has failed to collect the amount that

Waldner has claimed is owing. This failure is a direct result of Waldner's failure to comply with the terms of the Subcontract and the Prime Contract. Specifically, Waldner failed to provide Miller with sufficient backup that would support its claim, such as its contract with Dickson and proof of its fixed costs. Waldner also failed to appear at a meeting that Miller had set up with Glenn Springs for the specific purpose of addressing Waldner's claims. Additionally, Waldner failed to comply with the contract claim limitation period by failing to commence its lawsuit within 180 days of substantial completion.

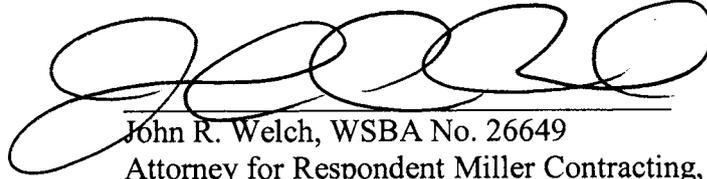
Waldner's failure to comply with the terms of the Subcontract and the Prime Contract has resulted in the full release of Miller from any liabilities for the claims asserted by Waldner.

IV. CONCLUSION

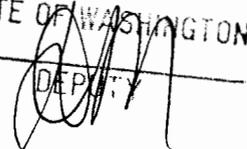
The trial court's conclusion that the Subcontract incorporates the 180 day claim limitation period of the Prime Contract is fully supported by the Subcontract. Our courts regularly enforce such incorporated terms, particularly when the intent is clear and unequivocal, as it is here. Miller respectfully requests that Waldner's appeal is dismissed and that the trial court is affirmed.

Respectfully Submitted
This 17th day of October, 2008

CARNEY BADLEY SPELLMAN

A handwritten signature in black ink, consisting of several large, overlapping loops and flourishes, positioned above a horizontal line.

John R. Welch, WSBA No. 26649
Attorney for Respondent Miller Contracting,
Inc

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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NO. 37592-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

WALDNER CONSULTING,
INC.,

Appellant,

vs.

MILLER CONTRACTING, INC.,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that:

I am now and at all times herein mentioned, I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

On October 17, 2008, I caused copies of the following documents to be delivered in the manner indicated on counsel listed below, along with this Certificate of Service.

- Brief of Respondent**

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DATED this 17th day of October, 2008.


Marie Jensen