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STATE OF WASHINGTON
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DEPUTY

NO. 40415-0-II

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

SPRADLIN ROCK PRODUCTS, INC., a Washington corporation,

Respondent,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF GRAYS HARBOR COUNTY, a municipal corporation,

Appellant

BRIEF OF RESPONDENT

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INTRODUCTION

Following a catastrophic storm that knocked out power in 98% of Grays Harbor, Tim Spradlin and his Spradlin Rock crew went to work before the PUD could even assess the damages or officially declare an emergency. They worked around the clock – for 123 days straight – opening roads to help restore power to the County. Tim believed the PUD's oral promise to pay for his costs and a reasonable profit.

But the PUD paid only Spradlin Rock's first four invoices, stopping payment when it learned that FEMA was not going to foot the bill. The trial court correctly ruled as a matter of law that these "tremendously detailed" invoices – paid without objection – filled-in the price term missing in the parties' oral contract. CP 647. The PUD never addresses this true basis of the trial court's ruling, raising only a straw-man argument on the account-stated doctrine.

Spradlin Rock's experts testified that its charges were reasonable and that its invoices were 99.992% accurate. The PUD's own expert opined that the PUD owed Spradlin Rock almost $3 million, as the evidence undisputedly showed. This Court should affirm.

STATEMENT OF THE CASE

A. A massive storm hit Grays Harbor in December 2007, leaving 98% of the residents without power.

Tim and Terese Spradlin own Spradlin Rock Products, Inc. and have been in business in Grays Harbor for over 40 years. 02/18 RP 223. Tim grew up in the logging business, and has done just about every job in the business. *Id.* at 223, 224. He eventually purchased Spradlin Rock from his dad and has operated it ever since. *Id.* Before the December 2007 storm, Spradlin Rock had done work for the PUD for about eight years. 02/17 RP 112.

> On December 2, 2007, a massive storm struck Grays Harbor County. The storm was of unprecedented magnitude and required an enormous effort to restore and repair the damage. The County was declared a disaster area; nearly 98 percent of PUD customers were without power following the storm.

BA 6-7. After the storm, Spradlin Rock worked around the clock for 123 days straight, opening roads to reach downed power lines. CP 124, 146, 176. The emergency work far exceeded – in time, manpower, equipment, and magnitude – anything Spradlin Rock had previously done for the PUD. *Id.* All of this is undisputed.

The dispute is what the PUD owes Spradlin Rock for its Herculean efforts. The PUD argues that a "Small Works Contract" should dictate the amount owed. But the parties entered a new

contract for emergency services, and the PUD paid Spradlin Rock's first four invoices without question or complaint.[1] Since the trial court correctly ruled as summary judgment that the Emergency Contract controls as a matter of law, these facts are primarily taken from the evidence before the trial court on summary judgment. CP 327-30.

B. Spradlin Rock hit the $200,000 Small Works Contract's cap before the storm hit.

In December 2006, Spradlin Rock entered a Small Works Contract with the PUD for 2007-2008.[2] CP 176. Such contracts allow the PUD to omit the bid process for individual projects under $200,000, submitting the contract itself for bids. 02/23 RP 637. Small Works jobs are "little small jobs that [Spradlin Rock would] do on a nice day," or on days they did not have other work. 02/18 RP 232-33.

The Small Works Contract included four pieces of Spradlin Rock's equipment with set hourly rates. CP 176, 404. Spradlin Rock "very rarely" had to procure other equipment for a Small

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[1] The PUD paid these invoices after reviewing them several times, requesting formatting changes, and discussing those requests with Tim. *Infra*, Statement of the Case § F. The PUD never complained about or objected to the invoice prices or rates. *Id.*

[2] The contract itself was not before the trial court on summary judgment, but appears in the PUD's response to motions *in limine* at CP 397-404.

Works job. 02/18 RP 232. When they did, the parties negotiated different rates. CP 176.

Only Tim and Spradlin Rock employee Kirk Anderson – who are exempt from prevailing wage laws – operated the equipment in the Small Works Contract. CP 176. Spradlin Rock "very rarely" had to hire others for Small Works jobs. 02/18 RP 232. Spradlin Rock structured these jobs to avoid overtime. *Id.*

The Small Works Contract capped Spradlin Rock's total services at $200,000. CP 176. The parties hit this cap before the storm. *Id.* Simply put, Spradlin Rock could not have performed the Emergency work under the Small Works Contract.

C. The parties orally agreed that Spradlin Rock would build roads in the storm's aftermath to help restore power to the County.

When the storm struck, Tim and Terese were visiting family in Maui. CP 124. Anderson called, telling Tim that a disastrous wind storm was knocking out power everywhere. *Id.* The Spradlins landed at Seatac around midnight. *Id.*

Storm damage made it impossible for the Spradlins to get home until 5:00 a.m. *Id.* Tim knew that the PUD would try to call, but called them on his cell phone since the phone lines were down.

Id. Things were so "catastroph[ic]" that the PUD had not even been able to assess the problems ahead. *Id.*

The PUD asked Spradlin Rock to go to work immediately:

> And when this project started it was drop everything that you're doing and come to work for us because you're the guy that can get us to where we need to go.

02/18 RP 233; CP 129, 146. The parties did not discuss compensation. CP 129.

D. Spradlin Rock worked around the clock under horrendous conditions to clear and build roads for the PUD.

1. It was immediately apparent that the Emergency work was a massive undertaking.

The first few days after the storm, the PUD assigned Spradlin Rock small jobs in comparison to the two at issue here – Think of Me Hill and Neilton (*a.k.a.* Quinault Ridge). 02/18 RP 234-37. Spradlin Rock helped build access roads, cleared timber, and delivered rock all over Grays Harbor. *Id.* They could not finish one job before the PUD dispatched them to another. CP 235.

Tim immediately realized that he was going to have to use all of Spradlin Rock's equipment, not just the four pieces listed in the Small Works Contract. CP 125, 176. Spradlin Rock also had to lease additional equipment for many months and to immediately hire drivers and operators. CP 176; 02/17 RP 71, 82. And Spradlin

Rock had to pay these new employees prevailing wages, far more than Tim and Anderson billed under the Small Works Contract. CP 145, 176, 404; 02/17 RP 83-84, 100.

Given the Emergency work's breadth, Tim asked the PUD how it was going to pay Spradlin Rock. CP 125. The PUD assured Tim that it would pay for all labor, costs, and a reasonable profit. CP 125, 129.

2. Think of Me Hill.

The PUD first told Tim about Think of Me Hill on Friday December 7th. 02/18 RP 237-38. Think of Me Hill was, in part, a residential development in progress. *Id.* at RP 247; Ex 128. The developer cleared six-to-eight acres, but had to stop the project when the weather caught up to them in mid-November. 02/18 RP 147. The land was "bare mud" when the storm hit. *Id.* at 247-48.

Tim visited Think of Me Hill on December 8, along with the superintendent for Wilson Construction, the contractor in charge of repairing the power lines. *Id.* at 239-40. Before Wilson could do anything, Spradlin Rock had to open roads. *Id.* at 251.

One week after the storm hit, the PUD passed a resolution declaring an emergency and "waive[ing] competitive bidding and contract requirements" required by RCW 54.04.070. Ex 18. The

PUD did not give Tim an operating plan, telling him to "do whatever [he] needed to do" to help restore power. 02/18 RP 263-64; 02/19 RP 109, 110-11. Working without an operating plan triples or quadruples project costs. 02/18 RP 266. So does working in the winter. *Id.*; 02/19 RP 175.

The conditions at Think of Me Hill were so bad that Spradlin Rock's crew had to use bulldozers and other heavy equipment to tow dump trucks in and out of the worksite. CP 313; 02/18 RP 17-18, 257; Exs 68, 69. Every hour, a dump truck would go off of the road, get stuck in the mud, and have to be pulled out of the ditch. 02/18 RP 246. Trucks tipped over and heavy equipment got stuck on the snow. CP 126, 148, 311.

They worked in the dark – only some of the heavy equipment had lights and they were often no good. 02/22 RP 327. They set up portable generators with "lights plants" so they could work after nightfall. *Id.* at 327-28. They even used flashlights to guide the dump trucks and lined the roads with flashlights stuck in orange traffic cones. *Id.* at 328.

Everywhere on the site, the crew was ankle deep in water. 02/18 RP 248; Ex 74. Every day, crew members had to dig out backed-up culverts that were washing out roads. 02/18 RP 18-19.

They worked in these conditions "all-day, all-night, every-day." CP 126.

Tim and his crew often worked 18-hour days, building, repairing and maintaining roads in darkness, and snow and ice, despite freezing temperatures. CP 126, 148, 311; 02/23 RP 493. Tim and Terese even worked Christmas day. 02/19 RP 21; 02/23 RP 487.

When Tim worked really late, he slept in his truck. 02/23 RP 495. Terese checked on him to make sure that he had not "back[ed] over a cliff somewhere." *Id.* at 489-90. Unlike other contractors, Spradlin Rock did not bill the PUD for rest time and travel time. *Id.* at 495. They did not even bill the PUD when Tim worked straight through the night. *Id.*

When Wilson Construction was done with Think of Me Hill toward the end of January 2008, the PUD asked Tim to conform the roads to the PUD's written easements. 02/19 RP 110-11, Exs 126, 130. Most of Spradlin Rock's emergency crew left in mid-February. *Id.* at 111. His last date of billing was March 9. *Id.*

3. Neilton Point.

The PUD agrees that Think of Me Hill was Emergency work, but asserts (without explanation), that Neilton (*a.k.a.* Quinault

Ridge) was not. BA 17-18. But the PUD treated Neilton as part of the ongoing emergency, operating under the proposition waiving bidding and contract requirements. Ex 18. The PUD told Spradlin Rock (and others) that they had to do the Neilton work in February – in five-foot snow banks – which is three-to-four time more expenses than building roads in the spring or summer. 02/18 RP 266; 02/19 RP 28, 175; Ex 3 photos D & E. The PUD wanted Neilton done in a hurry so it could recover the costs from FEMA. 02/19 RP 119-24.

Neilton Point houses a "critical" communications facility servicing the PUD, Grays Harbor County, the Quinault Tribal Council, the U.S. Forest Service and others. CP 303 (The PUD's Neilton operating plan). According to the PUD, the primary power source, an "existing overland cable[,] was irreparably damaged in the December 2007 windstorm." *Id.* The PUD was running the communications facility on back-up generators intended only for short-term use, but could not get fuel trucks in to re-fuel the generators. *Id.*; 02/19 RP 29-30.

The Neilton project involved burying cable and junction boxes at least 36 inches deep along 6.2 miles of U.S. Forest Service Road leading to the communications facility. CP 82, 303;

02/18 RP 179, 180. Spradlin Rock's job was to provide access, repair and maintain the road, and finish the road after the cable was down. CP 82; 02/19 RP 30-31. Spradlin Rock was working at Think of Me Hill when it started Neilton. 02/19 RP 21-22.

When the parties originally discussed Neilton, they planned to work from the top down to decrease traffic congestion, rock usage, and damage to the freshly plowed roads. 02/19 RP 22-24. The PUD neglects to mention that it drastically changed the original plan. *Compare* BA 17 *with* 02/19 RP 28-29. The "massive" snowfall made the original plan unworkable, so the PUD "reversed" the plan, electing to work from Highway 101 up to Neilton Point. 02/19 RP 28-29.

The PUD brought in a snow blower to clear out Neilton, leaving five-foot snow banks. 02/19 RP 28; Ex 3 photos D & E. The snow blower was gone when Spradlin Rock started, so they had to plow the roads. 02/19 RP 29-30. Tim typically got started at least two-to-three if not four hours before the rest of the crew arrived. 02/19 RP 31-32; Ex 3 photos H & J.

Mud often seeped up through the freshly plowed roads, forcing Spraldin Rock to "cap" the roads with a rock overlay to suppress the mud. 02/19 RP 30. But driving over the freshly-

capped roads to the worksite broke down the surface. *Id.* at 30-31. Spradlin Rock had to repeat the process again and again. *Id.*

The elevation gain was about 1600 feet where the Neilton work took place. CP 303. Often the road was so narrow that Tim and his crew had to back trucks and equipment down the hill. 02/19 RP 33. In some areas there were two-to-three-hundred foot drop offs from the roadside. *Id.*

4. These were the worst conditions Tim and his crew had ever worked in.

In his over 40 years in the business, these were the worst conditions Tim had ever worked in. 02/18 RP 223-24; 02/23 RP 671. The PUD's expert appraiser just did not understand what Tim and his crew were up against (02/23 RP 671-72):

> [T]his was the worst condition in my 40 years of road construction that I've ever been on and there was numerous delays that [Marshall] could – could not even comprehend. I have a list of 75, 78 items that – of which, after carefully looking at his appraisals, he did not take into consideration.

Tim's nephew, JT Spradlin, has built logging roads for 20 years. 02/18 RP 21. The weather conditions – including wind, driving rain and snow – were some of the worst JT had ever worked in. *Id.* at 18.

Jason Wakefield "[d]rove truck, hauled rock" for Spradlin Rock. 02/22 RP 415-17. Think of Me Hill was "the worst conditions

[he had] ever seen." *Id.* at 416. The mud was "very slick" and they had to back their trucks in and out in the dark. *Id.* at 416-17. It was a "dangerous, tedious job." *Id.* at 416.

Dave DuPont has been a logger for 32 years and has owned Double D Logging for 16.5 years. 02/22 RP 320-21. He leased Spradlin Rock equipment and worked for Spradlin Rock on Think of Me Hill. *Id.* at 323. Absent the emergency, DuPont would have suspended operations rather than work under such horrible conditions. *Id.* at 333. It costs 3-to-4 times more to build roads in such severe winter weather (02/19 RP 175) – a price DuPont could not withstand (02/22 RP 333):

> We would never put ourselves in that kind of – we've been in some bad situations with snow melting and so forth, but we would have never continued that kind of project. Our pockets would never have been deep enough to continue doing that.

E. The parties' oral agreement did not include price.

The parties talked several times about payment, both before and after Spradlin Rock submitted its first invoice. CP 125, 129. The PUD told Tim that it would pay for all direct and indirect costs and a reasonable profit. CP 125, 129, 389. They did not discuss specific terms. *Id.*

F. The PUD required more detailed invoices to satisfy FEMA, but paid Spradlin Rock's first four invoices without questioning the items, rates, or prices.

Tim submitted his first set of invoices to the PUD on February 4, 2008. CP 45-47. These invoices covered services rendered from December 3 through December 16. CP 125, 129. The invoices were "For Emergency Storm Work Performed 24/7." *Id.* They did not discuss specific terms. *Id.*

The invoices included two categories – labor and equipment, and materials. *Id.* This was exactly how Spradlin Rock had invoiced the PUD for the past eight years. CP 39, 125; 02/17 RP 112.

But the PUD wanted the invoices in a different format, with far greater detail, necessary for Federal-Emergency-Management-Agency reimbursement. CP 39, 129, 140. Spradlin Rock was not aware that the invoices needed to be different for FEMA. CP 39. The PUD gave Spradlin Rock sample invoices, showing the format the PUD wanted the invoices in. CP 39-40, 48-54.

The PUD told Tim that he to charge the Small Works rates for the four pieces of equipment listed in that contract.[3] CP 44, 125.

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[3] The PUD claims that "[a]s part of their oral contract," Tim agreed to charge the Small Works rates for the four pieces of equipment in the Small Works

The PUD did so to tie the Emergency Contract – an oral contract without any bids, to the Small Works Contract – a written contract with bids. CP 176, 397-404; 02/17 RP 10-12; 02/23 RP 637. FEMA denied reimbursement for all contractors in part because there were no bids or written contracts. CP 81-82, 148.

Spradlin Rock re-submitted its invoices, changing to the Small Works rates and including far more detail. CP 40-41, 58-63. The PUD still wanted more. CP 40-41. The parties met again, and the PUD gave Tim more sample invoices. *Id.*; 02/17 RP 120-21.

The PUD paid Spradlin Rock's third set of invoices, submitted on February 20, 2008. CP 41-44, 64-77. These four invoices provided the same information as the PUD's sample invoices. 02/17 RP 120-21. The invoices totaled $1,578,051.12 – just the first invoice exceeded the Small Works Contract's cap.[4] CP 64-77.

During this back and forth, the PUD never questioned – or even mentioned – rates, prices, or the total invoiced amount. CP 42-43. And the PUD never complained about Spradlin Rock's

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Contract. BA 16. The PUD did not make this demand until mid-February, long after Spradlin Rock had started working. CP 125.

[4] The cap had already been exhausted from non-emergency work. CP 176.

work. CP 37. The PUD rejected the invoices only because Spradlin Rock's format would not satisfy FEMA. CP 42-43.

G. The PUD reserved the right to ensure that back-up materials supported the invoices.

The PUD claims that it paid the invoices "with the understanding" that the parties would work out "discrepancies" after the PUD examined "backup material." BA 9. But the PUD never indicated that it intended to question rates, labor, or anything else. CP 139-40. The PUD reserved the right to check for "mistakes" – to ensure that everything added up (*id.*):

> Q. But you didn't question the amount. You didn't tell them this is too much, did you?
>
> A. No, because if he supplies the right documentation, it should come out [to] what he says or [it] won't, I mean, bottom line.

Everything added up. 02/17 RP 98-99. Spradlin Rock hired CPA Gaylon Boley to determine whether the back-up materials in fact backed up Spradlin Rock's invoices. *Id.* at 93-94. This included comparing thousands of time slips to payroll and verifying overtime and double-time. *Id.* at 96-97. Spradlin Rock's records were 99.992% accurate – it under-billed the PUD $354.01. *Id.* at 98-99. The PUD did not put on any contradictory evidence.

H. The PUD stopped paying its invoices when FEMA denied reimbursement.

The PUD claims that it "quickly" became concerned about Spradlin Rock's invoices, held meetings to address its concerns, audited its invoices, and ultimately terminated Spradlin Rock. BA 9-11. As discussed below, these claims are misleading and largely unsupported. And the PUD omits that it decided not to pay Spradlin Rock just days after FEMA denied reimbursement. CP 36, 138; 02/18 RP 67; Ex 46.

The PUD paid Spradlin Rock's first four invoices within two weeks. CP 64-77. On March 17, FEMA denied the PUD's claims for reimbursement. CP 138. Four days later, the PUD's operations manager and FEMA expert, Ed Pauley, wrote "do not pay" on Spradlin Rock's outstanding invoices, claiming that they were lacking proper paperwork for FEMA reimbursement. CP 36, 39, 140.

The PUD called a meeting on March 25 – Spradlin Rock had wrapped up Think of Me Hill and was working on Neilton. CP 147-48, 150; 02/19 RP 111, 143-44. Pauley gave Tim a handwritten list of FEMA requests, telling him that the PUD would not pay until he complied. CP 150. The PUD was worried that FEMA would deny

its claims because there were no bid requests or written contracts.[5] CP 147-48.

Despite the PUD's unsupported assertion that it "[o]bjected" to the invoices, it never complained that the invoices were too high. *Compare* BA 17 *with* CP 43. Nor did the PUD tell Tim to stop work on Neilton (until it terminated Spradlin Rock on April 3). CP 127, 647; Ex 46. The PUD just asked for more paperwork for FEMA. CP 148, 150.

And the PUD incorrectly suggests that it "objected to and did not pay" the Nielton invoices because Neilton was unrelated to the storm. BA 17-18. The PUD refused to pay numerous Think of Me Hill invoices – an "emergency project" – as well. CP 4, 20; BA 17. With as many excuses for non-payment the PUD raised, it never claimed that Neilton was a distinct project.

The PUD's "red flags" regarding Spradlin Rock's billing practices are red herrings. BA 10-11. The PUD claims that around the March 25 meeting it learned that Spradlin Rock had not filed statements of intent to pay prevailing wages. BA 10. This was a

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[5] As discussed above, FEMA had already denied the PUD's reimbursement request. The PUD appealed.

technical oversight that Spradlin Rock corrected immediately. CP 146-47, 286. Spradlin Rock paid prevailing wages. CP 146, 176.

The PUD tells less than half of the story regarding its "stolen" equipment allegations. BA 10. Spradlin Rock used an excavator and bulldozer that were standing idle at the worksite. CP 134-35, 389. The equipment started with one of Spradlin Rock's keys. CP 135. Tim intended to compensate the owner, whom he later learned was Rusty Gill. CP 389. But Gill initially demanded grossly excessive compensation – $86,000. CP 392. Spradlin Rock and Gill ultimately settled – Gill was satisfied with the settlement and acknowledged that Tim did not intend any wrongdoing. CP 317, 319, 389-93.

I. The PUD terminated Spradlin Rock when Think of Me Hill was finished and there was only one mile left on Neilton.

The PUD terminated Spradlin Rock on April 3, 2008. CP 151. Under the PUD's directive, Spradlin Rock immediately removed his equipment from Neilton. 02/19 RP 70. There was less than a mile of work left to be done. *Id.* The PUD has not paid Spradlin Rock for any of its work on Neilton.

J. The paid invoices include – in black and white – all of the charges the PUD complains about.

The paid invoices included – "in black and white" – all of the charges the PUD complains about:

> [T]he rates and prices that were outlined in those bills that were originally submitted and then reworked until it was broken down by piece of equipment, and by employee and by fuel surcharge and by profit charge, to me was black and white. . . . it was reviewed. It was in black and white.

02/10 RP 36. The PUD never suggests that the rates were hidden, nor could they credibly do so. Ex 26-29.

The PUD reviewed and twice rejected the invoices. *Supra*, Statement of the Case § F. The PUD knew that the Emergency rates were higher than the Small Works rates – it required Spradlin Rock to use the Small Works rates for the four pieces of equipment in the Small Works Contract. *Id.* If the PUD had any other problems with the invoices, then it should have raised them. Instead it paid, kept silent, and kept Spradlin Rock working:

> The PUD approved it several times. After insisting on more information. And maybe they didn't have all information, but they had all the money. They could have said at any point in time, we don't have enough information, we will pay 25 percent of this bill, but until you give us this, this, and that, we are not paying the rest, or these rates on their face are too high, we want to negotiate, reasonable rates, and we want this level unless, or we are going to take you off the job and put somebody else on it. But they just went ahead and paid, and kept [Tim] working on the storm damage projects.

02/10 RP 36-37. It occurred to the trial court that the PUD did not examine the invoices more closely because it thought FEMA was going to pay. 02/17 RP 12.

K. Nothing supports the PUD's assertion that it "reasonably assumed" that the Small Works Contract would govern the emergency work. BA 11.

Buried in a heading, the PUD asserts that it "Reasonably Assumed" that the Emergency rates would be consistent with the Small Works rates. BA 11. The record does not support this claim. Again, the PUD required Spradlin Rock to bill the Small Works rates for the four pieces of equipment in the Small Works Contract, but it never indicated that the invoices – or rates – had to otherwise comport with the Small Works Contract. CP 125.

And there is nothing "reasonable" about such an alleged assumption. BA 11. The Emergency work was done without bids or contracts – contractors have to bid on the Small Works Contract. Ex 18; RCW 36.04.155, 54.04.070(4). Spradlin Rock had already hit the Small Works Contract's cap before the storm hit (CP 176), and the Emergency work exceeded $200,000 (the maximum amount of a small work) almost immediately. *Id.*; Ex 26. Working around the clock for 123 days straight in horrendous and hazardous conditions is not a "small work."

The PUD's "Statement of the Case" on this point is a poorly disguised argument that Spradlin Rock's rates were unreasonable. BA 12-17. Spradlin Rock's rates were reasonable – they charged less per station (100 feet) than Brumfield Construction, which finished the last mile of Neilton after the PUD terminated Spradlin Rock. 02/22 RP 308. Spradlin Rock hired expert Jordan Rosenfeld to compare Spradlin Rock's price per station to Brumfield's price per station. 02/22 RP 297. Although Brumfield worked in the spring and summer, without rushing, it charged $1,200 more per station on Neilton, and $550 more per station on Think of Me Hill. *Id.* at 305, 308. Spradlin Rock's charges were reasonable as compared to Brumfield's charges, which the PUD paid. CP 308.

Joseph Stipic, the President of Northwest Rock for ten years, opined that Spradlin Rock's total charges on Think of Me Hill and Neilton were reasonable.[6] 02/19 RP 157, 162. The adverse weather conditions, terrain, and working conditions, and the required man-hours, drove up costs. *Id.* at 164-65. And the PUD

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[6] The trial court allowed this testimony because Spradlin Rock had the burden to prove that its total charges were reasonable even though the court had established the rates on summary judgment. 02/19 RP 184. Specifically, Spradlin Rock had to show that the time they put in was reasonable and that the way they billed equipment was reasonable. *Id.* The PUD's expert contested these issues. 02/23 RP 567-70.

also drove up costs by passing all risks along to Spradlin Rock, specifically the risk of working without a design plan. *Id.* at 163-65.

Jesse Kollman, who has been in the "dirt and rock" business since 1981, also opined that Spradlin Rock's total charges were reasonable. 02/19 RP 169-70, 174-77. The severe weather conditions and required overtime drove up costs. *Id.* at 175-76. It is four-times more expensive to build a road in the winter than in the summer. *Id.* at 175.

Ignoring this evidence, the PUD states that the summary judgment pleadings do not justify the paid-invoice rates. BA 12-17. But summary judgment was about whether a contract was formed, not whether the rates were reasonable. CP 327-30. An absence of evidence on this point does not prove anything.

In any event, the PUD omits much about the charges:

- Overhead: The PUD ignores that (1) it is industry standard to charge overhead for emergency work; and (2) all of the contractors doing emergency work for the PUD charged overhead.
- Fuel Surcharge: Spradlin Rock added the fuel surcharge to help recover all of its costs, not just to cover high fuel costs. *Compare* CP 128 *with* BA 13. Tim based the surcharge on the average rates in Washington at the time. CP 128.
- Payrolls: Gaylon Boley, an independent CPA, verified that Spradlin Rock's invoices were 99.992% accurate. 02/17 RP 98-99. Payroll taxes, fringe benefits and the like account for

the difference between the amount Spradlin Rock paid its employees and the amount it billed the PUD. *Id.* at 109-10.

- Administrative Time: The PUD was allowed to argue to the jury that Terese Spradlin overbilled for administrative time. *Compare* BA 15-16 *with* 02/24 RP 702-03. The PUD does not support its claim that administrative time was "Duplicative" – the invoice accurately reflected time records. 02/17 RP 98-99.
- Small Works rates: Tim agreed to bill Small Works rates for the four pieces of equipment in the Small Works Contract, but the parties never discussed rates for other equipment or operators. *Compare* BA 16 *with* CP 125. The rates Spradlin Rock charged for the Small Works equipment reflected its actual costs, without any profit. CP 177. Under the Emergency Contract, Spradlin Rock had to pay prevailing wages, double-time, and overtime. CP 64-74, 146, 176. The Small Works rates are based on rates for Tim and Anderson – who were exempt from prevailing wage laws, and who did the Small Works jobs on regular time when they could fit it in around other jobs. CP 176-77, 397, 404.

L. The PUD's failure to pay Spradlin Rock was catastrophic.

The PUD's refusal to pay Spradlin Rock was "catastrophic." 02/17 RP 130. Spradlin Rock did not use its credit line before the storm, but maxed out its credit line when the PUD stopped paying. *Id.* at 131. The Spradlins then personally loaned their life savings to Spradlin Rock. *Id.* at 132-33.

The Spradlins used the credit line of their other corporation, TJ Spradlin, to pay employees. *Id.* When they maxed out TJ Spradlin's credit line, they again loaned personal funds to Spradlin

Rock. *Id.* They took $400,000 out on their home, which they owned free-and-clear before the storm. *Id.* at 132-33.

M. Procedural history.

In October 2008, Spradlin Rock sued the PUD for breach of contract. CP 1-6, 23-31. Spradlin Rock moved for partial summary judgment that: (1) the parties entered a contract with an open price term; and (2) the paid invoices set the price term. CP 35, 79. The trial court granted the motion, ruling as follows (CP 329-30):

- The parties entered a contract for Spradlin Rock to build, restore, and repair roads so that the PUD could restore electricity;
- The parties initially left the price term open;
- Spradlin Rock worked seven days a week, around the clock, for more than 120 days;
- The PUD never complained about Spradlin Rock's work or rates before terminating the contract;
- The PUD paid Spradlin Rock invoices containing a detailed breakdown of all charges;
- A valid contract existed at the prices and rates in the invoices, which were in effect during the entire period of performance; and
- "No reasonable fact-finder could determine the parties intended to rely on the course of dealing on the small works contracts with regard to the incredible situation in December 2007."

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- "No reasonable fact-finder could determine the parties intended to rely on the course of dealing on the small works contracts with regard to the incredible situation in December 2007."

The PUD moved for reconsideration and "clarification," filing many affidavits and other documents for the first time. CP 267-313. The court denied the PUD's motion for reconsideration. CP 504-05.

At the presentation hearing for the summary judgment order, the court clarified that the PUD was free to argue that the hours Spradlin Rock billed were excessive. 02/10 RP 6. The court also clarified that the PUD could challenge billing for equipment while not in use – just not the rates billed. *Id.* at 7-8, 38.

The trial court entered an order *in limine*, excluding evidence of prices and rates other than those in the paid invoices, including rates under the Small Works Contract. CP 491. The court also excluded evidence that Spradlin Rock used Rusty Gill's equipment without his permission. CP 492-93; 02/17 RP 28-29. Contrary to the PUD's argument that the court excluded this evidence "as irrelevant to the established rates," the court ruled that the evidence was far more prejudicial than probative (ER 403) and would cause a "mini trial." *Compare* BA 20 *with* 02/17 RP 28.

The trial court granted the PUD's motion to exclude any references to FEMA under the collateral source rule. CP 374; 02/17 RP 15. The court warned the PUD that it would open the door by raising the Small Works rates in the Emergency Contract,

where Spradlin Rock agreed to use the Small Works rates to facilitate FEMA recovery. *Id.* at 10-12, 15. Although the trial court later ruled that the collateral source rule did not apply, it still prohibited FEMA references. 02/23 RP 451-53.

At trial, Spradlin Rock put on expert testimony that its overall charges on Think of Me Hill and Neilton were reasonable, including testimony that Spradlin Rock charged significantly less per station (100 feet) than its replacement on Neilton. *Supra*, Statement of the Case § K. And Spradlin Rock's invoices were 99.992% accurate – they actually under-billed the PUD. *Id.* § G.

The PUD's only expert, Robert Marshall, did not visit Neilton, appraise Nielton, or testify about Neilton. 02/24 RP 696. He testified that a reasonable charge for Spradlin Rock's work on Think of Me Hill would be $2,966,912. 02/23 RP 567-70. The PUD paid Spradlin Rock half that amount. 02/24 RP 782. In closing, the PUD argued that the jury should award Spradlin Rock $3,295,748 for the balance of Think of Me Hill and Neilton. *Id.* at 781.

After a six-day trial, the jury returned a $4,162,500 verdict for Spradlin Rock. CP 541-44. The trial court awarded Spradlin Rock $659,149.60 in prejudgment interest, and $25,000 in attorney fees

incurred in pursuing prejudgment interest. CP 656-58. The PUD appealed. CP 698.

ARGUMENT

A. The summary judgment ruling was not based on the account-stated doctrine – this Court need not consider the PUD's arguments on this point. BA 23-33.

The PUD's primary argument on appeal is that the trial court erroneously ruled as a matter of law that the PUD's payment of the first four invoices set the price term, prohibiting the PUD from challenging the invoice rates at trial. BA 23-33. This argument is based on a series of sub-arguments on the account-stated doctrine, providing that paying an invoice without protesting or manifesting the intent to negotiate the sum establishes an account stated. *Id.*; ***Sunnyside Valley Irrigation Dist. v. Roza Irrigation Dist.***, 124 Wn.2d 312, 316-17 n.1, 877 P.2d 1283 (1994). This argument misses the point entirely.

On summary judgment, Spradlin Rock argued that the paid invoices established the price term left open in the parties' oral contract – in other words, that the course of performance filled the gap. CP 84-86, 188-91. The PUD responded with the same account-stated argument it raises on appeal. CP 160-66. Spradlin

Rock plainly stated that its summary judgment motion was not based on the account-stated doctrine. 01/19 RP 856.

Nor is the summary judgment order based on the account-stated doctrine. CP 327-30. The trial court ruled as a matter of law that the parties entered an oral contract with an open price term and that the PUD's payment of the first four invoices, after a series of negotiations on formatting, set the price term; *i.e.* filled the gap. *Id.* The summary judgment ruling does not mention the account-stated doctrine. *Id.* This Court should not address this issue.

B. The paid invoices established the price term left open in the parties' oral contract.

The trial court correctly ruled that the paid invoices filled in the price term left open in the parties' oral agreement. As discussed below, this sort of gap filling is a legal question for the trial court. To fill the gap, the court properly rejected the course of dealing because prior dealings were nothing like the emergency work. It instead adopted the preferred gap-filler, course of performance, based on the invoices the PUD paid without objection. This Court should affirm.

Parties may enter a contract with an open price term. ***Tacoma Fixture Co., Inc. v. Rudd Co., Inc.***, 142 Wn. App. 547,

553-54, 174 P.3d 721, *rev. denied*, 164 Wn.2d 1006 (2008); RCW 62A.2-305.[7] The trial court will fill an open price term – a "gap" in the contract. ***Burgeson v. Columbia Producers, Inc.***, 60 Wn. App. 363, 366-67, 803 P.2d 838, *rev. denied*, 116 Wn.2d 1033 (1991). When it does so, the court construes (not interprets) the contract:

> When a court is filling gaps in the terms of an agreement, with respect to matters that the parties did not have in contemplation and as to which they had no intention to be expressed, the judicial process should not be called interpretation. . . . In determining its legal effect, as the court must, the process may be called "construction"; it should not be called "interpretation."

Burgeson, 60 Wn. App. at 367 (quoting 3 A. Corbin, *Contracts* § 534, at 11-12 (1960)).

Contract construction is a legal question:

> In ***Berg v. Hudesman***, . . . [t]he court distinguishes between interpretation, a process in which the parties' intent is ascertained through the admission of extrinsic evidence, and construction, a process by which legal consequences are made to follow from the terms of the contract. The former analysis involves a question of fact; the latter, a question of law.

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[7] The UCC is applicable by analogy to service contracts. ***Smith v. Skone & Conners Produce, Inc.***, 107 Wn. App. 199, 205, 26 P.3d 981 (2001) *rev. denied*, 145 Wn.2d 1028 (2002).

60 Wn. App. at 366-67 (citing ***Berg v. Hudesman***, 115 Wn.2d 657, 663, 801 P.2d 222 (1990); 3A. Corbin, *Contracts* § 534 (Supp. 1990)). The court – not the jury – determines legal questions:

> All questions of law including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it.

RCW 4.44.080 (Questions of law to be decided by court).

When filling a contract gap, the court may consider course of performance, course of dealing, and usage of trade. ***Morgan v. Stokely-Van Camp, Inc.*** 34 Wn. App. 801, 808-09, 663 P.2d 1384 (1983); RCW 62A.2-202. Course of performance is a party's prior performance where the contract involves repeated occasions for performance. BLACK'S LAW DICTIONARY, 408 (Ninth Ed. 2004). Course of dealing is the parties' previous conduct "which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." ***Morgan***, 34 Wn. App. at 809 (quoting RCW 62A.1-205(1)). Course of performance trumps course of dealing (and trade usage). RCW 62A.2.208(2).

The PUD agrees that the parties left the price term open in their oral contract. BA 7. As such, it was plainly the trial court's job to determine the price term, a legal question. ***Burgeson***, 60 Wn.

App. at 366-67; RCW 4.44.080. The PUD argues that the jury should have decided the contract price, never addressing the above-discussed law on this point.

The trial court correctly filled the price term in the parties' oral contract with the prices and rates in the paid invoices. CP 329-30. In exchange for Spradlin Rock's promise to provide Emergency road-building services, the PUD agreed to pay Spradlin Rock. CP 124-25. About half-way through Spradlin Rock's performance, the PUD partly performed, paying Spadlin Rock's first four invoices. *Supra*, Statement of the Case § F. In its month-long negotiation about FEMA invoicing requirements, the PUD never once questioned Spradlin Rock's charges. *Id.* This course of performance filled the price-term gap.

This matter is similar to ***Smith v. Skone***, in which Smith, a potato farmer, entered a written contract with Skone to pack and sell his 1993 crop for $65 per ton. 107 Wn. App. at 202. In 1994, the parties orally agreed to the same contract terms and Skone followed up with a confirmation letter. *Id.* In 1995, Smith and Skone entered a similar agreement – Skone claimed that Smith accepted a $5 per ton increase, but Smith claimed that he was unaware of the increase until he received statements for the 1995

harvest. *Id.* at 203. Smith did not object to the "clearly marked" price increase, cashing the check for his crops.[8] *Id.*

Smith sued Skone, arguing that the parties' course of dealing – the $65 price term from the two prior contracts – should control. *Id.* at 208. The trial court rejected Smith's claim, finding that the detailed accounting and check Smith cashed constituted a written agreement at the increased rate. *Id.* at 204. The appellate court affirmed, holding that the agreed-to price increase "overrode the prior conduct." *Id.* at 208.

Here too, the trial court correctly rejected the course of dealing. CP 330. As in ***Smith***, the paid invoices constituted a clear agreement on price. 107 Wn. App. at 208. For this reason alone, the paid invoices overrode the Small Works Contract rates. *Id.*

And the trial court correctly concluded that "[n]o reasonable fact-finder could determine" that the course of dealing controlled the Emergency Work. CP 330. The jobs Spradlin Rock performed under the Small Works Contract were small jobs it did in its spare time, during normal business hours, without extra equipment or

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[8] The PUD attempts to distinguish ***Smith***, arguing that Smith and Skone "settle[d]" their account. BA 28-29. "Settled" in this context simply refers to Skone paying Smith after they met to go over account statements. 107 Wn. App. at 203.

employees. *Supra*, Statement of the Case § B. The Emergency Contract work did not even compare – Spradlin Rock had to drop everything, hire employees, dedicate all of its equipment and lease even more equipment, and work around the clock for 123 days straight. *Id.*

To understand just how unreasonable it would be to think that the Small Works Contract would control the Emergency Contract prices and rates, this Court needs only to consider the wages paid under each contract. Spradlin Rock charged the PUD $52.90 per hour under the Small Works Contract. CP 397, 404. Spradlin Rock could charge so little because Tim and Anderson – the only people who operated the equipment on Small Works Contract jobs – were not subject to prevailing wage laws. CP 176.

Under the prevailing wage laws, Spradlin Rock had to pay dump truck drivers and equipment operators an average of $48.27 regular time, $65.35 overtime, and $86.70 double time. CP 176-77 & Ex 26. This was the actual cost to Spradlin Rock without profit or markup. CP 177. Just the cost of the crew would have exceeded the Small Works Contract rates. *Compare* CP 176-77 *and* Ex 26 *with* CP 397, 404. Spradlin Rock would have lost money hand-

over-fist if the Small Works Contract rates controlled the Emergency work.

In sum, the trial court correctly relied on the course of performance – what Spradlin Rock charged and the PUD paid – to fill the price term in the parties' oral contract. This Court should affirm on this independently sufficient ground that the PUD has failed to challenge in its opening brief.

C. The price term applies to Neilton, done in the storm's aftermath – at the PUD's request – so that the PUD could obtain FEMA reimbursement. BA 30-32.

The PUD argues that the Emergency Contract rates could not extend to Neilton, a separate account. BA 30-32. Again, the court did not apply the account-stated doctrine. CP 327-30. This Court should not address that issue. The Emergency Contract rates extend to Neilton because the PUD wanted Neilton done in the storm's aftermath so it could pursue FEMA reimbursement. 02/19 RP 119-24. The PUD fails to address this issue, or explain why it failed to comply with bid laws if Neilton was not part of the Emergency.

In any event, the only case upon which the PUD relies actually supports Spradlin Rock's arguments. And Neilton was plainly emergency work, where the PUD demanded that Spradlin

Rock finish this job – in horrendous winter weather – so that the PUD could collect from FEMA. *Supra*, Statement of the Case D 3.

The PUD tries to have it both ways, attempting to distinguish ***Smith*** (BA 27) but arguing that under ***Smith*** the paid-invoice rates cannot apply to Neilton, which it claims was "a completely unrelated" and "drastically different" project. BA 30-32. ***Smith*** simply does not support this argument. There, the appellate court refused to use the prior contract rate to determine the disputed rate, holding that the parties' course of performance overrode their course of dealing. 107 Wn. App. at 208. All three contracts in ***Smith*** were for exactly the same service – ***Smith*** does not support the PUD's argument that the contract price cannot extend to a "completely unrelated" project. BA 30.

But Neilton was plainly related to the 2007 storm. The PUD argues that the parties discussed Neilton before the storm hit, but fails to mention that in the storm's wake it saw an opportunity to obtain FEMA reimbursement for the Neilton project. 02/19 RP 119-24. Spradlin Rock did the Neilton work in horrendous winter weather for one reason: the PUD told Spradlin Rock to do the project fast so it could submit the bills to FEMA as part of the emergency recovery. *Id.* The PUD did Neilton under the

proposition waiving bidding and contract requirements. Ex 18. And the PUD changed the Neilton operations plan so that the project was feasible in snow and ice. 02/19 RP 28-29. There was no other reason for doing this project in the winter, when it was three-to-four times more expensive. 02/18 RP 266; 02/19 RP 175.

In sum, the PUD insisted that Spradlin Rock perform the Neilton work in emergency conditions and billed FEMA. It cannot now claim this work was "unrelated" to the emergency, much less that it was not subject to the Emergency Contract rates. The trial court correctly treated these related projects in a similar fashion. This Court should affirm as to Neilton.

D. Even if this matter were about the account-stated doctrine, the only case upon which the PUD relies is inapposite. BA 23-26, 32-33.

The PUD relies almost exclusively on ***Associated Petroleum Prods, Inc. v. Nw. Cascade, Inc.***, 149 Wn. App. 429, 203 P.3d 1077, *rev. denied*, 166 Wn.2d (2009) to support its argument that the four paid invoices do not constitute an account stated. BA 24-26. As discussed above, summary judgment was not based on the account-stated doctrine, so this Court need not consider this argument. *Supra*, Argument § A. But ***Associated*** is inapposite in any event.

Associated involves a fleet-fueling agreement between Associated Petroleum and Northwest Cascade, Inc., a construction company using diesel-powered equipment at its construction sites. 149 Wn. App. at 432. Associated agreed to fuel Northwest's trucks in the evening for $.20 per gallon over the market rate. *Id.* Shortly after Associated began performing, it suggested adding a "demurrage" fee for deliveries fewer than 200 gallons. *Id.* at 432, 433. Northwest refused and Associated subsequently added "time on site" charges to its invoices. *Id.* Northwest paid the invoices without noticing the charges. *Id.*

When Associated terminated the contract about three months later, Northwest discovered the time-on-site charges for the first time. *Id.* at 433. Associated admitted that the time-on-site charge was the demurrage fee by another name. *Id.* Northwest deducted the time-on-site charge from two outstanding invoices, and Associated sued for the difference. *Id.*

The trial court granted summary judgment that Associated was entitled to the invoiced amounts under the account-stated doctrine. *Id.* This Court reversed, holding that there was a question of fact "as to whether Associated concealed its unilateral modification of the contract from Northwest." *Id.* at 438.

Associated is inapposite. The parties agree that they left the price term open – the PUD never rejected a proposed price term. *Supra*, Statement of the Case § E & F. No one here modified a contract – the Small Works Contract could not control the Emergency Work, which was not a small work by definition. *Id.* at § K. And Spradlin Rock did not conceal anything from the PUD – the charges the PUD complains about were in black and white on the invoices. *Id.* § J.

There was no "fraud" on Spradlin Rock's part, and no "mistake[]" on the PUD's part. BA 26. Spradlin Rock's invoices were 99.992% accurate. 02/17 RP 98-99. The PUD only had to look at them to see exactly what they were being charged. Exs 26-29. And nothing supports the PUD's argument that it made a mistake – the PUD was happy to pay until FEMA denied recovery. *Compare* BA 26 *with* Statement of the Case § H.

The PUD's public-policy argument fails for the same reasons. BA 32-33. There was no fraud – Spradlin Rock did not "slip" anything into the invoices – it is all there in black and white. BA 33; Exs 26-29. The PUD paid the invoices after reviewing them, meeting with Tim, and revising them repeatedly. *Supra*, Statement of the Case § F; CP 329-30.

And affirming will not bar defendants from challenging "provisionally paid" invoices (BA 33) – the PUD paid the invoices without objection, reserving only the right to make sure everything added up. *Supra*, Statement of the Case § G. Everything added up – the invoices are 99.992% accurate. 02/17 RP 98-99.

In sum, the PUD cites no apposite authority supporting its arguments about the account-stated doctrine. And that doctrine is irrelevant because the trial court filled a gap using the parties' course of performance rather than relying on the account-stated doctrine. Again, this Court should affirm.

E. The course of dealing was irrelevant due to the trial court's correct summary judgment ruling. BA 33-36.

The PUD argues that the trial court erroneously ruled *in limine* that the PUD could not present course-of-dealing evidence with respect to prices and rates established by the paid invoices. BA 1 (AOE 2), 33-36. The ruling *in limine* is consistent with the trial court's summary judgment order, filling in the price gap in the parties' oral contract. CP 327-29, 491. The trial court was well within its discretion in issuing an evidentiary ruling giving effect to its summary judgment order. This Court should affirm.

The trial court has "broad discretion" in ruling on evidentiary matters and this Court will reverse only for a manifest abuse of discretion. ***In re Estates of Palmer***, 145 Wn. App. 249, 259, 187 P.3d 758 (2008). The PUD fails to address standards of review anywhere in its brief, including here. BA 33-36. The trial court did not abuse its discretion in prohibiting the PUD from putting on course-of-dealing evidence, which the PUD acknowledges would have been used to contradict the trial court's summary judgment ruling. BA 34, 36.

The PUD's assertion that course-of-dealing evidence would have proved that the PUD did not agree to the Emergency Contract rates is unsupported. BA 36. Again, under the express terms of the Small Works Contract, the Emergency Work was not a small work. *Supra*, Statement of the Case §§ B & D 3. The course of dealing on an unrelated matter has no bearing on the Emergency Contract rates. In any event, course of performance always controls over course of dealing. *Supra*, Argument § B.

The PUD belabors its complaints that Spradlin Rock charged too much for the Emergency work in comparison to the Small Works Contract. BA 35-36. But the PUD does not and could not rebut the trial court's obvious conclusion that no reasonable fact-

finder could determine that the parties intended the Small Works Contract rates to apply to the Emergency work. CP 330. Nor does the PUD answer the expert and other testimony (or the jury's verdict) that Spradlin Rock's charges were reasonable. *Supra*, Statement of the Case § K.

In short, the trial court properly exercised its discretion, prohibiting evidence inconsistent with its correct summary judgment ruling. This Court should affirm.

F. Spradlin Rock correctly billed the PUD for labor and administrative time. BA 36-38.

The PUD argues that the parties had a "cost-plus-reasonable-profit" contract, under which Spradlin Rock "may not bill for rates at higher than its actual costs, or recover for administrative time." BA 36-37 (citing ***Keever & Assocs., Inc. v. Randall***, 129 Wn. App. 733, 119 P.3d 926 (2005), *rev. denied*, 157 Wn2d 1009 (2006)). The PUD grossly misrepresents ***Keever***, which is inapposite in any event. This Court should affirm.

Keever agreed to build a barn for Randall for the cost of labor and materials plus 10% for overhead and profit. ***Keever***, 129 Wn. App. at 736. This is "'a cost-plus-a-percentage-of-the-cost contract, [under which] the contracting party reimburses the

contractor for the costs of the material and labor and the contractor's profit or gain is to be a certain percentage of the total cost of the project.'" 129 Wn. App. at 737 (quoting 17A Am.Jur.2d *Contracts* § 495). Keever sued Randall for breach. 129 Wn. App. at 736. The trial court held (1) that Keever could not mark-up its labor costs; but (2) that Keever could recover a fee for administering the contract. *Id.* Randall appealed, and Keever cross-appealed. *Id.* at 737.

The appellate court held that Keever could not recover an administrative fee, citing the general rule that "administrative time is not covered under a cost-plus contract." *Id.* at 739. The court held that Keever waived its argument on labor costs. *Id.* at 741.

Keever is inapposite – Spradlin Rock and the PUD did not have a "cost-plus-a-percentage-of-the-cost contract." *Id.* at 737. The parties initially agreed that the PUD would pay Spradlin Rock for all costs, direct and indirect, and a reasonable profit. CP 125, 129. They never agreed to a percentage of Spradlin Rock's costs. Rather, the PUD later paid Spradlin Rock's first four invoices without objection, fixing the Emergency Contract's price term.

The PUD omits the "rationale" for the general rule that a party may not recover administrative time under a cost-plus

contract: "that the percentage or plus that is added to the actual costs is contemplated to be compensation for the administrative" supervision. *Id.* at 739. Again, the parties did not have a cost-plus contract – there was no "plus . . . contemplated to be compensation for the administrative time. *Id.*

And Spradlin Rock billed the PUD exactly what it paid its workers without any markup. *Compare* BA 38 *with* CP 177; 02/17 RP 98-99, 109-10. Payroll taxes, fringe benefits and the like account for the difference between the amount Spradlin Rock paid its employees and the amount it billed the PUD. *Id.* at 109-10.

In sum, the parties did not have a cost-plus-a-percentage-of-the-cost contract. ***Keever*** is inapposite and the general rule it discusses is inapplicable.

G. The trial court correctly allowed the jury to decide lost profits. BA 38-39.

The PUD argues that the trial court erroneously permitted the jury to decide lost profits based solely on Tim's testimony that he "felt" Spadlin Rock would have done the Frye Creek job under the Small Works Contract if the PUD had not terminated Spradlin Rock when FEMA denied reimbursement. BA 38-39. This argument omits relevant testimony, relies exclusively on inapposite

authority, and was not raised in any event. BA 38 (citing ***Golf Landscaping, Inc. v. Century Constr. Co., a Div. of Orvco, Inc.***, 39 Wn. App. 895, 696 P.2d 590 (1984)). This Court should affirm.

Tim unequivocally testified, "if my [Small Works C]ontract would still have been in place, [Frye Creek] would have been offered to me to do." 02/19 RP 99. Tim's experience and history with the PUD provided ample basis for this testimony. Spradlin Rock had worked for the PUD for over eight years and had the Small Works Contract for "dirt work" for 2007-to-2008. 02/23 RP 652, 661. Tim knew that Frye Creek was "the type of work" that he would have done under the Small Works Contract. 02/19 RP 88.

This is significantly different than ***Golf Landscaping***, in which the contractor testified that he would normally bid on one job per week and had about a 25% success rate. 39 Wn. App. at 903. The court held that lost profits were not reasonably foreseeable, where they "relate[d] not to the particular contract involved, but to other contracts [the contractor] had not yet entered." *Id.* Here, however, lost profits plainly relate to the "particular contract involved" (*id.*) – Tim opined, without objection, that the PUD would have given him the Frye Creek job under the Small Works Contract. 02/19 RP 88, 99.

This Court should not consider this argument in any event, where the PUD did not raise it below. *See* ***State v. Price***, 126 Wn. App. 617, 637, 109 P.3d 27, *rev. denied*, 155 Wn.2d 1018 (2005), ("A party who objects to the admission of evidence on one ground at trial may not on appeal assert a different ground for excluding that evidence"). When moving to dismiss Spradlin Rock's lost-profits claim, the PUD argued solely that Spradlin Rock could not seek lost profits, where the PUD had the right to terminate Spradlin Rock without cause. 02/23 RP 462-63. It did not argue the lost-profits evidence was speculative. *Id.*

Nor did the PUD object when Tim testified on direct that Spradlin Rock would have done the Frye Creek job if the PUD had not terminated the Small Works Contract. 02/19 RP 88. And the PUD elicited Tim's testimony that "if my [Small Works C]ontract would still have been in place, [Frye Creek] would have been offered to me to do." *Id.* at 99. The PUD cannot now claim for the first time that Tim's testimony was speculative. ***Price***, 126 Wn. App. at 637.

The PUD also failed to object to lost-profits jury instruction (02/24 RP 713-18) and fails to assign error to the instruction. BA 1-2. Failure to object to a jury instruction waives appellate review.

Valdez-Zontek v. Eastmont Sch. Dist., 154 Wn. App. 147, 165, 225 P.3d 339 (2010).

In sum, there was sufficient lost-profits evidence to go to the jury, and the PUD did not preserve this issue in any event. This Court should affirm.

H. The trial court correctly granted prejudgment interest on the amount the PUD asked the jury to award. BA 40-45.

Here again, the PUD takes issue with an argument that was never made or ruled upon – that the PUD's damages calculation liquidated "an otherwise unliquidated amount." BA 40. The court correctly awarded prejudgment interest on $3,295,748, where it was undisputed that the PUD owed Spradlin Rock at least that much. 03/22 RP at 895-96. This sum was liquidated not based on counsel's statement, but based on the uncontroverted evidence at trial. This Court should affirm.

The trial court may award prejudgment interest on liquidated claim – claims "where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion." ***Scoccolo Const., Inc. v. City of Renton***, 158 Wn.2d 506, 519, 145 P.3d 371 (2006). A dispute over the whole claim or part of the claim will not change a

liquidated sum to an unliquidated sum. ***Scoccolo***, 158 Wn.2d at 519. Prejudgment interest is favored to prevent the retention of sums owed to another. ***Kiewit-Grice v. State***, 77 Wn. App. 867, 873, 895 P.2d 6, *rev. denied*, 127 Wn.2d 1018 (1995). This Court reviews prejudgment interest awards for abuse of discretion. ***Kiewet-Grice***, 77 Wn. App. at 872.

The PUD's only expert, Robert Marshall, testified that it "should have cost" $2,996,921 for the Think of Me Hill work. 02/23 RP 570. The only significant difference between Marshall's appraisal and Spradlin Rock's invoices is that Marshall cut the equipment hours in half, opining that the PUD should not pay for standby equipment.[9] 02/23 RP 576, 592. Marshall did not opine on Neilton, or even visit Neilton. 02/24 RP 696.

In closing arguments, the PUD asked the jury to adopt Marshall's appraisal. 02/24 RP 779-82. The PUD actually did the math for the jury, starting with Marshall's $2,996,921 appraisal, adding $117,360 for undisputed and unpaid invoices on two different PUD projects, and subtracting $1,578,051 the PUD already paid, totaling $1,506,237 still owing on Think of Me Hill. *Id.*

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[9] Stipic, Kollman, and Tim testified that it is industry standard to bill for equipment on site that is not in use. 02/19 RP 77, 166-67, 177. The PUD paid other contractors who charged for standby equipment. *Id.* at 81-83.

Although Marshall did not opine on Neilton, the PUD asked the jury to award $1,789,511 on Neilton, cutting Spradlin Rock's equipment charges in half, just as Marshall had done in his Think of Me Hill appraisal. *Id.* at 782-85. The PUD asked the jury to award $3,295,748 total, stating, "that's a fair number based on the analysis that you've heard in this courtroom.[10] *Id.* at 786.

The trial court awarded prejudgment interest on the PUD's damages calculation, finding that "there's certainly no evidence that would justify any verdict below that." 03/22 RP 893, 896; CP 648 FF 3. This ruling in no way suggests that counsel's closing argument "render[ed] an otherwise unliquidated amount liquidated." BA 43. Rather, the court found that the $3,295,748 damages calculation is a liquidated sum because Marshall (and all other experts) agreed that the PUD owed Spradlin Rock at least that much. 02/23 RP 570; 03/22 RP 893, 896; CP 648 FF 3, CL 4 & 5. If the jury believed Marshall, then it could "compute [damages] with exactness, without reliance on opinion or discretion." ***Scoccolo***, 158 Wn.2d at 519.

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[10] $1,506,237 for Think of Me Hill + $1,789,511 for Neilton = $3,295,748.

Kiewet is inapposite. BA 41-42. There, the contractor sued the Department of Transportation, alleging that the DOT breached the parties' construction contract, causing Kiewit to make expenditures that were not in the contract. 77 Wn. App. at 870-73. Kiewet prevailed and the trial court awarded prejudgment interest on the entire lump-sum verdict. *Id.* at 869-70. The appellate court reversed, holding that the jury exercised discretion to determine the reasonableness of the extra expenditures. *Id.* at 874.

The PUD did not challenge the reasonableness of Spradlin Rock's charges up to $3,295,748. 02/23 RP 570. And the trial court did not "dissect[]" the verdict or rule that the entire verdict was liquidated. BA 41. The court awarded prejudgment interest on the uncontested amount the PUD owed Spradlin Rock. This is the point of prejudgment interest – compensation for the wrongful deprivation of funds owed.

The trial court also was within its discretion in awarding interest under RCW 39.76.011(1), requiring public entities to pay interest when they fail to timely pay "amounts due on written contracts . . . ." There are no Washington cases discussing RCW 36.76.011(1)'s written-contract requirement, but the appellate court found a written contract on substantially similar facts in ***Smith v.***

Skone, *supra*. There, the parties had an oral contract under which Skone agreed to pack and sell Smith's potato crop. 107 Wn. App. at 207. Smith received detailed account statements, including amounts, prices, and costs. *Id.* Although Smith did not sign them, he also did not object. *Id.* The court held that the statements memorialized the oral agreement in a "written contract." *Id.*

Here too, the trial court correctly held that the paid invoices constitute a written contract. CP 647 FF 2, 4. These "tremendously detailed" invoices – which the PUD approved, signed, and paid – showed all equipment, employees, profit, surcharges, and other pricing information. *Id.* at FF 2. This Court should affirm.

CONCLUSION

This Court should affirm for the reasons stated above.

RESPECTFULLY SUBMITTED this 3rd day of January, 2011.

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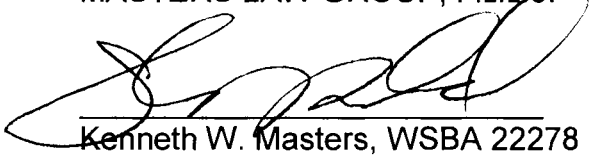

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CERTIFICATE OF SERVICE BY MAIL

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