

NO. 40025-1-II

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

TACOMA SCHOOL DISTRICT NO. 10, a Washington School District
Appellant,

v.

NOWICKI AND ASSOCIATES, INC. a Washington Corporation, and
NOW ENVIRONMENTAL SERVICES, d/b/a NOWICKI
ENVIRONMENTAL, a Washington Corporation,
Respondents.

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(THE HONORABLE FREDERICK FLEMING)

OPENING BRIEF OF APPELLANT
TACOMA SCHOOL DISTRICT NO. 10

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I. INTRODUCTION

This appeal concerns the trial's court's order that the Tacoma School District No. 10 ("District") pay hundreds of thousands of dollars of attorney's fees incurred by a private environmental consultant, based on the consultant's dispute with a private contractor. Eastwood Enterprises, Inc. ("EEI"), the contractor, sued Nowicki & Associates, Inc. ("Nowicki"), the consultant, for damages allegedly caused by Nowicki's inadequate design work on a remodeling project at Foss High School in Tacoma ("Project"). The District had assigned any rights it had against Nowicki to EEI, and EEI controlled the litigation and retained full entitlement to its potential benefits. Nowicki and its successor NOW¹ impleaded the Tacoma School District ("the District") as a third/fourth party defendant solely to assert a claim for attorney's fees against the District. Though no claims against the District were ever determined by the trial court, the court awarded both Nowicki and NOW fees against both EEI and the District.

No fee award of any kind was justified in this case because the fee statute at issue was not satisfied. But the trial court's award of fees

¹ In 2004, NOW Environmental ("NOW") purchased the assets of Nowicki and assumed the contract at issue in this case. CP 61. The District entered into later contracts with NOW in its own right, the relevant provisions of which were identical to the previous Nowicki contracts. In this brief, Appellant will distinguish between Nowicki and NOW where relevant to the issues on appeal.

against the District particularly contravenes Washington law and the legislative scheme governing public contracting. The court's order awarding fees against the District should be reversed, and Nowicki and NOW's claims against the District dismissed.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in awarding attorneys' fees against the District under RCW 39.04.240. CP 459-60, CP 761-774.
2. The trial court erred in denying the District's Motion to Dismiss and Motion for Summary Judgment on Nowicki and NOW's Third Party and Fourth Party Claims. CP 64-65, 1968-70.
3. The trial court erred in granting summary judgment to Nowicki and ruling that the hold harmless provision in the District-Nowicki contract does not apply to economic losses. CP 459-60.
4. The trial court erred in entering judgment against the District on October 30, 2009 in the amount of \$177,079 in attorneys' fees for Nowicki and \$58,283.75 in attorneys' fees for NOW. CP 761-774.

B. Issues Pertaining to Assignments of Error

1. Whether the trial court erred in awarding attorneys' fees against the District under RCW 39.04.240 where the action did not arise

out of a “public works contract” and the District was not a party to the adjudicated claims? (Assignment of Error 1)

2. Whether the trial court erred in awarding attorneys’ fees against the District where the District’s cause of action against Nowicki had been validly assigned to EEI, and EEI assumed all of the District’s rights and liabilities in relation to the District’s contract with Nowicki and NOW? (Assignments of Error 1-4)
3. Whether the trial court erred in awarding attorneys’ fees against the District when Nowicki and NOW did not “prevail” under RCW 39.04.240, because no claims against the District were adjudicated and third and fourth party plaintiffs Nowicki and NOW failed to make a timely offer of settlement? (Assignment of Error 1)
4. Whether in granting summary judgment to Nowicki the trial court erred in ruling that the hold harmless provision of the District-Nowicki contract was limited to economic losses? (Assignment of Error 3)
5. Whether the trial court erred in denying the District’s Motion to Dismiss and Motion for Summary Judgment relating to Nowicki and NOW’s third and fourth party indemnity claims where the District-Nowicki contract precluded any indemnity obligation on the part of the District? (Assignments of Error 2, 4)

6. Whether the trial court erred in awarding fees to Nowicki and NOW where the fees were not segregated and assessed for duplicative and unnecessary work? (Assignment of Error 3)

III. STATEMENT OF CASE

This case began with a dispute between EEI and Nowicki/NOW over the adequacy of plans and specifications that Nowicki/NOW prepared for the District. CP 1-8. Nowicki was hired by the District to provide engineering consulting services as a part of the renovation of Foss High School. CP 231-233. EEI was hired as an asbestos abatement subcontractor on the Project, but had no contract with the District itself. The core of the dispute between Nowicki and EEI concerned the adequacy of the plans and specifications prepared by Nowicki relating to the Project and whether the alleged inadequacies in Nowicki's work caused EEI to incur additional costs. CP 1-8. The District had no part in the merits of this dispute between Nowicki and EEI. CP 1-8.

Though only the District and Nowicki/NOW are parties to this appeal, the action below centered on EEI's claims against Nowicki/NOW. EEI sued Nowicki and NOW on claims arising out of Nowicki's and NOW's contracts with the District, but was unsuccessful in prosecuting its case. CP 457-460. Nowicki/NOW impleaded the District in an attempt to recover its attorneys' fees, yet the trial court never determined any of the

claims asserted against the District. CP 807-816; RP, 10/30/09, at 28-29. Though the District was only marginally involved in the litigation below, the trial court ordered the District jointly and severally liable for the attorneys' fees Nowicki and NOW incurred in defending against EEI's claims. CP 460, 769. The District seeks reversal of the fee order, as well as the dismissal of the impleader claims.

A. The District Contracts with Nowicki for Professional Services Relating to the Foss High School Modernization Project

Commencing in July 2002, Nowicki entered into a series of contracts with the District to provide professional engineering consulting services relating to the Project. *See* CP 231-233. The contract between Nowicki and the District was awarded pursuant to the District's authority to enter into professional services contracts for engineering services under chapter 39.80 RCW. *See* CP 1695-98. As such, the contract was not competitively bid. *See* RCW 39.80.050 (agencies shall negotiate contracts). Under the contract, Nowicki performed certain inspection, design and monitoring work related to the asbestos and hazardous materials aspects of the Project. CP 232. Nowicki's contract with the District required Nowicki to hold the District harmless for **all claims or**

liabilities of any nature arising out of Nowicki's negligent acts or omissions. CP 232.²

According to EEI's complaint against Nowicki, a component of Nowicki's work included the preparation of the plans and specifications for the removal of asbestos at the high school. CP 2. Nowicki also prepared an asbestos survey, which purported to represent the location and quantities of hazardous materials present at the Project site. CP 2. Nowicki's specifications and survey were included in the District's request for bids that was sent to potential asbestos abatement subcontractors for the Project CP 2. EEI bid on that work, and was awarded a subcontract by Garco, the District's general contractor. CP 2.

B. EEI's Recovery Action

After beginning work, EEI allegedly encountered more hazardous material than was indicated in the specifications. CP 2, 227-28. EEI claimed that Nowicki's plans and specifications were "severely inaccurate" and resulted in an underestimation of the amount of asbestos in the building. CP 2. As a result, EEI claimed to have incurred \$800,000

² The Hold Harmless provision provides in full: "The Contractor/Consultant shall hold the District, and its officers, agents and employees harmless from all suits, claims, or liabilities of any nature, including cost and expenses for or on account of the injuries or damages sustained by any person or property resulting in whole or in part from negligent activities or omissions of the Consultant/Contractor, its agents, or employees pursuant to this Agreement. The Consultant/Contractor is not obligated to indemnify the District in any manner whatsoever for the District's own negligence. The Consultant/Contractor and the District agree that the indemnities set forth in this section shall survive and shall be enforceable beyond the termination or completion date of this Agreement." CP 232.

of additional costs to complete the Project. CP 229. EEI sued Garco and the District in Pierce County Superior Court to recover the additional costs. CP 3. On November 1, 2006, EEI, Garco and the District entered into a settlement agreement, whereby the District paid EEI \$165,000 for the damages allegedly attributable to additional asbestos abatement work. CP 86.

As a part of the settlement, the District assigned to EEI any rights the District had against Nowicki arising out of the inadequate plans and specifications. CP 88-89. The assignment clause provided in full:

The District shall assign to EEI all of its rights against Nowicki related to Nowicki's performance on the Project. EEI shall have the right, but not the requirement, to assert such claims at its own expense and shall have the right to retain all recovery from such claims. The District warrants that it will hold EEI harmless for any unpaid or owed amounts, if any, due Nowicki pursuant to its current contract with the District. EEI will hold the District harmless from any expense or liability associated with the prosecution of its claims against Nowicki.

CP 88-89.

C. EEI Brings This Case Against Nowicki and NOW

EEI then filed suit against Nowicki and its successor in interest, NOW, based on the allegedly inadequate specifications. CP 1 – 8. EEI also asserted claims based on the District's contract with Nowicki. CP 4. Specifically, EEI claimed it was entitled to recover from Nowicki on the basis of express contractual indemnity, all costs and expenses incurred by

the District in connection with all amounts paid by or on behalf of the District in settlement of EEI's claims in the prior litigation. CP 4. EEI also asserted entitlement to these costs on the basis of implied in fact/common law indemnity, based on an asserted "special relationship" between the District and Nowicki, and based on a contribution theory. CP 5-6. Likewise, EEI asserted that Nowicki had breached its contract with the District by preparing deficient plans and designs for the Project. CP 6. Finally, EEI asserted entitlement to attorneys' fees against Nowicki and NOW pursuant to RCW 39.04.240 and RCW 4.84.250 -.280. CP 6. The District was not a party to EEI's lawsuit against Nowicki. CP 1.

On September 17, 2007, Nowicki filed a third party complaint against the District, alleging entitlement to attorneys' fees incurred in defending EEI's action based on three legal theories: 1) "implied contract indemnification; 2) "expressed contract entitlement to indemnification by contract;" and 3) "implied indemnification." CP 814-815. On December 18, 2007, NOW filed a "Fourth Party Complaint" asserting similar claims against the District, based on theories of equitable indemnity, implied indemnity and "covenant of good faith." CP 61-62. Neither NOW nor Nowicki claimed entitlement to attorneys' fees against the District under RCW 39.04.240. *See* CP 814, 61.

On November 5, 2007, the District moved to dismiss Nowicki and NOW's third and fourth party claims, which the trial court granted in part, dismissing Nowicki's second cause of action for express contractual indemnification. CP 1921, 65. The District argued that the "hold harmless" provision in the District-Nowicki contract provided only "one-way" indemnification rights—specifically, the contract did not require the District to indemnify Nowicki, rather the provision required Nowicki to indemnify the District. *See* CP 1921-35. The trial court denied the District's motion relating to the implied indemnity claims, which the court denominated as the "good faith" and "special relationship" claims. CP 65. On June 18, 2008, the District moved for summary judgment on the two remaining third/fourth party indemnity claims, but the trial court denied the District's motion without elaboration.³ CP 1936-49, 1968-70.

Nowicki/NOW and EEI then engaged in extensive motions practice, including motions to compel discovery, three motions for summary judgment and motions in limine. Nowicki and NOW's first two motions for summary judgment were denied and Nowicki's third motion

³ The District's motion was heard by Judge Larkin, the presiding judge, because the assigned Judge, Judge Fleming was ill. At the same hearing, Nowicki and NOW's first motions for summary judgment were also heard by Judge Larkin and also denied. CP 1971; *see* RP, September 18, 2009, at 8-9.

was granted with respect to EEI's claims.⁴ CP 458-60. There were never any rulings in favor of Nowicki or NOW on the indemnity claims against the District.

On July 31, 2009, concurrent with the filing of its *third* motion for summary judgment against EEI, Nowicki moved to amend its third party complaint to add a claim for attorneys' fees under RCW 39.04.240 against the District. CP 272-78. On September 3, 2009, NOW filed a short motion joining in Nowicki's request and "incorporating by reference" Nowicki's fee arguments. CP 423. The District opposed Nowicki and NOW's motions and argued that neither were entitled to attorneys' fees under the statute or under Nowicki and NOW's remaining implied indemnity claims. CP 698-707.

D. The Court Orders the District Liable for Nowicki and NOW's fees incurred against EEI

On September 18, 2009, the trial court granted Nowicki's third motion for summary judgment against EEI. CP 457-60. The court ruled that 1) EEI, as assignee, was barred from claiming a right to indemnification under the hold harmless provision in the District-Nowicki contract because the provision was limited to claims of damage to persons or property and did not apply to economic losses; and 2) EEI, as assignee

⁴ The trial court denied Nowicki's first and second motions for summary judgment on July 18, 2008 and May 8, 2009 respectively. CP 1971, 268.

of the District's cause of action, could not recover the money paid out in settlement of the earlier suit because the District had been under no legal obligation to settle EEI's claims. CP 458-59. In supporting the latter point, the court found that EEI understood the scope of work required by the District's specifications and yet excluded out of its bid the removal of all asbestos, and after being terminated by the District, EEI submitted a claim for extra work that did not comply with the District's claim dispute process. CP 459. The Court made no findings regarding the District's liability on Nowicki's or NOW's third or fourth party claims. CP 458-60. Even though the District was not the subject of Nowicki's third motion for summary judgment, the court awarded attorneys' fees against both EEI and the District under RCW 39.04.240. CP 460.

At the subsequent fee hearing, the trial court entered an order holding EEI and the District jointly and severally liable for \$177,079 in fees for Nowicki and \$58,283.75 for NOW. CP 761-70. At the request of counsel for the District, the trial court acknowledged that Nowicki's and NOW's third and fourth party indemnity claims against the District had never been adjudicated. RP October 30, 2009, at 28-29. In response, counsel for Nowicki and NOW agreed to voluntarily dismiss those claims. *Id.* at 29-31.

The trial court's rationale for entering judgment against the District is unclear. The orders do not make any findings against the District, and the hearing transcript indicates Nowicki and NOW's intention to voluntarily dismiss their third and fourth party claims against the District.

Mr. Franklin (counsel for the District): We don't have any claims against Nowicki or NOW. So my question is, is [Nowicki] saying... they are going to dismiss the third-party claims? ... I have the same question as to [NOW] as to the third – the fourth party claims, because if those are going to be pursued, then I'd like to get them on the calendar. If they are not going to be pursued, I would like to have them addressed.

Mr. Hudson (counsel for Nowicki): I'm saying that if the court signs the order, the third-party claims that we would have for re-do of attorneys' fees under a different doctrine are moot.

Mr. Bristol (counsel for NOW): Right.

Mr. Hudson: If you are asking me to do a dismissal of that, I would certainly consider that, if that makes you feel better.

Mr. Franklin: It is not a matter of making me feel better, your Honor. To the degree that the proposed order from Nowicki is different than today's order by the Court, then I would ask those provisions be stricken. So if what Mr. Hudson –

The Court: He is willing to do that, is what he is saying.

Mr. Franklin: Okay.

Mr. Bristol: And NOW Environmental will do the same thing. It is just moot. It is just an alternate theory. The issues have already been adjudicated under a different theory. So, we are not going to adjudicate the same issues under a separate theory of recovery. So, we dismiss the third and fourth party claims.

The Court: And I think that makes a clean record for somebody else to look at.

RP, October 30, 2009, at 30-31.

In light of the above, the only theory under which the trial court could have awarded fees against the District was RCW 39.04.240. But the court's order did not find that the requirements of RCW 39.04.240 were satisfied (nor could it have, as elaborated below). CP 768. Instead, the fee hearing transcript suggests that the court ordered fees against the District because "the case as a whole" concerned the remodel of Foss High School.

Mr. Franklin (counsel for the District): I'm going to ask for clarification as to the basis on which the award against the District would be made?

The Court: I think because the whole thing arises out of the circumstances that were precipitated by the district.

RP, October 30, 2009, at 27.

The fee order states that "Defendant Nowicki" is the prevailing party, but does not indicate against whom or on what claims. CP 769.

IV. ARGUMENT

There are four independent and alternative grounds on which this Court should reverse the trial court's award of attorneys' fees against the District. First, the court improperly relied upon RCW 39.04.240, a statute applicable to certain public works contracts, even though this case does not concern a "public works contract." Rather, the contracts underlying

this lawsuit are a professional services consulting agreement and a settlement agreement. Second, Nowicki was not a “prevailing party” under RCW 39.04.240. Nowicki and NOW’s third and fourth party claims against the District were never adjudicated and both Nowicki and NOW failed to make the statutorily required offer of settlement. Third, the District had validly assigned any cause of action it might have asserted to EEI. EEI, as assignee, bore both the rights and liabilities of the claims if it chose to assert them. The District did not initiate the action, participate in prosecuting EEI’s claims, or retain any interest in the outcome. If RCW 39.04.240 applies, it can only apply to EEI, the real party in interest in this case. Finally, even if the third and fourth-party indemnity claims had been litigated, Nowicki and NOW could not have prevailed on those claims as a matter of law. There is no right of implied indemnity where it directly contradicts a contractual indemnity provision. As such, the trial court erred in failing to grant the District’s motions to dismiss and for summary judgment regarding Nowicki and NOW’s indemnity claims. The District, therefore, respectfully requests that this Court reverse the fee award against the District and dismiss Nowicki and NOW’s third and fourth party indemnity claims.

A. Standard of Review

A trial court's determination as to whether a particular statutory or contractual provision authorizes an award of attorney fees is reviewed de novo. *Gray v. Pierce County Housing Authority*, 123 Wn. App. 744, 760, 97 P.3d 26 (2004). When reviewing an award of attorney fees, the relevant inquiry is first, whether there is a legal entitlement to attorney fees, and second, whether the award of fees is reasonable. *North Coast Electric Co. v. Selig*, 136 Wn. App. 636, 642-43, 151 P.3d 211 (2007). "Whether a party is entitled to attorney fees is an issue of law, which is reviewed de novo. Whether the amount of fees awarded was reasonable is reviewed for an abuse of discretion." *Id.*

B. The Trial Court's Award of Fees Against the District Is Contrary To Both The Plain Language And The Policy of RCW 39.04.240.

The trial court erred by holding the District jointly and severally liable for attorneys' fees under RCW 39.04.240 because the elements of the statute were not met. RCW 39.04.240 is a fee-shifting statute, meant to "encourage settlements" and the pursuit of meritorious cases by public agencies and private parties. WA H.R. Rep. ESB 6407, at 2, March 5, 1992. It applies the provisions of the small claims attorneys' fees statutes, RCW 4.84.250-.280, to actions arising out of public works contracts in

which a public entity is a party. *See Absher Construction Co. v. Kent School Dist. No. 415*, 77 Wn. App. 137, 148, 890 P.2d 1071 (1995).

If, however, the requirements on the face of the statute are not met, it cannot be applied to shift fees. Here, the trial court did not follow the statutory requirements and erred in applying RCW 39.04.240 to the District because the contracts at issue were not public works contracts as defined in the statute. Moreover, the District was not a “party” to the adjudicated claims, another express statutory requirement. Further, neither Nowicki nor NOW “prevailed” as the statute requires. Finally, even if the plain language did not preclude relief, the history and policy behind the statute do not support awarding fees against the District in this case.

1. RCW 39.04.240 Does Not Apply Because The Contracts At Issue Are Not Public Works Contracts As Defined In The Statute And The District Was Not A Party To The Case.

The plain language of RCW 39.04.240 requires both a public works contract and the presence of a public body in the action before fees may be awarded. RCW 39.04.240 provides:

(1) The provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a **public works contract** in which the state or a municipality, or other public body that contracts for public works, is a party, except that: (a) The maximum dollar limitation in RCW 4.84.250 shall not apply; and (b) in applying RCW 4.84.280, the time period

for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.

2) The rights provided for under this section may not be waived by the **parties to a public works contract** that is entered into on or after June 11, 1992, and a provision in such a contract that provides for waiver of these rights is void as against public policy. However, this subsection shall not be construed as prohibiting the parties from mutually agreeing to a clause in a public works contract that requires submission of a dispute arising under the contract to arbitration.

RCW 39.04.240 (emphasis added).

The goal of statutory interpretation is to discern and implement the legislature's intent. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). In interpreting a statute, courts look first to the plain language. *Id.* If the plain language of the statute is unambiguous, then the court's inquiry is at an end. *Id.* The statute is to be enforced in accordance with its plain meaning. *Id.* Likewise, where a term is defined in a statute, courts must use that definition. *United States v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 999 (2005).

Here, the statute's plain meaning precluded relief. Neither of the two contracts underlying EEI's claims against Nowicki was a public works contract as defined in the statute. A public works contract is "a contract in writing for the execution of public work for a fixed or determinable amount duly awarded after advertisement and competitive

bid, or a contract awarded under the small works roster process in RCW 39.04.155.” RCW 39.04.010(2). Because the statute defines “public works contract”, this Court is required to use the statutory definition. *See Hoffman*, 154 Wn.2d at 741. The District-Nowicki contract was a professional services contract for engineering consulting services, awarded pursuant to chapter 39.80 RCW, not under RCW 39.04.010 or .155. *See CP 1694-98*. Likewise, the District-EEI contract was a settlement agreement, assigning to EEI the District’s rights against Nowicki (which again, did not arise out of a public works contract). CP 86-91.

The plain language of section .240(2) further establishes that a public works contract is a necessary prerequisite to award attorneys’ fees. Section two mandates that “**parties to a public works contract**” cannot waive the attorneys’ fees obligation through the terms of a public works contract. Again, focusing on the contract, the statute provides that “a provision **in such a contract** that provides for waiver of these rights is void as against public policy.” RCW 39.04.240(2).

RCW 39.04.240 is further limited by the requirement that the public body be a *party to the action* in which the fees are incurred. *See Absher Construction*, 77 Wn. App. at 148 (emphasizing that provisions apply to *an action* arising out of a public works contract). The District was not a party to the underlying dispute between Nowicki, NOW and

EEl. The District did not sue to enforce its rights, nor was it involved in the suit “defending its position.” *See* WA H.R. Rep. ESB 6407, at 2, March 5, 1992. Rather, Nowicki and NOW only joined the District as a third/fourth party defendant in an attempt to recover attorneys’ fees. CP 807-16, 58-63.

This kind of end-run around the “party” requirement cannot be squared with RCW 39.04.240. Under the trial court’s application of the statute, the public could be liable for attorneys’ fees in *any* dispute between a contractor and a subcontractor working on a public project, even when it did not involve a public works contract as defined, and the public entity had no means of controlling or settling the litigation at issue. Private parties could (and would) simply add a public body via a third party action in order to recoup their attorneys’ fees. If the statutory requirements that there be a public works contract and that the public body be a “party” to the action could be defeated so easily, then the limitations in the statute are illusory.⁵

⁵ Furthermore, even if the District could properly be considered a “party” to this action, it was not a party to any of the adjudicated claims. In fact, as detailed further below, the only claims against the District were dismissed by the court or abandoned by the Plaintiffs. CP 64-65, RP October 30, 2009 at 30-31. While the District was nominally a party to the case by virtue of Nowicki and NOW’s third and fourth party complaints, no findings were ever entered regarding the District’s liability. Because the District had assigned its rights against Nowicki to EEl, the District had no interest in the outcome of the EEl-Nowicki/NOW dispute. *See* Part B.2.a and Part C, *infra*.

2. The Statute Does Not Apply Because Nowicki and NOW Are Not Prevailing Parties Against The District

Even if this Court concludes that the above elements of RCW 39.04.240 are satisfied, Nowicki and NOW are still not entitled to attorneys' fees as a matter of law. Neither party meets the statutory definition of "prevailing party" required for a fee award.

As explained above, RCW 39.04.240 makes RCW 4.84.250-.280 applicable in actions involving public works contracts. RCW 39.04.240(1). Under RCW 4.84.250, attorneys' fees are awarded only to the "prevailing party." A plaintiff "shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff...." RCW 4.84.260. Conversely, a defendant is a prevailing party under the statute when the plaintiff recovers nothing, or less than a settlement offer made by the defendant.⁶ RCW 4.84.270. Settlement offers must be made at least 30 and no more than 120 days after service of the complaint. RCW 39.04.240. A settlement offer is a pre-requisite to recovery, unless a plaintiff recovers nothing. *Hertz v. Riebe*, 86 Wn. App. 102, 107, 936 P.2d 24 (1997). A prevailing plaintiff who fails to make a settlement offer within the statutory timeline cannot recover fees. *Id.*

⁶ Here, Nowicki and NOW were plaintiffs in their claims against the District. The District was a defendant. *See* CP 807, 59.

Here, Nowicki and NOW are not entitled to attorneys' fees because they did not prevail on their claims against the District. Even if they had prevailed, they did not make the required offers of settlement.

a. Nowicki and NOW Are Not Prevailing Plaintiffs Against The District Because Their Claims Were Never Adjudicated.

Nowicki and NOW could not have "prevailed" under RCW 39.04.240, because their underlying claims against the District were never adjudicated. Though the trial court acknowledged that Nowicki and NOW's third and fourth party claims were never resolved, it nonetheless ordered attorneys' fees against the District under RCW 39.04.240. RP October 30, 2009 at 29-30.

E EI filed suit against Nowicki in March 2007, but the District was not joined as a Defendant until September 2007 when Nowicki filed its third party complaint. CP 807. In its complaint, Nowicki sought attorneys' fees from the District under three different indemnity-based causes of action. CP 807- 816. In December 2007, the trial court dismissed one of Nowicki's claims against the District for failure to state a claim. CP 64-65. The remaining two indemnity claims were never tried or adjudicated in any respect. Though Nowicki filed *three* motions for summary judgment against EEI, there were never any rulings on

Nowicki's or NOW's third and fourth party claims against the District.

See CP 1971, 268, 458-60.

Likewise, NOW filed its fourth party complaint against the District in December 2007, alleging two indemnity-based causes of action mirroring Nowicki's surviving claims and one "breach of covenant of good faith" claim. CP 61-62. NOW also never prosecuted its claims. Nowicki and NOW waited until July 2009 and September 2009 respectively to attempt to amend their pleadings to add "claims" for attorneys' fees against the District under RCW 39.04.240. CP 272-78, 423. Though the trial court never expressly granted their motions to amend, the court invoked the statute in its fee award against the District and EEI. CP 761-70.

The party seeking fees under RCW 39.04.240 must have "prevailed." *Basin Paving Co. v. Mike M. Johnson, Inc.*, 107 Wn. App. 61, 68, 27 P.3d 609 (2001) (non-prevailing party not entitled to attorneys' fees). Though Nowicki and NOW successfully defended EEI's claims against them, they are not "prevailing parties" on their unadjudicated third and fourth party claims against the District. Nowicki and NOW prevailed as *defendants* against EEI's claims, but abandoned the indemnity claims they brought as *plaintiffs* against the District. *See* RP, October 30, 2009, at 30-31. While there are some instances in which a voluntary dismissal

can render the *defendant* a prevailing party, a *plaintiff* cannot achieve prevailing party status by dismissing its own claims. Compare *Cork Insulation Sales Co. v. Torgeson*, 54 Wn. App. 702, 706, 775 P.2d 970 (1989) (voluntary non-suit does not trigger fee statute because no judgment was entered) with *Beckman v. Wilcox*, 96 Wn. App. 355, 361, 979 P.2d 890 (1999) (fees awarded to condemnee in condemnation action under RCW 8.24.030 even though action voluntarily dismissed); see also *Toste v. Durham & Bates Agencies*, 116 Wn. App. 516, 524, 67 P.3d 506 (2003) (settling defendant could not “prevail” on unlitigated claim).

Nowicki and NOW cannot be the “prevailing parties” on claims they never prosecuted. Without prevailing party status, RCW 39.04.240 does not allow a fee award.

b. Nowicki and NOW Are Not Prevailing Plaintiffs Against The District Because They Did Not Make A Settlement Offer.

Even if Nowicki and NOW had prevailed on their claims against the District (which they did not), they would still not be eligible for attorneys’ fees under RCW 39.04.240. Nowicki and NOW were *plaintiffs* in their case against the District, so were obligated by the plain language of the statute to tender a settlement offer to the District in order to be eligible for fees. RCW 39.04.240 incorporates the definitions of “prevailing plaintiff” and “prevailing defendant” from RCW 4.84.260 and

.270. “Both require offers of settlement unless the plaintiff recovers nothing.” *Hertz*, 86 Wn. App. at 107.

A prevailing plaintiff is required to make an offer of settlement in order to be eligible for attorneys’ fees. *In re matter of the 1992 Honda Accord*, 117 Wn. App. 510, 524, 71 P.3d 226 (2003) (prevailing plaintiff did not make settlement offer and was therefore ineligible for fees under statute); *See also In re Estate of Tosh*, 83 Wn. App. 158, 165, 920 P.2d 1230 (1996) (citing *Kingston Lumber Supply Co. v. High Tech Dev., Inc.*, 52 Wn. App. 864, 867-68, 765 P.2d 27 (1988)). Likewise, a prevailing plaintiff who fails to make a settlement offer within the statutory timeline cannot recover fees. *Basin Paving Co. v. Contractors Bonding and Ins. Co.*, 123 Wn. App. 410, 415, 98 P.3d 109 (2004) (prevailing plaintiff city was not entitled to fees under RCW 39.04.240 where settlement offer untimely).

Counsel for Nowicki expressly acknowledged this distinction at the fee hearing. RP October 30, 2009 at 7 (“[P]laintiffs are treated differently.... They are required, if they’re going to come under the statute, to submit an offer, according to the guidelines. So, the defendants, in the way the laws are set up, are treated just slightly different in this one sentence than the plaintiffs are treated.”) Likewise, the court acknowledged that the District was in the case solely as a Defendant. *Id.*

at 30 (“Mr. Franklin: Your Honor, we’re the defendant. The Court: I know.”)

EEI and the District occupied dramatically different positions in the litigation. EEI affirmatively brought claims against Nowicki and NOW. CP 1-8. Nowicki and NOW prevailed against EEI, and EEI recovered nothing. CP 458-60. As such, if the statute applied, Nowicki and NOW were potentially “prevailing defendants” in their dispute with EEI. *See* RCW 4.84.270; *Lowery v. Nelson*, 43 Wn. App. 747, 752, 719 P.2d 594 (1986) (Where a *plaintiff* recovers nothing, prevailing defendant entitled to attorneys’ fees). The District, however, was a *defendant* who was never given a settlement offer and against whom no claims were adjudicated. CP 764, 608. There is no reading of the language of the statute that would support a fee award in this instance. In sum, the trial court’s order should be reversed because based on the plain language, none of the statutory requirements were met.

3. The History and Policy of RCW 39.04.240 Do Not Support An Award of Fees Against the District In This Case.

In addition to the plain language, the legislative history and policy behind the statute compel reversal of the fee award.

Through the numerous statutes governing public works, the Legislature has established a category of public contracts that are subject

to the additional procedural safeguards of advertising and competitive bidding found in RCW 39.04.010 and .155. These are the contracts covered by the attorneys' fees provision in RCW 39.04.240. The Legislature chose not to extend those same safeguards to *all* contracts concerning public bodies. As relevant here, architectural and engineering contracts awarded under chapter 39.80 RCW (like the District-Nowicki contract) are not subject to the same requirements as public works contracts, nor are they covered by RCW 39.04.240. Consistent with this legislative scheme, not every public works project requires a "public works contract". Indeed, there are some "public works" in which a public body is not even directly involved. *See City of Spokane v. State*, 100 Wn. App. 805, 814-15, 998 P.2d 913 (2000).

The definition of a *public works project* is much broader than that of a public works *contract*. Just as not every contract relating to a public works project is subject to advertising and competitive bid, not every public project will trigger the attorneys' fees requirements of RCW 39.04.240. *See Supporters of the Center v. Moore*, 119 Wn. App. 352, 359-60, 80 P.3d 618 (2003) (distinguishing public works project subject to prevailing wage law from narrower requirements of public works contracts involving competitive bidding). Only actions arising out of a

public works **contract** as defined in the statute can trigger the fee shifting statute.

This limitation is also consistent with the history of the statute, which was passed to encourage municipalities to pursue meritorious cases, to encourage settlements and “to ease the financial burden on either the contractor or the public owner if they have to sue for their rights or defend their position.” *See* WA S. Rep. ESB 6407, February 18, 1992; WA H.R. Rep. ESB 6407, at 2, March 5, 1992. Awarding fees against the District in this instance would discourage settlements involving public entities. Settlements such as the District-EEI agreement would be impossible because the District would incur potential liability for claims it had validly assigned to a third party, and over which it held no further control. The legislative intent of RCW 39.04.240 is not served by allowing private parties to implead a public body solely for the purpose of securing attorneys’ fees.

In sum, the District’s contract with Nowicki was a professional services consulting agreement awarded under chapter 39.80 RCW, not a public works contract. The assignment of the District’s cause of action to EEI did not change the nature of that contract into a public works contract under the statute. RCW 39.04.240 does not apply to either contract. The statute does not impose a free-floating duty on a public entity to pay

attorneys' fees any time a dispute arises out of a public works *project*. Rather, the statute is specific that the duty arises out of the competitively bid public works *contract* where a public entity is a party to the dispute. Moreover, Nowicki and NOW did not prevail on their claims against the District and did not make the statutorily required offer of settlement. The trial court erred when it awarded fees against the District and EEI under the statute.

C. The District Cannot Be Liable for Attorneys' Fees on Claims Assigned to and Prosecuted By EEI.

For the reasons articulated above, RCW 39.04.240 is inapplicable to this case. Should this Court conclude otherwise, however, the District still cannot be liable for attorneys' fees under the statute. The District properly assigned its cause of action against Nowicki to EEI, and the trial court refused to find the assignment invalid. RP, October 30, 2009, at 28-29; CP 1971. Both settlements and assignments are favored under Washington law. *See Haller v. Wallis*, 89 Wn.2d 539, 544, 573 P.2d 1302 (1978); RCW 4.08.080. Likewise, causes of action and contracts are broadly assignable. *Id.*; *Carlile v. Harbor Homes*, 147 Wn. App. 193, 210, 194 P.3d 280 (2008). A valid assignment transfers both the benefits and burdens of a cause of action and allowing the transfer of less than all applicable rights and liabilities undermines the very concept of

assignability. See *Puget Sound Nat'l Bank v. State*, 123 Wn.2d 284, 290, 868 P.2d 127 (1994).

The trial court's order contradicts these principles. EEI, as an assignee, bore both the rights and liabilities of the District in prosecuting any assigned claims against Nowicki. Awarding fees against the District solely in its capacity as assignor of the cause of action should not be sustained.

1. As Assignee, EEI Assumed Both The Rights And Liabilities Of The District.

A party suing on an assigned cause of action steps into the shoes of the assignor and has all the rights of the assignor, including applicable statutory rights. *Federal Financial Co. v. Gerard*, 90 Wn. App. 169, 177, 949 P.2d 412 (1998). Along with the assigned rights, the assignee takes on the assignor's potential liabilities. *Puget Sound Nat'l Bank v. State*, 123 Wn.2d at 290 (an assignment should transfer both a liability and a benefit). Here, because EEI had the right to bring the action against Nowicki, EEI was entitled to the potential benefits and bore the potential burdens, including the potential liability for Nowicki and NOW's attorneys' fees.

Nowicki's attempt to impose liability against both the District as assignor and EEI as assignee fails as a matter of law. A valid assignment

transfers both the burdens and benefits of a cause of action to the assignee, and relieves the assignor of both. *See Int'l Commercial Collectors, Inc. v. Mazel Co., et al.*, 48 Wn. App. 712, 718 n.5, 740 P.2d 363 (1987) (quoting Restatement (Second) of Contracts § 340 (1979) (“An assignment transfers to the assignee the same right held by the assignor, with its advantages and disadvantages...”)); *see also Washington State Dep't of Revenue v. Security Pacific Bank*, 109 Wn. App. 795, 810-11, 38 P.3d 354 (2002) (Assignee entitled to tax deduction by virtue of assigned loans); *Pacific Northwest Life Ins. Co.*, 51 Wn. App. 692, 701, 754 P.2d 1262 (1988) (Assignee of vendor's interest in real estate subject to purchaser's fraud defense); *Paullus v. Fowler*, 59 Wn.2d 204, 212, 367 P.2d 130 (1961) (Assignees of option to purchase property were bound by terms of option agreement as changed by assignor, even though assignee's copy of agreement did not evidence changes); *see also* 6A C.J.S. Assignment § 112 (“assignor is usually not liable merely because the assignee sustains a loss in connection with the contract assigned”).

By virtue of the assignment, EEI became the real party in interest in the case against Nowicki and NOW. *Estate of Jordan by Jordan v. Hartford Acc. and Indem. Co.*, 120 Wn.2d 490, 495, 844 P.2d 403 (1993) (An assignee's cause of action is direct, not derivative); *see also Amende v. Town of Morton*, 40 Wn.2d 104, 106-07, 241 P.2d 445 (1952) (“If as

between assignor and assignee, the transfer is complete, so that the former is divested of all control and right to the cause of action and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest.”) (internal citation omitted). The transfer gave EEI the “right, but not the requirement, to assert such claims at its own expense and ... the right to retain **all recovery from such claims.**” CP 88-89 (emphasis added). By assigning to EEI the right to receive all the fruits of the District’s claims against Nowicki, the District’s assignment was effective and complete. *See Amende*, 40 Wn.2d at 107. The District did not, and could not, manage EEI’s case against Nowicki, nor interfere in the litigation of EEI’s claims. *See* 6A C.J.S Assignment § 112 (“Any act of dominion by the assignor over the thing assigned, depriving the assignee of title or right to possession, is a conversion for which the assignor may be held liable in tort.”).

Our Supreme Court has recognized that assignments should not be finely parsed between benefits and burdens. In *Puget Sound Nat’l Bank v. State*, 123 Wn.2d 284, the Court held that a bank, as assignee of a sales contract from an auto dealer, was entitled to the same tax refund to which the dealer would have been entitled. The Court reasoned that the assignment of the contracts to the bank bestowed upon the bank all applicable statutory and contractual benefits along with the applicable

liabilities. The Court concluded that allowing the transfer of less than all applicable benefits and burdens would render assignments unworkable.

If this Court permits assignment of certain contractual or statutory rights, while prohibiting others, parties to an assignment will be unable to determine what rights and liabilities transfer in assignment. This dilemma will only breed inconsistencies and uncertainty into the law of assignment. For example, an assignment should generally transfer both a tax liability and a tax benefit.

123 Wn.2d at 290. Accordingly, the bank was entitled to the tax refund that the dealer could have claimed had the dealer not assigned the contracts.

The Supreme Court recently applied this principle in *American Safety Casualty Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 174 P.3d 43 (2007). There, a surety on a performance bond, as assignee of a general contractor's rights under a public works construction project, sued the city to recover money allegedly owed on the contract. The Court held for the city, finding that the surety had not complied with the required claim procedures under the contract. The Court made no distinction between the rights of the contractor and those of the assignee, and instead implicitly held that the notices given to the contractor of the city's intent to require strict compliance with its claim procedures were effective against the surety as assignee. As here, the assignee took the cause of action subject to the defenses applicable against the assignor. The Court also awarded

attorneys' fees against the surety, as assignee, under RCW 39.04.240, and not against the assigning contractor. CP 773.

In the present case, while assignment law **prohibited** the District's involvement in EEI's cause of action, a public body must be a party to the action in order to receive a fee award. RCW 39.04.240(1) (public body must be "party" to the action). This contradiction reveals the error in the trial court's ruling: the District could not be a "party" as required under RCW 39.04.240 while it was simultaneously prohibited from having any involvement in the claims generating the fees.

2. Nowicki/NOW Cited No Legal Authority Supporting the Trial Court's Ruling.

Notably, there was no authority cited below for holding an assignor jointly liable on an assigned cause of action. Nowicki relied heavily on *Nancy's Product Inc. v. Fred Meyer, Inc.*, 61 Wn. App. 645, 652, 811 P.2d 250 (1991), asserting this case supports the theory that an assignor retains liability on an assigned cause of action. CP 473, RP October 30, 2009 at 14-15. This is not the holding of the case. Rather, in *Nancy's Product*, Nancy's was a buyer of salads prepared by Fred Meyer. After Nancy's failed to pay money owed Fred Meyer for the salads, an assignee of Fred Meyer sued Nancy's for the unpaid balance. After Nancy's lost that case, it later brought suit against Fred Meyer alleging

damages caused by the negligent preparation and storage of its salads. Noting the difference between the two causes of action, the Court held that Nancy's claim against Fred Meyer for negligence was not a compulsory counterclaim that was required to be brought in the first action concerning the unpaid account. 61 Wn. App. at 652. Moreover, the court noted that while the claim against Fred Meyer could have been asserted as a defensive setoff, because it was not, the court could not attempt to force satisfaction of the judgment in the first action by setoff of any recovery Nancy's received in the second. *Id.* The case is inapposite and does not support Nowicki's attempt to impose liability on the District for the same claims assigned to EEI.

Nowicki also asserted that failing to levy fees against the District would amount to an improper "waiver" of the District's responsibility for fees under RCW 39.04.240.⁷ RP October 30, 2009 at 27. The trial court made no specific findings of waiver, but implied that honoring the assignment and awarding fees against EEI alone would be tantamount to

⁷ RCW 39.04.240(2) provides "The rights provided for under this section may not be waived by the parties to a public works contract that is entered into on or after June 11, 1992, and a provision in such a contract that provides for waiver of these rights is void as against public policy. However, this subsection shall not be construed as prohibiting the parties from mutually agreeing to a clause in a public works contract that requires submission of a dispute arising under the contract to arbitration."

waiving the statute as applied to the District. *Id.*⁸ To the extent the court reached this conclusion, it was incorrect.

At the outset, the anti-waiver provision found in section two of the statute does not apply here any more than section one of the statute. As explained in part B.1, *supra*, the waiver provision prevents parties to a *public works contract* from agreeing that the attorney fee provisions will not apply. The statute prevents both public entities and hopeful bidders from contracting away the attorneys' fees obligation **in the terms of a public works contract**. RCW 39.04.240(2). By its terms, the waiver provision does not apply where, as here, the contract underlying EEI's lawsuit against Nowicki was a professional services contract to which EEI was not a party, and was not a public works contract under the statute. Likewise, the waiver provision does not apply to the District-EEI settlement, which was not a public works contract.

Moreover, even assuming the statute did apply, the anti-waiver clause works to nullify a "provision of the contract" that seeks to waive the attorneys' fees obligation. RCW 39.04.240(2). A "waiver" is the

⁸ Mr. Franklin (Counsel for the District): I'm going to ask for clarification as to the basis upon which the award against the district would be made?

The Court: I think because the whole thing arises out of the circumstances that were precipitated by the district.

Mr. Bristol (Counsel for Nowicki): And the district can't waive, Nowicki can't waive, that provision. It can't be waived.

The Court: It says right here that can't be waived, in the statute.

RP October 30, 2009 at 27.

intentional and voluntary relinquishment of a known right. *Lester v. Percy*, 58 Wn.2d 501, 503, 364 P.2d 423, 425 (1961). Here, there was no intention or action by either party to relinquish any statutory rights, only to *transfer* those rights from the District to EEI. *See* CP 88-89. RCW 39.04.240 does not prohibit transfer, only waiver. The trial court confirmed this by stating on the record that the assignment was not wrongful or against public policy. RP October 30, 2009 at 29.

As required by the principles of assignment law, any obligation to pay attorneys' fees remained tied to the cause of action that was assigned to EEI. *See American Safety*, 162 Wn.2d at 773 (Assignee (not assignor) of public works contract required to pay attorneys' fees to prevailing city under RCW 39.04.240); *Federal Financial*, 90 Wn. App. at 177 (by virtue of assignment, private party assignee of contract could take advantage of extended statute of limitations usually only available to FDIC). This is evidenced by EEI's pleading RCW 39.04.240 in its suit against Nowicki. Had the assignment agreement meant to waive the attorneys' fees obligation, then EEI could not have pursued it. The assignment validly **transferred** to EEI both the right to seek attorneys' fees from Nowicki and the possibility that EEI would be required to pay Nowicki's fees. Therefore, if the statute applies at all, it applies only against EEI.

In sum, the assignment to EEI of the District's cause of action against Nowicki precludes an award of attorneys' fees against the District under RCW 39.04.240, even if the statute applied. The fee award against the District should be reversed on the additional ground that all rights and liabilities were assigned to EEI.

D. The Trial Court Erred in Denying the District's Motion to Dismiss and Motion for Summary Judgment Regarding the Indemnity Claims.

In addition to reversing the fee award, this Court should reverse the trial court's denial of summary judgment and dismiss Nowicki and NOW's third and fourth party "implied indemnity" claims as a matter of law. Though the trial court never reached the merits of these claims, the proper result was dismissal.

As explained above, Nowicki brought three indemnity claims against the District in its third party complaint. CP 807- 816. The District moved to dismiss the third party claims. CP 1921. With respect to Nowicki's "express indemnity" claim based upon the District-Nowicki contract, the District argued that the hold harmless provision provided only a "one-way" indemnity in favor of the District and there was no obligation under the contract for the District to indemnify Nowicki. CP 1926. The court granted the District's motion in part and dismissed the express indemnity claim. CP 65. Nowicki has not appealed the dismissal.

Nowicki and NOW's remaining "implied indemnity" claims are based upon the implied duty of good faith in the District-Nowicki contract and an alleged "special relationship" between the District and Nowicki. CP 61-62, 814-15. The court's denial of the District's motions to dismiss and for summary judgment on these claims was error. CP 65, 1968-70. The hold harmless provision expressly relieves the District of liability for **all claims** and the trial court erred in interpreting the clause to exclude economic losses. CP 232 (emphasis added). Moreover, Nowicki cannot establish an implied indemnity obligation that is contrary to the express indemnity that runs solely in favor of the District. Likewise, Nowicki fails to establish the elements of implied indemnity based on the District-Nowicki contract or "relationship."

1. The Hold Harmless Provision Indemnifies The District Against All Claims, Including Economic Losses.

In granting summary judgment to Nowicki against EEI, the trial court erred in ruling that the hold harmless provision in the District-Nowicki contract applied only to economic losses. CP 458-59. Indemnification clauses are subject to the fundamental rules of contractual construction, which require "reasonable construction so as to carry out, rather than defeat, the purpose." *Nunez v. American Bldg. Maintenance Co. West*, 144 Wn. App. 345, 350-51, 190 P.3d 56, 58 (2008) (citations

omitted). In construing indemnity clauses, courts must address the intent of the parties to allocate the risk of loss or damages arising out of a contract. *Id.* (quoting *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 520-21, 527 P.2d 1115 (1974)).

The plain language of the District-Nowicki contract demonstrates that the parties intended to allocate the risk of loss or damages arising out of the contract to Nowicki. The hold harmless provision indemnifies the District from the costs of “**all suits, claims, or liabilities of any nature**, including costs and expenses for or on account of the injuries or damages sustained by any person or property resulting in whole or in part from negligent activities or omissions of the Consultant/Contractor, its agents, or employees pursuant to this Agreement.” CP 232 (emphasis added). The trial court confirmed as much by granting the District’s Motion to Dismiss the express indemnity claim. CP 65.

The trial court erroneously ruled, however, that this provision was limited to claims arising out of damage to persons or property and did not cover “economic losses.” CP 768. But it is well-established that the term “include” is construed as a term of enlargement, not as a term of limitation. *See e.g., Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 359, 20 P.3d 921 (2001); *Wheeler v. State Dept. of Licensing*, 86 Wn. App. 83, 88, 936 P.2d 17, 19 (1977) (citing *Queets Band of Indians v.*

State, 102 Wn.2d 1, 4, 682 P.2d 909 (1984)). Moreover, the Supreme Court recently rejected a similar argument attempting to limit an indemnity clause encompassing "all claims" to tortious actions only. *See Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 486-88, 209 P.3d 863 (2009) ("The first paragraph of the clause specifically states that the subcontractor shall indemnify the contractor from *any and all* claims, demands, losses and liabilities....It defies the plain language of the contract to read this provision as restricting such claims to tortious acts.") (emphasis in original).

Accordingly, while the hold harmless provision "includes" damages to persons or property, its coverage is not limited to such claims. Rather, the contract requires Nowicki to indemnify and hold the District harmless from **all suits, claims, or liabilities of any nature**. As such, the District cannot be liable for the attorneys' fees arising out of EEI's suit against Nowicki.

2. The Court Cannot Imply An Indemnity Obligation That Runs Counter To An Express Indemnity Provision.

The District-Nowicki contract requires Nowicki to indemnify the District against all claims. Therefore, the Court cannot imply a contrary indemnity obligation running from the District to Nowicki. Although there may in some instances be a cause of action for "implied contractual

indemnity” or “equitable indemnity,” the right does not arise in every contract or contractual relationship. *Central Washington Refrigeration Inc. v. Barbee*, 133 Wn.2d 509, 514 n.4, 946 P.2d 760 (1997).

It is a generally accepted proposition that where a contract between the parties contains an express indemnity provision, no contradictory or inconsistent indemnity obligation will be implied. 42 C.J.S. Indemnity § 31 (“The law will not imply a right of indemnity where the parties have entered into a written contract with express indemnification provisions.”); *see also Grubb & Ellis Management Servs. v. 407417 B.C., LLC*, 213 Ariz. 83, 89, 138 P.3d 1210 (Ariz. Ct. App. 2007) (“Landlord may not recover on the basis of implied indemnity principles because the parties expressly agreed upon an indemnity provision in their contract.”) (citations omitted).⁹

In granting the District’s Motion to Dismiss, the trial court properly ruled that the hold harmless provision in the District-Nowicki contract required Nowicki to unilaterally indemnify the District, but created no corresponding contractual obligation for the District to

⁹ *See also* 41 Am. Jur. 2d Indemnity § 20 (“The law will not imply a right of indemnity where the parties have entered into a written contract with express indemnification provisions.”); *Delle Donne & Associates v. Millar*, 840 A.2d 1244, 1252 n.12 (Del. 2004) (same); *Hoffman Const. Co. of Alaska v. U.S. Fabrication & Erection*, 32 P.3d 346, 362 (Alaska 2001) (refusing to find implied right to indemnity in opposite direction of one-way express indemnity obligation); *Service Sign Erectors Co., Inc. v. Allied Outdoor Advertising, Inc.*, 175 A.D.2d 761 (N.Y. 1991) (same).

indemnify Nowicki.¹⁰ CP 64-65. Because the parties contemplated and allocated indemnity risks in their contract, the court cannot imply an obligation that runs counter to the express terms of their agreement. As such, the court should have dismissed Nowicki and NOW's implied indemnity claims as a matter of law.

This result is consistent with Washington law on implied obligations. "There cannot be both an express contract and an implied contract relating to the same subject matter and covering all its terms. In such cases, the express contract would supersede the implied one." DEWOLF & ALLEN, 25 WA. Prac. 1:9 (2007) (citing *Caughlan v. Int'l Longshoremen's and Warehousemen's Union*, 52 Wn.2d 656, 328 P.2d 707 (1958)). "Contracts implied-in-fact, like express contracts, must rest upon a manifestation of mutual assent: they will not be implied in terms inconsistent with intentions clearly expressed nor in the face of a conclusive manifestation that no contract was intended." *Caulkins v. Boeing Co.*, 8 Wn. App. 347, 351, 506 P.2d 329 (1973) (quoting *Osborn v. Boeing*, 309 F.2d 99, 102 (9th Cir. 1962)); see also *Willis v. Champlain Cable Corp.*, 109 Wn.2d 747, 756, 748 P.2d 621 (1988) (internal quotation

¹⁰ Indeed, Nowicki conceded in its briefing below that the indemnity provision created a "one-way" indemnity obligation in favor of the District., CP 1951, though erroneously argued that the indemnity was limited to tort claims.

omitted) (collecting cases holding that no obligation can be implied that is inconsistent with the express terms of the contractual relationship).¹¹

Accordingly, any implied indemnity provision in favor of Nowicki would directly contradict the one-way express indemnity right in favor of the District provided in the hold harmless provision. The trial court should have dismissed Nowicki and NOW's implied indemnity claims on this basis.

3. Neither The District-Nowicki Contract Nor the Parties' Relationship Imply A Duty to Indemnify.

While Nowicki's "good faith" and "special relationship" implied indemnity claims fall short because they contravene the express indemnity provision in the contract, these claims also fail on alternative grounds.

Nowicki's "good faith" claim is founded on the allegation that the District's assignment of its rights to EEI violated the implied duty of good faith and as such, creates "an implied contract of indemnification." CP 814. While Washington law recognizes a duty of good faith, "this duty obligates the parties to cooperate with each other so that each may obtain

¹¹ Likewise, the Supreme Court has repeatedly emphasized the importance of holding parties to construction disputes to the express remedies provided in their contracts. *Berschauer/Phillips Construction Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 828, 881 P.2d 986 (1994) ("There is a beneficial effect to society when contractual agreements are enforced and expectancy interests are not frustrated. In cases involving construction disputes, the contracts entered into among the various parties shall govern their expectations. The preservation of the contract represents the most efficient and fair manner in which to limit liability and govern economic expectations in the construction business.")

the full benefit of performance.” *Carlile*, 147 Wn. App. at 215. The duty of good faith does not “inject substantive terms into the parties’ contract.” *Id.* (citing *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991)). Rather, “it requires only that the parties perform in good faith the obligations imposed by their agreement.” *Id.* “The Supreme Court has consistently held there is no ‘free-floating’ duty of good faith and fair dealing that is unattached to an existing contract.” *Id.* at 215-16 (internal quotations omitted). The duty exists only in relation to performance of a specific contract term. *Id.* at 216. There was no specific term in the District-Nowicki contract that prohibited the District’s assignment of claims to EEI. Likewise, there was no showing that the assignment was wrongful or against public policy. *See* RP, October 30, 2009, at 29-30. As such, the covenant of good faith does not imply either an anti-assignment clause or an indemnity clause in favor of Nowicki or NOW. *See Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192, 197, 49 P.3d 912 (2002) (“If no contractual duty exists, there is nothing that must be performed in good faith.”).

Nowicki’s “special relationship” claim is equally deficient. Nowicki alleges only that the alleged relationship “came about as of their contract, and the good faith doctrine implied therein, as well as the working relationship between the two entities, with [Nowicki] providing

information and advice and the District rendering its decisions accordingly.” CP 815.¹² This claim essentially duplicates the meritless contract-based and “good faith” claims. Nowicki alleged no facts regarding the District-Nowicki “relationship” sufficient to establish an implied indemnity claim, and cited no authority to the trial court in support of this claim. *See* CP 815, 1801-02.

“In the context of implied contractual indemnity, the importance of a “special relationship” is whether it permits a factfinder to conclude that the would-be indemnitor has agreed to be responsible for the loss suffered by the indemnitee.” 3 Bruner & O’Connor Construction Law § 10:111. Here, both the nature of the parties’ relationship and the language of the express indemnity provision indicate that the District did not agree to be responsible for *any* losses suffered by Nowicki. Without evidence of the District’s intent to indemnify Nowicki, the simple existence of the District’s contract and its work with Nowicki is insufficient to create an implied indemnity agreement as a matter of law. *See Urban Development Inc. v. Evergreen Building Products, LLC*, 114 Wn. App. 639, 645-46, 59 P.3d 112 (2003) (contractual relationship insufficient to imply indemnity agreement); *Donald B. Murphy Contractors*, 112 Wn. App. at 198 (County’s promise to procure builder’s risk insurance insufficient to

¹² NOW’s “special relationship” claim is identical. CP 61.

establish implied indemnity claim). Though Nowicki claimed that the District “denied alleged problems as to [Nowicki’s] performance,” CP 814, the Supreme Court has held that “praise of one’s work product and statements that a party does not intend to file a lawsuit against another party, do not alone or in combination equal an affirmative promise to not file a lawsuit.” *Berschauer/Phillips Construction*, 124 Wn.2d at 832.¹³

The District and Nowicki/NOW were parties to an arms-length contract. Neither the implied duty of good faith nor the parties’ general business relationship can imply an indemnity agreement that contravenes the contract itself. The implied indemnity claims should have been dismissed along with the express indemnity claim.

E. The Fee Award Was Improper

To the extent any fee award was justified, and the District disputes that it was, the trial court abused its discretion in awarding 100% of the fees incurred to Nowicki and NOW where Nowicki and NOW failed to segregate work for duplicative and unsuccessful claims. Attorneys’ fees should be awarded only for those services related to the cause of action that allows for fees. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 66, 738 P.2d 665 (1987) (citing *Nordstrom Inc. v. Tampourlos*, 107 Wn.2d

¹³ In analogous circumstances, the Supreme Court rejected a contractor’s claim that a school district was equitably estopped from assigning its breach of contract action where it had engaged in a joint defense agreement with the contractor and had previously praised the contractor’s work. *Berschauer/Phillips Construction*, 124 Wn.2d at 832.

735, 743, 733 P.2d 208 (1987)). Where a party prevails on only some of its claims, courts generally limit a party's recovery to those fees attributable to the claims upon which the party prevailed. *Deep Water Brewing LLC v. Fairway Resources, Ltd.*, 152 Wn. App. 229, 282, 215 P.3d 990 (2009) (citing *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 502, 859 P.2d 26, 865 P.2d 507 (1993)).

Nowicki prevailed on four of six of the claims asserted between EEI and Nowicki, but on none of its counterclaims and none of its claims against the District. *See* CP 731-734 (chart indicating adjudicated claims). Moreover, a substantial amount of Nowicki's time entries are connected with preparing, researching and arguing various *unsuccessful* motions for summary judgment. Nowicki filed two lengthy motions for summary judgment, both of which were denied by the court.¹⁴ Nonetheless, the court granted Nowicki's entire fee request. CP 761-70. Similarly, NOW's fee request is based entirely on fees incurred for unadjudicated claims, unsuccessful motions or duplicative work done by Nowicki. *See e.g.*, CP 621-22; 632-33 (work concerning Nowicki's Second Motion for Summary Judgment); CP 632-33 (unsuccessful motion for summary judgment); CP 646-652 (unsuccessful motion for discretionary review). To the extent

¹⁴ The "memorandum" submitted in support of Nowicki's first motion for summary judgment was 357 pages long, while the memorandum in support of the second motion for summary judgment was 943 pages. Both were denied by the trial court without elaboration. CP 1971, 268.

fees are allowed at all, the court abused its discretion in granting these blanket fee awards without holding Nowicki and NOW to their burden of segregating fees incurred for duplicative and unsuccessful work. *See Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 672-73, 880 P.2d 988 (1994). The fee awards are unreasonable and should be reversed for this reason as well.

F. The District is Entitled To Attorneys' Fees.

Pursuant to RAP 18.1, RCW 39.04.240, and RCW 4.84.330, the District requests its attorneys' fees incurred in the trial court action and on appeal. The District is entitled to attorneys' fees on the basis of its contract with Nowicki, which holds the District harmless from **all** suits, claims, or liabilities of any nature.

Moreover, the District is entitled to fees under RCW 39.04.240. Nowicki sued the District alleging entitlement to fees under the statute as a prevailing party. Should this Court reverse the trial court, the District will be the prevailing party and entitled to attorneys' fees for successfully defending against Nowicki's claims.

Finally, RCW 4.84.330 provides a third basis for an award of attorneys' fees to the District. Nowicki/NOW sued on its contract with the District, claiming that the contract created an implied right to attorneys' fees by virtue of the parties' relationship and the covenant of good faith.

CP 814. Nowicki also claimed that the hold harmless provision in the contract expressly entitled it to attorneys' fees. CP 815. Though the District disputes each of these allegations, if the District is successful in defending against Nowicki's suit, it is entitled to the attorneys' fees that Nowicki alleges the contract provides.

RCW 4.84.330 creates a right to attorneys' fees in a defendant who successfully defends against a contract claim where a plaintiff alleges a right to fees, even where the defendant proves that no such right exists. *Herzog Aluminum v. General American Window Corp.*, 39 Wn. App. 188, 197, 692 P.2d 867 (1984) ("The broad language 'in any action on a contract' found in RCW 4.84.330 encompasses any action in which it is alleged that a person is liable on a contract."); *Yuan v. Chow*, 96 Wn. App. 909, 916-17, 982 P.2d 647 (1999) (applying *Herzog* to award attorneys' fees to defendant allegedly liable on promissory note).

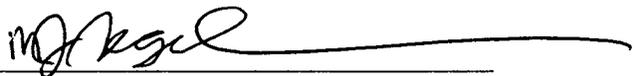
Here, Nowicki and NOW alleged the District's liability for attorneys' fees based on numerous grounds arising out of the District-Nowicki contract, and were ultimately awarded attorneys' fees under RCW 39.04.240. Based on *Herzog* and the decisions of this Court adopting it, should the District prevail on appeal, the District should be entitled to both its trial and appellate attorneys' fees.

V. CONCLUSION

The purpose of RCW 39.04.240 is to encourage settlements between parties to public works contracts, but the trial court's ruling here encourages the opposite. By holding the District liable for attorneys' fees generated in a dispute between private parties, the trial court's order contradicts RCW 39.04.240, and well-established principles of assignment and contract law. Public entities must be able to use the favored tools of settlement and assignment to resolve disputes without serving as guarantors for private parties who choose to pursue validly assigned claims. The trial court should be reversed, and all claims against the District dismissed.

DATED this 22nd day of April, 2010.

K&L GATES LLP

By 

Matthew J. Segal, WSBA # 29797

Kymerly K. Evanson, WSBA # 39973

Attorneys for Appellant

Tacoma School District No. 10

APPENDIX

C

West's Revised Code of Washington Annotated Currentness

Title 39. Public Contracts and Indebtedness (Refs & Annos)

Chapter 39.04. Public Works (Refs & Annos)

→ **39.04.240. Public works contracts--Awarding of attorneys' fees**

(1) The provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party, except that: (a) The maximum dollar limitation in RCW 4.84.250 shall not apply; and (b) in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.

(2) The rights provided for under this section may not be waived by the parties to a public works contract that is entered into on or after June 11, 1992, and a provision in such a contract that provides for waiver of these rights is void as against public policy. However, this subsection shall not be construed as prohibiting the parties from mutually agreeing to a clause in a public works contract that requires submission of a dispute arising under the contract to arbitration.

CREDIT(S)

[1999 c 107 § 1; 1992 c 171 § 1.]

Current with 2010 Legislation effective through April 12, 2010

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West's Revised Code of Washington Annotated Currentness
Title 39. Public Contracts and Indebtedness (Refs & Annos)
Chapter 39.04. Public Works (Refs & Annos)
→ **39.04.010. Definitions**

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Award" means the formal decision by the state or municipality notifying a responsible bidder with the lowest responsive bid of the state's or municipality's acceptance of the bid and intent to enter into a contract with the bidder.

(2) "Contract" means a contract in writing for the execution of public work for a fixed or determinable amount duly awarded after advertisement and competitive bid, or a contract awarded under the small works roster process in RCW 39.04.155.

(3) "Municipality" means every city, county, town, port district, district, or other public agency authorized by law to require the execution of public work, except drainage districts, diking districts, diking and drainage improvement districts, drainage improvement districts, diking improvement districts, consolidated diking and drainage improvement districts, consolidated drainage improvement districts, consolidated diking improvement districts, irrigation districts, or other districts authorized by law for the reclamation or development of waste or undeveloped lands.

(4) "Public work" means all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein. All public works, including maintenance when performed by contract shall comply with chapter 39.12 RCW. "Public work" does not include work, construction, alteration, repair, or improvement performed under contracts entered into under RCW 36.102.060(4) or under development agreements entered into under RCW 36.102.060(7) or leases entered into under RCW 36.102.060(8).

(5) "Responsible bidder" means a contractor who meets the criteria in RCW 39.04.350.

(6) "State" means the state of Washington and all departments, supervisors, commissioners, and agencies of the state.

CREDIT(S)

[2008 c 130 § 16, eff. June 12, 2008; 2007 c 133 § 1, eff. July 22, 2007; 2000 c 138 § 102; 1997 c 220 § 402 (Referendum Bill No. 48, approved June 17, 1997); 1993 c 174 § 1; 1989 c 363 § 5; 1986 c 282 § 1; 1982 c 98 § 1; 1977 ex.s. c 177 § 1; 1923 c 183 § 1; RRS § 10322-1.]

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West's Revised Code of Washington Annotated Currentness

Title 4. Civil Procedure (Refs & Annos)

▣ Chapter 4.84. Costs (Refs & Annos)

→ **4.84.250. Attorneys' fees as costs in damage actions of ten thousand dollars or less--Allowed to prevailing party**

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

CREDIT(S)

[1984 c 258 § 88; 1980 c 94 § 1; 1973 c 84 § 1.]

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Title 4. Civil Procedure (Refs & Annos)

Chapter 4.84. Costs (Refs & Annos)

→ **4.84.260. Attorneys' fees as costs in damage actions of ten thousand dollars or less--When plaintiff deemed prevailing party**

The plaintiff, or party seeking relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff, or party seeking relief, as set forth in RCW 4.84.280.

CREDIT(S)

[1973 c 84 § 2.]

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Title 4. Civil Procedure (Refs & Annos)

↳ Chapter 4.84. Costs (Refs & Annos)

→ **4.84.270. Attorneys' fees as costs in damage actions of ten thousand dollars or less--When defendant deemed prevailing party**

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280.

CREDIT(S)

[1980 c 94 § 2; 1973 c 84 § 3.]

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Title 4. Civil Procedure (Refs & Annos)

Chapter 4.84. Costs (Refs & Annos)

→ **4.84.290. Attorneys' fees as costs in damage actions of ten thousand dollars or less--Prevailing party on appeal**

If the case is appealed, the prevailing party on appeal shall be considered the prevailing party for the purpose of applying the provisions of RCW 4.84.250: PROVIDED, That if, on appeal, a retrial is ordered, the court ordering the retrial shall designate the prevailing party, if any, for the purpose of applying the provisions of RCW 4.84.250.

In addition, if the prevailing party on appeal would be entitled to attorneys' fees under the provisions of RCW 4.84.250, the court deciding the appeal shall allow to the prevailing party such additional amount as the court shall adjudge reasonable as attorneys' fees for the appeal.

CREDIT(S)

[1973 c 84 § 5.]

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HOUSE BILL REPORT

ESB 6407

As Passed Legislature

Title: An act relating to public works construction contracts.

Brief Description: Providing for awards in construction contract actions.

Sponsor(s): Senators Madsen, Anderson, Matson and Vognild.

Brief History:

Reported by House Committee on:
Commerce & Labor, February 28, 1992, DPA;
Passed House, March 5, 1992, 98-0;
Passed Legislature.

**HOUSE COMMITTEE ON
COMMERCE & LABOR**

Majority Report: *Do pass as amended.* Signed by 10 members: Representatives Heavey, Chair; G. Cole, Vice Chair; Lisk, Assistant Ranking Minority Member; Franklin; Jones; R. King; O'Brien; Prentice; Vance; and Wilson.

Staff: Chris Cordes (786-7117).

Background: In Washington, attorneys' fees are not awarded to the prevailing party in a law suit unless the award is specifically authorized by statute or contract, or is awarded on equitable grounds. The "equitable grounds" exception is narrowly applied by the courts.

Washington statutes generally permit the award of the costs of a law suit and limited statutory attorneys' fees to the prevailing party. In addition, various statutes throughout the code authorize the award of reasonable attorneys' fees in specific kinds of cases, including cases involving claims for damages of \$10,000 or less and cases that are found to be frivolous and advanced without reasonable cause. Other than these general statutes, there are no statutory provisions authorizing the award of attorneys' fees in law suits arising out of public works contracts.

Summary of Bill: The statutory procedures for awarding attorneys' fees in actions for damages of \$10,000 or less are made applicable to an action arising out of a public

works contract in which a public body is a party. In using these provisions, the maximum amount of the claim is \$250,000, rather than \$10,000, and the parties are required to serve offers of settlement not less than 30 days and not more than 120 days after serving and filing the complaint, rather than at least 10 days before trial. The parties may not waive these rights, but the waiver prohibition is not to be construed as prohibiting the parties from mutually agreeing to a contract clause that requires submission of a dispute to arbitration.

Fiscal Note: Available.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The purpose of the bill is to encourage settlements. If attorneys' fees and costs are awarded in an action, then a decision to pursue the law suit will be made on the merits of the case and not on the costs of going to court. Public agencies seem to react to litigation as if their attorneys are free. This discourages the pursuit of meritorious cases. Amendments are acceptable that would give public agencies more discretion over making decisions about the lowest responsible bidder on a contract.

Testimony Against: The bill creates incentives to sue the public agencies because, under the bill, if the party recovers any amount at all, he or she will get attorneys' fees. There is a problem with using these provisions if the funding is from a federal source. A better solution for resolving small claims is mandatory arbitration. A number of amendments are needed if the bill is to be workable.

Witnesses: (In favor): Dick Ducharme, Utility Contractors of Washington; and Duke Schaub, Associated General Contractors. (Opposed): Norman Anderson and Bill Boland, Department of Transportation.

SENATE BILL REPORT

ESB 6407

AS PASSED SENATE, FEBRUARY 18, 1992

Brief Description: Providing for awards in construction contract actions.

SPONSORS: Senators Madsen, Anderson, Matson and Vognild

SENATE COMMITTEE ON COMMERCE & LABOR

Majority Report: Do pass as amended.

Signed by Senators Matson, Chairman; Anderson, Vice Chairman; Bluechel, McDonald, and McMullen.

Staff: Dave Cheal (786-7576)

Hearing Dates: February 6, 1992; February 7, 1992

HOUSE COMMITTEE ON COMMERCE & LABOR

BACKGROUND:

Currently in a lawsuit based on a public works contract, each party pays its own attorneys' fees and costs regardless of the merits of their position or the eventual disposition of the case.

SUMMARY:

The prevailing party in an action arising out of a construction contract with a public owner is entitled to an award of attorneys' fees, costs, and interest. "Prevailing party" is defined as the party in whose favor final judgment is rendered. "Public owner" means the state, a municipality, or other public body. "Costs" means reasonable and necessary expenses incurred in the prosecution or defense of the action.

The rights provided under the bill are not subject to waiver.

The application of the bill is limited to cases where the amount in controversy is under \$250,000.

Appropriation: none

Revenue: none

Fiscal Note: requested February 4, 1992

TESTIMONY FOR:

The financial burden is eased on either the contractor or the public owner if they have to sue for their rights or defend their position.

TESTIMONY AGAINST:

Having to pay attorneys' fees makes agencies overly cautious in their contract enforcement decisions. Settlement and alternative dispute resolution is discouraged.

TESTIFIED: Duke Schaub, AGC of Washington (pro); Norman Anderson, Department of Transportation (con); Cliff Webster, Associated Builders and Contractors (pro)

HOUSE AMENDMENT(S):

The existing attorneys' fees provisions and "prevailing party" definitions of RCW 4.84.250 through 4.84.280 are substituted for the definition in the original bill. The plaintiff is the prevailing party if they recover as much or more than their settlement offers. The defendant is the prevailing party if the plaintiff receives nothing or the same or less than the defendant's settlement offer. Settlement offers must be served between 30 and 120 days after filing and serving the complaint.

Public owners are required to consider the ability of bidders to complete the contract within the prescribed schedule and compliance of the contractor with state and federal law, when they determine the lowest responsible bidder in awarding contracts.

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

TACOMA SCHOOL
DISTRICT NO. 10, A
Washington School District,

Appellant,

v.

EASTWOOD
ENTERPRISES, INC., an
Oregon Corporation;
NOWICKI & ASSOCIATES,
INC., a Washington
Corporation; NOW
ENVIRONMENTAL
SERVICES, INC., d/b/a
NOWICKI
ENVIRONMENTAL, a
Washington Corporation; and
NOWICKI & ASSOCIATES,
INC., a Washington
Corporation,

Respondents.

No. 40025-1-II

DECLARATION OF
SERVICE

FILED
COURT OF APPEALS
DIVISION II
10 APR 23 AM 11:39
STATE OF WASHINGTON
BY  DEPUTY

The undersigned hereby certifies that copies of the
Opening Brief of Appellant Tacoma School District No. 10
were delivered to all parties of record via the method indicated
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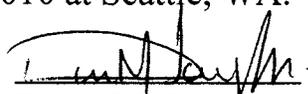
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I declare under penalty of perjury that the foregoing is
true and correct:

EXECUTED this 22nd day of April, 2010 at Seattle, WA.


Dawn M. Taylor

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DECLARATION OF SERVICE - 2

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