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Appendix A

Coastal Construction, James Hewitt and Tarina Thomas' Proposed
Instruction No. 40 to the Jury

Appendix B

Defendants Stellar J Corporation and Travelers Casualty and
Surety Company's Stipulations and Objections to Plaintiff's and
Third-Party Defendants' Proposed Jury Instructions and Said
Defendants' Request for Jury Receiving Defendants' Proposed
Instructions not Proposed by Plaintiff and Third-Party Defendants

Appendix C

Defendant Stellar J and Travelers Casualty and Surety Company's
Proposed Supplemental Jury Instructions

I. INTRODUCTION

Stellar J Corporation (hereinafter “Stellar J”) and Travelers Casualty and Surety Company (hereinafter “Travelers”) submit the following Reply Brief of Appellants in reply to Coastal Construction Group, Inc. (hereinafter “Coastal”), James Hewitt (hereinafter “Hewitt”), and Tarina Thomas’ (hereinafter “Thomas”) Response Brief.

II. DEFINITION OF REVERSIBLE ERROR

Error is reversible if it prejudices another party. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). Error is prejudicial if it presumptively affects the outcome of trial. *Caldwell v. WSDOT*, 123 Wn. App. 693, 696-97, 96 P.3d 407 (2004), *review denied*, 154 Wn.2d 1006 (2005).

III. ARGUMENT IN REPLY

The theme of Coastal’s Response is two-fold. First, Coastal theatrically argues that Stellar J’s appeal impugns the jury. *Response*, p. 1 (citing *People v. Barnum*, 104 Cal. Rptr.2d 19, 24 (Cal. Ct. App. 2001), *rev. granted and opinion superseded by*, 21 P.3d 1188 (2001)). Second, as offered before and during trial, Coastal tritely proffers a David v. Goliath conceit presumably to elicit an emotive response. *Response*, p. 1 (see 1 Samuel 17:1-58, King James Version). This appeal is not based on either

pretense. Stellar J's appeal is based on clear error of law by the Trial Court, which entitles Stellar J and Travelers to relief.

A. Discrepancies re: Coastal's Citations to the Record

- Coastal argues that its damages are based on the measure of damages provided by the parties' contract and not under the umbrella of a total cost claim or modified total cost claim. *Response Brief*, pp. 31-33.

Before and during trial, Coastal and the Trial Court identified Coastal's damages claim as either a total cost claim or modified total cost claim. CP 1976-77; RP 74-76, 12/30/09; RP 8-11, 01/07/10; RP 40, 01/13/10. In fact, the Trial Court reserved ruling on Stellar J's motion in limine to exclude Coastal's total cost claim until trial. RP 76, 12/30/09. In response to Stellar J's motion for directed verdict, Coastal argued that the testimony of its purported expert, Nick Castorina, "looked at all the factors that are required for modified total cost claim." RP 9, 01/07/10.

- Coastal argues that it submitted substantial evidence to support its modified total cost claim, citing Exhibits 23, 27, 41, 60, 64, 110, and 198. *Response*, p. 35.

However, those Exhibits do not address damages, but consist of construction meeting minutes, e-mails regarding: (1) a revised drawing of a Flowserve submittal, (2) MCC submittal review comments, (3) Coastal's allegation that the MCC dimensional information from the Project

Engineer is incorrect, and (4) the late delivery of pump components, a Request for Information report by the Project Engineer, and Stellar J representative Jeff Walker's Declaration submitted in the Clark County lawsuit involving Flowserve, all of which, collectively, or individually, do not support Coastal's modified total cost claim against Stellar J.

- Coastal argues Mr. Hewitt testified that Coastal's costs were reasonable. *Response*, p. 35 (citing RP 136, 01/05/10).

However, page 136, 01/05/10 is re-cross examination testimony from Patrick Wiltzius. Coastal presented no evidence addressing the reasonableness of its claimed damages amount.

- Regarding his opinion on damages, Coastal argues Mr. Castorina reduced the amount for items charged to Coastal and considered whether other issues raised by Stellar J were Coastal's fault.

Under a modified total cost claim, costs caused by the claiming party are subtracted from the claim. See *Seattle Western Industries, Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 6, 750 P.2d 245 (1988). The evidence shows that delays were caused by Coastal's contractors, Siemens and Tacoma Electric. CP 606-07, 757-58, 847, Ex. 407, RP 78-80, 01/05/10. Mr. Castorina did not account for these delays in formulating his opinion, nor did he present any evidence or opinion that Coastal's claimed damages were reasonable. RP 60-144, 01/06/10.

- Coastal argues Stellar J was responsible for significant changes and months of delay that caused Coastal to incur additional labor and materials. *Response, p. 3* (citing RP 20, ll. 20-22, RP 29, ll. 1-5, 17-20, Ex. 24, 01/05/10).

However, RP 20, ll. 20-22, RP 29, ll. 1-5, 17-20, and Ex. 24 do not show that Stellar J was responsible for significant changes and months of delay that caused Coastal to incur additional labor and materials.

- Coastal argues Stellar J's lack of experience and coordination caused delays in the submittal process with regard to the electrical equipment. *Response, p. 4* (citing RP 85-86, 91, and 96, 01/04/10).

However, pages 85, 86, 91, and 96 do not provide that Stellar J lacked experience and coordination causing delays in the submittal process with regard to the electrical equipment.

- Coastal argues that Stellar J paid Coastal under both the materials contract and Subcontract by one check. *Response, p. 5* (citing RP 149, 01/05/10).

Stellar J paid Coastal for Coastal's singular invoices, minus retention when necessary. Exs. 331, 332, 349, 350, 371, 372. If Stellar J paid Coastal for multiple invoices, Stellar J's check stubs identified the singular invoice amounts corresponding with each Coastal invoice paid under any such check. Exs. 336, 337, 338, 364, 365, 381, 382, 392, 393.

• Coastal argues Stellar J's Project schedule did not include any "float", insinuating that the schedule did not allow much room for Coastal to respond to a delay. *Response*, p. 5 (citing Ex. 13, RP 115, ll. 12-18, 01/05/10).

However, "float" is not necessary to schedule a successful project. RP 160-61, 01/11/10. Further, before Coastal signed the parties' contract, Coastal reviewed the Project schedule and did not express any concern about the budgeted time. RP 15, 17-18, 01/13/10.

• Coastal argues that Stellar J withheld responses to Coastal's submittals causing delay to Coastal. *Response*, p. 6 (citing RP 129, 01/06/10).

However, page 129 refers to only one submittal response.

• Coastal submits that Coastal was delayed because of changes made to other equipment being supplied by Stellar J that resulted in changes to the MCCs. *Response*, p. 6 (citing Exs. 60, 64, 105).

Exhibits 60, 64, and 105 do not show delay experienced by Coastal.

• Coastal argues that the delay caused by Stellar J made it impossible for Coastal to have the MCCs delivered to the Project until after January 19, 2006. *Response*, p. 7 (citing RP 85-87, 90-91, 97, 01/04/10, RP 18, 01/05/10).

Pages 85-87 do not provide that Stellar J caused Coastal delay. Page 90 refers to Siemens, which was Coastal's responsibility. CP 606-07.

- Coastal submits numerous and substantial changes in the scope and extent of Coastal's work under the contracts required additional time and materials. *Response*, p. 7 (citing Exs. 23, 27, 41, 60, 64, 110, 178, 198, 244, 249, RP 136, 01/06/10).

However, Exhibits 23, 27, 41, 60, 64, 110, 178, 198, and page 136 do not show numerous and substantial changes in the work that cost Coastal additional time and materials. In fact, page 136 is testimony from Mr. Catorina's direct testimony which conceded that the alleged financial impact was difficult to quantify.

- Coastal argues delays and substantial changes by Stellar J caused Coastal to incur additional overhead expenses and caused Coastal to provide extra materials and labor. RP 135, 144, 01/06/10.

However, pages 135 and 144 do not show Coastal's overhead expenses or that Coastal had to provide extra labor and materials.

- Coastal alleges that Stellar J informed Coastal the reason Coastal was not paid was because the City had not paid Stellar J, which Coastal alleges was untrue after contacting the City. *Response*, p. 8 (citing RP 154, 155, 01/05/10).

The check had been issued by the City on a Friday, which Coastal inquired about on the following Monday. RP 41, 01/13/10. Stellar J did not receive the check until Thursday. *Id.*

- Coastal argues that Stellar J was also “blaming” other subcontractors for the by-pass pumping. *Response, p. 9.*

Coastal’s argument is illogical because, over Stellar J’s objection, Coastal submitted Flowserve’s settlement of its lawsuit against Stellar J, which was advantageous to Stellar J presumably because of Flowserve’s untimely performance. Ex. 200.

- Coastal argues that Stellar J had not obtained the necessary SCADA communication to turn off the bypass pumps. *Response, p. 10* (Exs. 135, 152, 16, RP 123, 127, 01/12/10). The pumps were operational without SCADA communication. RP 115, 01/08/10. An actual start up of the pump stations occurred on April 10, 2006. RP 126, 01/12/10.

- Coastal argues that the lien releases executed by Thomas and Hewitt were not enforceable against them individually because Stellar J had not paid Coastal. *Response, p. 11.*

Stellar J paid Coastal throughout the Project until the end, except for \$92,000.00, and Hewitt and Thomas were not paying their subcontractors or suppliers from the beginning of the Project; Coastal owed Tacoma Electric more than the \$92,000.00 withheld by Stellar J.

B. The Trial Court erred by denying Stellar J's CR 50 motion to dismiss Coastal's Total Cost Claim.

Coastal argues that its alleged damages were based on the parties' contract and not on a total cost claim (*Response*, pp. 31-33), which Coastal did not argue until after trial upon its request for prejudgment interest. Compare CP 1976-77 with CP 2118-21, 2326-29. Coastal did not raise this damages argument before the Trial Court during trial. See RP 9, 01/07/10. Therefore, this argument cannot be raised by Coastal on appeal. See *Commercial Credit Corp. v. Wollgast*, 11 Wn. App. 117, 125-26, 521 P.2d 1191, *review denied*, 84 Wn.2d 1004 (1974).

The total cost basis for establishing damages can be used only in building and construction contract cases when substantial changes occur which are not covered by the contract or within the contemplation of the parties and which are not such that the contractor should have anticipated or discovered them. *S.L. Rowland Const. Co. v. Beall Pipe & Tank Corp.*, 14 Wn. App. 297, 304, 540 P.2d 912 (1975), *review denied*, 87 Wn.2d 1001 (1976).

In order for a party to recover under a total cost claim, it must show that (1) a substantial change occurred that is not covered by the contract or within the contemplation of the parties and which are not such that the contractor should have anticipated or discovered; (2) the change or

delay was sudden and unpredictable; (3) the change or delay made it impossible for the claiming party to either undertake the performance of other work or to cut back on home office personnel or facilities; (4) the claiming party is not responsible for any part of the change or delay; and (5) the claiming party is unable to continue performing the contract, even in a capacity that is not as efficient or as effective as the claiming party initially planned when the contract was executed. *S.L. Rowland Const Co.*, 14 Wn. App. at 304; *Eichleay Corp.*, ASBCA No. 5183, 60-2 B.C.A. ¶ 2688 (ASBCA 1960); *Charles G. Williams Constr., Inc. v. White*, 271 F.3d 1055, 1058 (D.C.Cir. 2001) (quoting *West v. All State Boiler, Inc.*, 146 F.3d 1368, 1377 (D.C.Cir. 1998); *Melka Marine, Inc. v. United States*, 187 F.3d 1370, 1376 (D.C.Cir. 1999); *W.G. Cornell Co. v. Ceramic Coating Co.*, 626 F.2d 990, 994 (D.C.Cir. 1980).

Coastal's total cost claim, whether a total cost claim or modified total cost claim, did not satisfy these requirements. *Response*, p. 35. Accordingly, the Trial Court's decision to allow the jury to consider Coastal's total cost claim was reversible error.

C. The Trial Court erred by denying Stellar J's CR 50 motion to dismiss Coastal's claims not supported by the evidence.

Coastal failed to demonstrate proximate cause for its alleged damages. RP 161-165, 01/06/10. The project delays were caused by

Coastal's failure to timely deliver. CP 732, 743-46, 952, Ex., 407, RP 18, 78-79, 01/05/10. Further, even if Coastal presented sufficient evidence of Stellar J's alleged breach, Coastal failed to present sufficient evidence to show that Coastal's alleged damages were causally related to Stellar J's alleged breach. RP 144-165, 01/06/10. Next, Coastal did not prove that its damages were reasonable. RP 60-166, 01/06/10. The Trial Court's denial of Stellar J's motion for directed verdict was reversible error.

D. The Trial Court erred by dismissing the Fraud claims against Thomas and Hewitt.

Contrary to Coastal's assertion and the Trial Court's finding, the economic loss rule did not bar the fraud claims against Thomas and Hewitt. *See Response, pp. 37-38*. Further, Coastal's reliance on *Eastwood v. Horse Harbor Foundation*, --- P.3d ---, 2010 WL 4351986 (2010), actually supports Stellar J's position. In *Eastwood*, the Supreme Court of Washington upheld the individual liability of the directors of a lessee nonprofit corporation finding that the duty not to commit waste was independent from the parties' contract. That is precisely what Stellar J alleged here. Under the "ABC" rule, Hewitt and Thomas were bound by independent tort duties not to involve Stellar J in a lawsuit with others, to-wit: Tacoma Electric. *See Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 358-359, 110 P.3d 1145

(2005); *Dauphin v. Smith*, 42 Wn. App. 491, 494, 713 P.2d 116 (1986).

Based upon Hewitt and Thomas' breach of this duty, Stellar J's fraud claims should not have been dismissed upon directed verdict.

Coastal suggests that Stellar J's fraud claims against Thomas and Hewitt "were a strategic tool to try to scare Coastal into submission." *Response*, p. 38. That is not so. Stellar J has shown that Hewitt and Thomas signed the affidavits of payment for payments that were not paid. Next, Coastal argues that the Trial Court did not find sufficient evidence to support Stellar J's fraud. *Id.* The Trial Court's exact words are:

... Nonetheless, I feel that with that from the Court of Appeals, I don't have any choice but to dismiss it [the fraud claims]. I would note that had there not been for that or if we took that issue aside, I'm not all that impressed with the proof in this case. But nonetheless, there are facts and circumstances and inferences which would support the charge continuing if it were not for the economic loss rule....

RP 57, 01/13/10 pm. Thus, contrary to Coastal's assertions, the Trial Court did find sufficient evidence for the fraud claims to proceed, but for the Trial Court's dismissal of these claims under the economic loss rule, regardless of whether the fraud claims were impressive to the Trial Court or not. Accordingly, the Trial Court erred by dismissing these claims.

E. Judgment was Improperly entered against Travelers.

Coastal emphasizes that it was awarded breach of contract damages based on the contract between the parties. *Response*, pp. 31-33. Indeed, Coastal admits that the damages awarded to it were not based on reasonable value.

Thus, this was not a Quantum Meruit case where Coastal was awarded reasonable values. Instead, the damages awarded by the jury were damages for Stellar J's breaches of contract.

Response, p. 33.

However, Washington law is clear that Travelers' liability under its bond is based upon RCW 39.08.030 and not on the terms of the contract between Coastal and Stellar J. *U.S. Filter Distribution Group, Inc. v. Katspan, Inc.*, 117 Wn. App. 744, 754, 72 P.3d 1103 (2003) ("A supplier's right of action against a defaulting contractor's surety arises from the provisions of RCW 39.08.030, not from the terms of its agreement with the contractor"); *Keller Supply Co., Inc. v. Lydig Constr. Co., Inc.*, 57 Wn. App. 594, 600, 789 P.2d 788 (1990) ("[W]e do not believe [claimants'] right of action . . . arises in any way out of its contract . . . rather its claim is based solely on the provisions of the Bond Act . . ."). Coastal ignores this authority.

Consistent with the above authority, Washington courts have long held that a recovery against the bond must be based upon the reasonable value of labor, materials or services furnished by the claimant and not the provisions of its contract. *Bishop v. T. Ryan Constr. Co.*, 106 Wash. 254, 267, 180 P. 126 (1919):

The respondent recovers against the bond because of the statute, which gives him the right to resort to the bond for value of the services rendered to a subcontractor for which the subcontractor does not pay. But the contract between the party performing the service and the subcontractor does not in all cases fix the amount of such recovery. It is allowed to control only insofar as it is reasonable and insofar as it is a just charge for the service performed.

Id at 267.

Here, Coastal admits that the damages awarded against Travelers were not based upon a determination of their reasonable value. Moreover, Coastal does not meaningfully address the error identified by Stellar J and Travelers that Coastal's total cost measure of damages failed to demonstrate that its costs were reasonable or recoverable; therefore, Coastal's alleged damages are not "lienable" and are excluded from any recovery under the bond. Further, *Seattle Western Industries, Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 750 P.2d 245 (1988), as relied upon by Coastal, did not involve an award against a contractor's surety based upon a total cost measure of damages and thus has no relevance here.

The Trial Court erred by entering judgment against Travelers.

F. The Trial Court's Award of Prejudgment Interest was Reversible Error.

Coastal concedes that its claim is unliquidated. *Response*, p. 42. However, Coastal appears to argue that its unliquidated claim is for an amount due, which is determinable by computation to a fixed standard contained in the contract. An unliquidated claim is where the exact amount cannot be definitely fixed from the facts proved, disputed or undisputed. *CKP, Inc. v. GRS Constr. Co.*, 63 Wn. App. 601, 614, 821 P.2d 63 (1991). A defendant should not be required to pay prejudgment interest in cases where he is unable to ascertain the amount owed.

Coastal cannot provide the amount allegedly owed to Coastal by Stellar J. *Response*, *passim*. Coastal's damages claim is a claim for quantum meruit, and a quantum meruit claim may not be the basis for an award of prejudgment interest. *CKP, Inc.*, 63 Wn. App. at 615. The Trial Court's award of prejudgment interest to Coastal is reversible error.

G. The Trial Court's application of Oregon Law was Reversible Error.

Coastal argues that Stellar J's assignment of error for this issue is not properly before the Court because Stellar J did not assign error to the jury instructions. *Response*, p. 44 (citing CP 2502). As Coastal admits, Stellar J's request to apply Washington law was brought during a pretrial

motion. *Response*, p. 45. Unless the Trial Court requires that further objections at trial are required when making its ruling, a party losing a pretrial motion is deemed to have a standing objection. *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 622, 762 P.2d 1156 (1988). Here, the Trial Court decided this issue upon Stellar J's pretrial motion and did not require further objection at trial. Thus, Stellar J had a standing objection to the Trial Court's decision to apply Oregon law and Stellar J was not required to object to the jury instructions. Second, Stellar J did object and the objections are preserved in the record. RP 6, 01/14/10.¹ It is undisputed that after initial pleading, through summary judgment, until the time of trial, this case was litigated under Washington law.

In the very same paragraph containing the Oregon choice of law provision in the Subcontract, the parties also agreed to a venue selection clause for Clark County, Washington. Ex. 5, p. 6, ¶ 23. Stellar J filed suit as plaintiff against Coastal in Clark County based upon this clause and moved to dismiss the Lewis County lawsuit for improper venue. CP 613-

¹ The second paragraph of CP 2502 is based on Coastal's proposed Jury Instruction No. 40. Coastal's proposed Jury Instruction No. 40 is attached as App. A. Stellar J has designated Coastal's proposed jury instructions through supplemented Clerk's Papers. Stellar J filed a written objection to Coastal's proposed jury instructions, including proposed Instruction No. 40. Stellar J's objections are attached hereto as App. B, and Stellar J has designated this document through supplemented Clerk's Papers. During trial, Stellar J also submitted a jury instruction under Washington law contravening Coastal's proposed Instruction No. 40, which is attached as App. C, and which Stellar J has designated through supplemental Clerk's Papers.

25, 649-53. Coastal resisted the venue selection clause (under Washington law), which the Lewis County Superior Court voided thereby creating venue in Lewis County. CP 626-48, 654-55.

A party's use of Washington law is a clear acquiescence by application, and an opposing party's lack of opposition to citations during summary judgment may be construed as the same. See *Prime Start Ltd. v. Maher Forest Products, Ltd.*, 442 F.Supp.2d 1113, 1119 (W.D.Wa 2006) (interpreting Washington law). Parties acquiesce in the application of Washington law if both sides have either relied on or tacitly approved of reliance on Washington law. *Id.*

As both Coastal and Stellar J relied on Washington law before trial, the parties acquiesced to the use of Washington law at trial. The Trial Court's decision to allow Coastal to use Oregon law at trial was reversible error.

H. The Trial Court's Award of Post-Judgment Interest at Twelve Percent was Reversible Error.

Coastal argues that application of a post-judgment interest rate is a "purely procedural" issue, but fails to provide any authority for that proposition. *Response*, p. 48. Stellar J, on the other hand, relied on the case of *Paul v. All Alaskan Seafoods, Inc.*, 106 Wn. App. 406, 428-29, 24 P.3d 447 (2001), for the proposition that the application of a conflicting

interest rate is a substantive issue of law. *Opening Brief*, p. 40. Coastal argues that this case is inapplicable because the issue in the *Paul* case was whether Admiralty law or Washington law applied. This authority is not distinguishable but analogous because the case involved substantive application of post-judgment interest between two jurisdictions. The two jurisdictions in this matter are Washington and Oregon.

Here, the Trial Court ruled that Oregon substantive law applied for the parties' Subcontract, and the Trial Court ruled that prejudgment interest awarded to Coastal under the parties' Subcontract was calculated at the Oregon statutory rate of nine percent (9%). If the Trial Court was correct to rule that Oregon's substantive law applied to the parties' Subcontract, including the award of prejudgment interest, then Stellar J respectfully requests that the Court reverse the decision of the Trial Court and apply Oregon's statutory rate of nine percent (9%) to any award of post-judgment interest under the parties' Subcontract.

I. The Trial Court's Denial of Stellar J's Motion for Summary Judgment under the Perfect Tender Rule was Reversible Error.

In response to this assignment of error, Coastal argues that Stellar J interfered with Coastal's ability to provide the MCCs by August 15, 2005. *Response*, p. 16. However, Coastal has not provided any factual support for this proposition. The Purchase Order required Coastal to participate in

the submittal process to submit designs, dimensions and information regarding the product and service it was providing to the Project Engineer. Ex. 6, p. 1. Coastal subcontracted with Tacoma Electric to supply electrical equipment, including the MCCs, to the Project site. CP 731. From the time the Purchase Order was executed until the time the MCCs were delivered, Tacoma Electric and Siemens did not timely comply or provide the necessary information to allow the Project Engineer to approve the Submittal, for which Coastal complained to Tacoma Electric for this tardiness. CP 747, Ex. 407.

Under the UCC, if the goods or the **tender of delivery** fail in any respect, the buyer may reject the whole. *Alaska Pacific Trading Co. v. Eagon Forest Products, Inc.*, 85 Wn. App. 354, 359, 933 P.2d 417, *review denied*, 133 Wn.2d 1006 (1997) (citing RCW 62A.2-601(a)) (emphasis added). This includes failure on the part of the seller to deliver the goods by the contractually agreed delivery date. *Id.* Failure by the seller to timely tender delivery allows the buyer to seek remedies for damages. RCW 62A.2-713, RCW 62A.2-714.

In this matter, it is undisputed that Coastal agreed to a delivery date of August 15, 2005. It is undisputed that Coastal did not deliver the MCCs until January 19, 2006, and the operation and maintenance manuals

for the MCCs until March 14, 2006. The Trial Court's denial of Stellar J's Motion for Partial Summary Judgment was reversible error.

J. The Trial Court's Denial of Stellar J's Motion for Leave to Amend the Answer, Affirmative Defenses and Counterclaims was reversible error.

1. Stellar J is not appealing the Trial Court's denial to add new parties.

Stellar J is not appealing the Trial Court's denial to add new parties. Stellar J is appealing the Trial Court's denial to allow Stellar J to allege fault against the City and its Project Engineer, Brown & Caldwell. Indeed, Coastal has argued that delays in the submittal process under the control of the Project Engineer damaged Coastal. CP 606.

2. The Trial Court's denial to allow Stellar J to add new claims was reversible error.

Coastal argues that because approximately 3½ years passed before Stellar J moved to amend its counterclaims to add new claims, the passage of time is indicative of prejudice to Coastal. *Response*, p. 18. The purpose of pleadings is to facilitate a proper decision on the merits and not to erect formal and burdensome impediments to the litigation process. *Caruso v. Local Union No. 690 of Intern. Broth. of Teamsters*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983) (citations omitted). Delay, whether it is excusable or not, in and of itself, is not sufficient reason to deny the motion. *Id* (in

Caruso, a delay of 5 years and 4 months did not arise to the level of prejudice to deny a motion to amend).

The touchstone for denial is the prejudice the amendment would cause the nonmoving party. A claim by the nonmoving party that it would suffer undo prejudice because of lack of prior knowledge, making it difficult to prepare for trial, without setting forth specific objections relating to actual prejudice, is insufficient to show prejudice to deny the motion. *Walla v. Johnson*, 50 Wn. App. 879, 884-85, 751 P.2d 334 (1988) (citing *Caruso*, 100 Wn.2d at 351).

Here, Coastal has failed to show actual prejudice. The parties' contract incorporates the terms of the Master Contract between Stellar J and the City. The Purchase Order and Subcontract refer to each other and the Master contract. See e.g., Ex. 301, Attachment A, p. 8., last ¶ re: MCC submittals [i.e., equipment under the Purchase Order], p. 9, cell nos. 5 and 10 and handwritten entries at bottom of page identifying "main contract", Ex. 302, p. 1, cell no. 1, and bullet points on the same page re: MCC [equipment] submittals and delivery. The three documents are interrelated as to the scope of work and the method and means of how the work was to be completed.

The contract documents between Coastal and Stellar J are the Purchase Order, Subcontract and Master Contract. Stellar J should not

have been precluded from amending its pleading to allege a counterclaim under the parties' contract because the same documents formed the basis of Coastal's Complaint against Stellar J and are the same contractual documents under which Coastal sought relief. CP 604-12. Lastly, Coastal's argument that any error was harmless is incorrect. The Trial Court precluded Stellar J from arguing claims under the Subcontract, which the jury was not allowed to consider. Accordingly, the Trial Court's denial of Stellar J's motion to amend was an abuse of discretion and reversible error.

K. The Trial Court's exclusion of Roy Rogers from testifying was reversible error.

Coastal accuses Stellar J of "sandbagging" the disclosure of Roy Rogers as the basis for his exclusion from testifying. *Response, p. 24*. The Court's Pretrial Conference Report and Order required that Stellar J designate its expert witnesses by December 1, 2009, which Stellar J accomplished. CP 1241-45. On December 1, 2009, Stellar J designated its expert witnesses pursuant to the Court's Pretrial Order. CP 1282-95. The Court's Pretrial Order did not require a disclosure of expert opinions. CP 1243. Further, Stellar J was not able to complete the deposition and discovery of Mr. Castorina, until December 3, 2009, because of Coastal's scheduling. CP 1435-36, 1440-1444. Moreover, the substance of Stellar

J's expert witness designation equaled the substance of the opinions disclosed by Coastal's expert. CP 1436, 1480-87, 1555-56, RP 31-32, 12/30/09.

Stellar J repeatedly attempted to schedule depositions of Stellar J's expert witnesses with Coastal. CP 1556-62. Initially, Coastal expressed willingness to schedule the depositions of Stellar J's expert witnesses. CP 1563-64. On December 9, 2009, Coastal's counsel indicated that once he was provided with Stellar J's expert witness availability, he would do his best to "juggle things to schedule it." CP 1563. Coastal's counsel retracted this willingness.

On December 15, 2009, the Court rescheduled the pretrial hearing from December 23, 2009 to December 30, 2009. On that same day, after the Court rescheduled the pretrial hearing, Stellar J again provided the available dates for Coastal to depose Mr. Rogers on December 16, December 21 through December 24, and December 28 through December 30, 2009. CP 1698. Stellar J provided Coastal with eight (8) dates when Mr. Rogers was available for depositions. *Id.* However, Coastal refused to take depositions until after the Court heard Coastal's Motion in Limine at the pretrial hearing. CP 1697, 1701-03. The Trial Court's exclusion of Roy Rogers from testifying was an abuse of discretion and reversible error.

L. The Trial Court's denial to strike the testimony of Mr. Castorina once he testified was reversible error.

When ruling on somewhat speculative testimony, the Trial Court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001). The only fact alleged in Coastal's Complaint supporting any cause of action was that Stellar J withheld money from Coastal for an alleged delay in the electrical equipment being supplied by Tacoma Electric. CP 604-12. The sole issue in Coastal's Complaint was whether the amount withheld by Stellar J was justified as a result of the late delivery of the MCCs by Coastal. CP 606. That was the only fact relating to the damages pleaded by Coastal. Mr. Castorina's testimony at trial regarding delay damage calculations and Coastal's modified total cost claim were irrelevant and are unfairly prejudicial to Stellar J. RP 60-166, 10/06/10.

M. The Trial Court's decision to allow Coastal to argue claims for damages not properly pleaded was reversible error.

Coastal argues that it remained unpaid for its work and incurred damages as a result of project delay. *Response*, p. 28 (citing CP 606-08).

The delay as alleged by Coastal was caused by its supplier, Tacoma Electric, in addition to, Coastal's claim against Stellar J for non-

payment. CP 607. As Coastal's delay claim was not properly pleaded against Stellar J, and considering that the Trial Court denied Stellar J's motion to argue similar claims at trial, the Trial Court's decision to allow Coastal to argue a delay claim against Stellar J was reversible error.

N. The Trial Court's decision to allow the jury to consider Stellar J's settlement with Flowserve was reversible error.

Coastal argues that Stellar J was making the exact claims against Flowserve and had sued Flowserve. *Response*, p. 27 (citing Exs. 159, 197, 198). Coastal is incorrect. Stellar J asserted counterclaims against a lawsuit brought by Flowserve. The pumps were delivered by Flowserve to the Project on January 4, 2006. Stellar J did not allocate any damages for Coastal's failure to timely deliver the MCCs during the time period in which Flowserve was in breach. CP 745, Ex. 157, RP 18-20, 01/08/10. Stellar J only assessed damages for the time period after Flowserve performed. *Id.* Moreover, Stellar J paid Coastal for all invoices from Coastal through the time when the goods were delivered by Flowserve. CP 1693, Ex. 408, RP 164, 01/05/10. The Trial Court allowing the jury to hear evidence of Stellar J's settlement with Flowserve was reversible error.

O. The Attorney Fees and Costs Awarded to Coastal should be Overturned or Reduced.

The contract in this matter awards the prevailing party attorney fees and costs. CP 2114. If both parties prevail on a major issue, neither is a prevailing party. *Hertz v. Riebe*, 86 Wn. App. 102, 105, 936 P.2d 24 (1997) (citations omitted). Based on the foregoing, Coastal is not entitled to attorney fees. Alternatively, Stellar J is entitled to an offset and reduction of fees. *Marassi v. Lau*, 71 Wn. App. 912, 917, 859 P.2d 605 (1993), *overruled on other grounds, Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009).

P. Stellar J is entitled to Attorney Fees on Appeal.

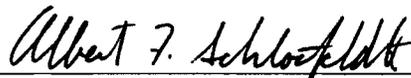
Based on the foregoing, Stellar J is entitled to attorney fees on appeal. *Hertz*, 86 Wn. App. at 26; RAP 18.1.

IV. CONCLUSION

Based on the foregoing, Stellar J respectfully requests the relief identified in the Opening Brief, including a new trial in this matter.

Respectfully submitted this 10 day of December, 2010.

DUGGAN SCHLOTFELDT & WELCH PLLC



ALBERT F. SCHLOTFELDT, WSBA# 19153
MARK A. WHEELER, WSBA# 31492
Of Attorneys for Appellants

APPENDIX A

SUPERIOR COURT
LEWIS COUNTY, WASH
REC'D & FILED

2010 JAN -4 AM 8:56

KATHY BRACK, CLERK

BY MS
DEPUTY

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF LEWIS

COASTAL CONSTRUCTION GROUP,)
INC., a Washington corporation,)

NO. 06-2-00913-2

164

Plaintiff,)

v.)

STELLAR J CORPORATION, a)
Washington corporation; TACOMA)
ELECTRIC SUPPLY, LLC, a Washington)
limited liability company; TRAVELERS)
CASUALTY AND SURETY)
COMPANY, a foreign corporation; and)
THE CITY OF CHEHALIS,)
WASHINGTON,)

Defendants.)

STELLAR J CORPORATION, a Texas)
corporation,)

Third Party Plaintiff,)

v.)

JAMES C. HEWITT and TARINA)
THOMAS, as individuals,)

Third Party Defendants.)

COASTAL CONSTRUCTION, JAMES HEWITT AND TARINA THOMAS'
PROPOSED INSTRUCTIONS TO THE JURY

(With Citations)

Dunn & Black

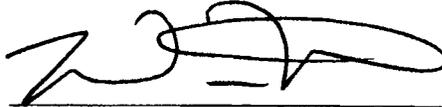
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Banner Bank Building
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DATED this 4th day of January, 2010.

DUNN & BLACK, P.S.



KEVIN W. ROBERTS, WSBA #29473
WESLEY D. MORTENSEN, WSBA #39690
Attorneys for Plaintiffs and Third-Party
Defendants

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APPENDIX B

Received & Filed
LEWIS COUNTY, WASH
Superior Court

JAN 14 2010

By Kathy A. Brack, Clerk
Deputy

IN THE SUPERIOR COURT OF WASHINGTON FOR LEWIS COUNTY

COASTAL CONSTRUCTION GROUP,
INC., a Washington corporation,

Plaintiff,

vs.

STELLAR J CORPORATION, a
Washington corporation; TACOMA
ELECTRIC SUPPLY, LLC, a Washington
limited liability company; TRAVELERS
CASUALTY AND SURETY
COMPANY, a foreign corporation; and
THE CITY OF CHEHALIS,
WASHINGTON,

Defendants,

STELLAR J CORPORATION, a Texas
corporation,

Third Party Plaintiff,

JAMES C. HEWITT and TARINA
THOMAS, as individuals,

Third Party Defendants.

NO. 06 2 00913 2

178

DEFENDANTS STELLAR J
CORPORATION AND
TRAVELERS CASUALTY AND
SURETY COMPANY'S
STIPULATIONS AND
OBJECTIONS TO PLAINTIFF'S
AND THIRD-PARTY
DEFENDANTS' PROPOSED JURY
INSTRUCTIONS

and

SAID DEFENDANTS'
REQUEST FOR JURY RECEIVING
DEFENDANTS' PROPOSED
INSTRUCTIONS NOT
PROPOSED BY PLAINTIFF AND
THIRD-PARTY DEFENDANTS

STIPULATIONS AND OBJECTIONS TO PLAINTIFF'S PROPOSED JURY INSTRUCTIONS - 1

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1 Defendants Stellar J Corporation and Travelers Casualty and Indemnity Company
 2 submit the following stipulations and objections to Plaintiff's and Third-Party Defendants'
 3 proposed jury instructions. Regarding the instructions stipulated to by Defendants,
 4 Defendants stipulate to the instructions as identified as long as the headings of
 5 Plaintiff's/Third-Party Defendant's proposed instructions are removed before submittal to the
 6 jury.

<u>Plaintiff's proposed Instruction No.</u>	<u>Stipulated</u>	<u>Objection</u>	<u>Basis for Objection</u>
1	moot		
2	moot		
3	X		
4	X		
5	X		
6	X		
7	moot		
8	X		
9	X		
10	X		
11		X	The language of Instruction No. 11 is from WPI 300.01. Instruction No. 11 should be rejected because: (1) there is a possibility that a summary can oversimplify and confuse the jury, especially when considering other instructions – see ER 403; also compare with, e.g., Instruction No. 12; (2) there is an inconsistency because Stellar J also claims damages, which is indicated affirmatively for Coastal in

29 **STIPULATIONS AND OBJECTIONS TO PLAINTIFF'S PROPOSED JURY INSTRUCTIONS - 2**

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			Instruction No. 11, but not for Stellar J in Instruction No. 11; and (3) whether any party will seek a judgment as indicated for Coastal in Instruction No. 11 is irrelevant for the jury's deliberation – <u>see</u> ER 401, ER 402, ER 403.
12		X	The language of Instruction No. 12 is from WPI 300.03. Instruction No. 12 should be rejected because: (1) the term “material” is not included in the elements of Coastal’s breach of contract claim in Instruction No. 12, but is included in elements of Stellar J’s breach of contract claim in the same Instruction; (2) the affirmative defenses are listed for Stellar J’s claim, but not for Coastal’s claim.
13	X		
14	X		
15	X		
16	X		
17		X	The language of Instruction No. 17 purports to come from the case of <i>Felton v. Menan Starch Co.</i> , 66 Wn.2d 792, 797 (1965). Instruction No. 17 should be rejected because: (1) whether a contract is ambiguous is a question of law, not a question of fact – <i>Millican of WA v. Wienker Carpet Service, Inc.</i> , 44 Wn. App. 409, 415-16, 722 P.2d 861 (1986) (citations

STIPULATIONS AND OBJECTIONS TO PLAINTIFF’S PROPOSED JURY INSTRUCTIONS - 3

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			omitted); (2) there is no definition of “ambiguous”, which could lead to juror confusion – see ER 403; and (3) the “context rule” of contracts is given in both Instruction No. 16 and D-15; therefore, Instruction No. 17 is inappropriate.
18	X		
19	X		
20	X		
21	X		
22		X	The language of Instruction No. 22 purports to come from the case of <i>Jacks v. Blazer</i> , 39 Wn.2d 277, 285 (1951). This instruction omits language from the citation specifically referring to a “bilateral contract” – <i>id.</i> Instruction No. 22 should be rejected because the language of Instruction No. 22 is repetitive/cumulative of Instruction No. 21 – see ER 403.
23		X	The language of Instruction No. 23 comes from WPI 302.07. It appears to be a correct statement of WPI 302.07. There is no objection, except for an instruction on wavier should also be given regarding Coastal’s failure to follow the contractual notice provisions. See Stellar J’s Supplemental Jury Instruction No. D-38.

STIPULATIONS AND OBJECTIONS TO PLAINTIFF’S PROPOSED JURY INSTRUCTIONS - 4

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24		X	The language of Instruction No. 24 purports to come from the case of <i>V.C. Edwards Contracting Co. v. Port of Tacoma</i> , 83 Wn.2d 7, 13 (1973). Instruction No. 24 should be rejected because (1) Coastal's reliance on the <i>V.C. Edwards Contracting Co.</i> case, is only a half-statement of the law because that Court found that such a claim is barred if the claimant contractor should have discovered or anticipated the changed condition; and (2) Instruction No. 24 is repetitive/cumulative of the "duty of good faith" instruction given under Instruction No. 19 and at D-21 – see ER 403.
25		X	The language of Instruction No. 25 is from WPI 302.08 and appears to be correct, but only states half of WPI 302.08; <u>compare with D-20.</u>
26		X	The language of Instruction No. 26 is from RCW 62A.2-311, but only states a portion of that statute and is thus an incorrect statement of the law as the language of Instruction No. 26 is taken out of the full context of RCW 62A.2-311.
27		X	Instruction No. 27 purports to come from 5 cases, <i>Young v. Widney Island Bd. of Realtors</i> , 96 Wn.2d 729, 734 (1982); <i>Comarco Contractors v. State</i> , 22 A.D.2d 833

STIPULATIONS AND OBJECTIONS TO PLAINTIFF'S PROPOSED JURY INSTRUCTIONS - 5

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			(1964); <i>U.S. v. Miller-Davis Co.</i> , 61 F.Supp. 89 (D.Conn. 1945); <i>Cotter v. Consolidated Constr.</i> , 365 N.E.2d 636 (1977); <i>Continental Ill. Nat'l Bank & Trust v. U.S.</i> , 101 F.Supp. 755 (1952), and WPI 33.03. Instruction No. 27 should be rejected because (1) Instruction No. 27 appears to unnecessarily combine causation and mitigation instructions; and (3) the language in Instruction No. 27 is repetitive/cumulative of such instructions under Instruction Nos. 28 and 38 – <u>see ER 403</u> ; (3) <u>also compare with D-7 and D-35.</u>
28		X	The language of Instruction No. 28 is from WPI 15.01; the second, bracketed sentence from WPI 15.01 should be given, which is not included in Instruction No. 28; <u>compare with D-7.</u>
29		X	The language of Instruction No. 29 purports to come from the cases of <i>Miller v. Guy H. James Constr. Co.</i> , 653 P.2d 221 (Okla.App. 1982); <i>Bradford Builders, Inc. v. Sears, Roebuck & Co.</i> , 270 F.2d 649 (5 th Cir. 1959), and <i>United States v. Spearin</i> , 248 U.S. 132 (1918). Instruction No. 29 should be rejected because, in Washington, if the contract between the parties provides a remedy for allegedly defective plans, the

STIPULATIONS AND OBJECTIONS TO PLAINTIFF'S PROPOSED JURY INSTRUCTIONS - 6

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			claimant contractor is bound to the procedures delineated in the parties' contract. <i>Absher Constr. Co. v. Kent School Dist. No. 415</i> , 77 Wn. App. 137, 139-41, 890 P.2d 1071 (1995).
30		X	The language of Instruction No. 30 purports to come from RCW 60.28.010. It appears that RCW 60.28.010 has been repealed. Instruction No. 30 should be rejected because Instruction No. 30 incorrectly instructs that retainage is recoverable automatically once a public works project is finished, regardless if a dispute for retainage is at issue.
31		X	The language of Instruction No. 31 purports to come from RCW 39.08.010 and RCW 39.08.030. Instruction No. 31 should be rejected because Instruction No. 30 incorrectly presumes that a bond claim is immediately payable regardless of the dispute in controversy.
32		X	The language of Instruction No. 32 purports to come from Black's Law Dictionary, 5 th ed.; (2) the word "one" is misspelled in l. 3 in Instruction No. 32. Instruction No. 31 should be rejected because "principal" is not defined, and, likewise, the language of instruction No. 32 is confusing, which could lead

STIPULATIONS AND OBJECTIONS TO PLAINTIFF'S PROPOSED JURY INSTRUCTIONS - 7

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			to juror confusion – <u>see</u> ER 403.
33		X	The language of Instruction No. 33 is from WPI 303.02; “for” is misspelled on page 1, l. 16; Stellar J requests that the Court give Stellar J’s instruction under D-30, which specifically identifies the parties. <u>Compare with</u> D-30, which identifies the parties.
34		X	The language of Instruction No. 34 is from WPI 301A.02 regarding quasi-contract. Instruction No. 34 should be rejected because Coastal admits that an enforceable contract exists between the parties regarding Coastal’s damages claim. Submitting any argument to the contrary could result in juror confusion – <u>see</u> ER 403.
35		X	The language of Instruction No. 35 is from WPI 303.08 regarding restitution damages. Instruction No. 35 should be rejected because Coastal admits that an enforceable contract exists between the parties regarding Coastal’s damages claim. Submitting any argument to the contrary could result in juror confusion – <u>see</u> ER 403.
36		X	(1) The language of Instruction No. 36 is from WPI 301A.01 regarding promissory estoppel. Instruction No. 36 should be rejected because Coastal

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			admits that an enforceable contract exists between the parties regarding Coastal's damages claim. Submitting any argument to the contrary could result in juror confusion – see ER 403. Further, Instruction No. 36 misstates sub (1) of WPI 301A.01 by not providing between whom the promise was made as is provided in sub (1) of WPI 301A.01; and (2) the Note on Use to WPI 301A.01 indicates that the issue of promissory estoppel is generally decided by the Trial Court.
37		X	The language of Instruction No. 37 is from WPI 303.05 regarding reliance damages. Instruction No. 35 should be rejected because Coastal admits that an enforceable contract exists between the parties regarding Coastal's damages claim. Submitting any argument to the contrary could result in juror confusion – see ER 403.
38		X	The language of Instruction No. 38 is from WPI 303.06 regarding mitigation of damages. Instruction No. 38 is correct, but does not state the position for Stellar J, which is necessary as Stellar J is claiming damages in a counterclaim – compare with D-35.
39	X		

STIPULATIONS AND OBJECTIONS TO PLAINTIFF'S PROPOSED JURY INSTRUCTIONS - 9

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40		X	<p>The language of Instruction No. 40 purports to come from the case of <i>E. Carl Schiewe, Inc. v. Brady</i>, 46 Or.App. 441, 448 (1980). Instruction No. 41 should be rejected because subsequent to the <i>E. Carl Schiewe, Inc.</i> case, the Court in the case of <i>Wegroup PC/Architects and Planners v. State</i>, 131 Or.App. 346, 350, 885 P.2d 709 (1994), held that a party is not entitled to payment for work under contract when a change order is not properly executed. <u>Compare with D-26.</u></p>
41		X	<p>The language of Instruction No. 41 purports to come from the case of <i>Modern Builders, Inc. of Tacoma v. Manke</i>, 27 Wn. App. 86, 95 (1980). Instruction No. 41 should be rejected because a claimant contract is not entitled to compensation in quantum meruit when such changes are addressed by the parties' contract. <i>S.L. Rowland Constr. Co. v. Beall Pipe & Tank Corp.</i>, 14 Wn. App. 297, 304, 540 P.2d 912 (1975).</p>
42		X	<p>The language of Instruction No. 42 purports to come from the case of <i>Johnson v. California-Washington Timber Co.</i>, 161 Wash. 96, 103 (1931). Instruction No. 42 should be rejected because the issue of offset is irrelevant as any offset will be</p>

STIPULATIONS AND OBJECTIONS TO PLAINTIFF'S PROPOSED JURY INSTRUCTIONS - 10

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			addressed regarding the damages awarded in the Special Verdict Form after the jury's verdict; further, submitting this issue to the jury could result in juror confusion – see ER 401, ER 402, ER 403.
43	X		
44		X	The language of Instruction No. 44 is from WPI 1.12. This instruction is premature and should only be given if the jury is deadlocked during deliberations.

Defendants Stellar J Corporation and Travelers Casualty and Surety Company request that the Court give the following instructions to the jury in addition to Plaintiff's/Third-Party Defendants' Instructions stipulated to by said Defendants.

<u>Defendants' proposed Instruction No.</u>	<u>Issue</u>
Supplemental D-39	Fraud burden of proof of clear, cogent, and convincing evidence compared to burden of proof by a preponderance of the evidence. Citation = WPI 160.03
D-7	Proximate cause. Citation = WPI 15.01
D-8	Lawyer's interviewing of a witness. Citation = WPI 2.06
D-9	Coastal's burden of proof re: breach of contract/Stellar J's burden of proof re: affirmative defenses. Citation = WPI 300.03
D-10	Stellar J's burden of proof re: breach of contract/Coastal's burden of proof re: affirmative defenses. Citation = WPI 300.03
D-14	Definition of consideration. Citation = WPI 301.04
D-19	Perfect tender rule. Citation = <i>Alaska Pacific</i>

STIPULATIONS AND OBJECTIONS TO PLAINTIFF'S PROPOSED JURY INSTRUCTIONS - 11

	<i>Trading Co. v. Eagon Forest Products, Inc.</i> , 85 Wn. App. 354, 359, 933 P.2d 417, <i>review denied</i> , 133 Wn.2d 1006 (1997); RCW 62A.2-607(3)(a); RCW 62A.2-714(1),(3).
D-20	Interference with Stellar J's ability to perform. Citation = WPI 302.08
D-22	Defense to equitable claim when parties' contract provides a remedy. Citation = <i>Nelse Mortensen & Co. v. Group Health Co-op of Puget Sound</i> , 90 Wn.2d 843, 845, 586 P.2d 469 (1978).
D-23	Defense to equitable claim when party's own conduct contributed to alleged damages, i.e., unclean hands. Citation = <i>Malo v. Anderson</i> , 62 Wn.2d 813, 384 P.2d 867 (1963) (citation omitted); <i>McKelvie v. Hackney</i> , 58 Wn.2d 23, 31, 360 P.2d 746 (1961) (citation omitted).
D-24	Incorporation of contractual terms by reference. Citation = <i>Western Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.</i> , 102 Wn. App. 488, 494, 7 P.3d 861 (2000), <i>review denied</i> , 143 Wn.2d 1003 (2001) (citation omitted).
Supplemental D-38	Defense based on failure to follow contractual notice provisions, wavier and burden of proof. Citation = WPI 302.07; <i>Mike M. Johnson, Inc. v. County of Spokane</i> , 150 Wn.2d 375, 386-87, 78 P.3d 161 (2003).
D-26	A party is not entitled to payment for work under contract when a change order is not properly executed. Citation = <i>Wegroup PC/Architects and Planners v. State</i> , 131 Or.App. 346, 350, 885 P.2d 709 (1994).
D-27	Indemnity. Citation = <i>See Tyee Constr. Co. v. Pacific Northwest Bell Co.</i> , 3 Wn. App. 37, 41-42, 472 P.2d 411, <i>review denied</i> , 78 Wn.2d 995 (1970).
D-28	Fraud. Citation = WPI 160.01
D-29	Eichleay defense (re: home office overhead). Citation = <i>Eichleay Corp.</i> , ASBCA No.

STIPULATIONS AND OBJECTIONS TO PLAINTIFF'S PROPOSED JURY INSTRUCTIONS - 12

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	5183, 60-2 B.C.A. ¶ 2688 (ASBCA 1960); <i>Charles G. Williams Constr., Inc. v. White</i> , 271 F.3d 1055, 1058 (D.C.Cir. 2001) (quoting <i>West v. All State Boiler, Inc.</i> , 146 F.3d 1368, 1377 (D.C.Cir. 1998); <i>Melka Marine, Inc. v. United States</i> , 187 F.3d 1370, 1376 (D.C.Cir. 1999); <i>W.G. Cornell Co. v. Ceramic Coating Co.</i> , 626 F.2d 990, 994 (D.C. Cir. 1980).
D-30	Instruction re: measure of damage. Citation = WPI 303.02
D-31	Total cost claim defense. Citation = <i>See S. L. Rowland Constr. Co. v. Beall Pipe & Tank Corp.</i> , 14 Wn. App. 297, 304; 540 P.2d 912 (1975); <i>see Seattle Western Industries, Inc. v. David A. Mowat Co.</i> , 110 Wn. 2d 1, 750 P.2d 245 (1988); <i>See Youngdale & Sons Const. Co., Inc. v. U.S.</i> , 27 Fed. Cl. 516, 541 (1993); <i>See J. D. Hedin Const. Co. v. U.S.</i> , 171 Ct. Cl. 70, 347 F.2d 235 (1965); <i>See WRB Corp. v. U.S.</i> , 183 Ct. Cl. 409, (1968).
D-32	Critical path definition. Citation = <i>Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.</i> , 175 F.3d 1221, 1232-33 (1999); <i>Haney v. United States</i> , 230 Ct.Cl. 148, 676 F.2d 584, 595 (1982); <i>see also, e.g., Wilner v. United States</i> , 24 F.3d 1397, 1398, n. 5 (D.C.Cir. 1994) (quoting <i>G.M. Shupe, Inc. v. United States</i> , 5 Cl.Ct. 662, 728 (1984)).
D-33	Defense to damages alleged re: critical path. Citation = <i>Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.</i> , 175 F.3d 1221, 1232 (1999); <i>George Sollitt Constr. Co. v. U.S.</i> , 64 Fed.Cl. 229, 240 (2005).
D-34	Definition of concurrent delay and defense. Citation = <i>See Blinderman Constr. Co. v. U.S.</i> , 39 F.ed.Cl. 529, 543 (1997), <i>aff'd</i> , 178 F.3d 1307 (Fed.Cir. 1998); <i>see R.P. Wallace, Inc. v. U.S.</i> , 63 Fed.Cl. 402, 409-10 (2004).
D-35	Mitigation of damages. Citation = WPI 303.06

STIPULATIONS AND OBJECTIONS TO PLAINTIFF'S PROPOSED JURY INSTRUCTIONS - 13

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D-37	Instruction after jury instructions read. Citation = WPI 6.18
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DATED this 13th day of January, 2010.

DUGGAN SCHLOTFELDT & WELCH PLLC



ALBERT F. SCHLOTFELDT, WSBA# 19153
MARK A. WHEELER, WSBA# 31492
SHAWN A. ELPEL, WSBA# 21898
Of Attorneys for Defendant Stellar J Corporation
and Travelers Casualty and Surety Company

APPENDIX C

Received & Filed
LEWIS COUNTY, WASH
Superior Court

JAN 14 2010

By Kathy A. Brack Clerk
Deputy

IN THE SUPERIOR COURT OF WASHINGTON FOR LEWIS COUNTY

COASTAL CONSTRUCTION GROUP,
INC., a Washington corporation,

Plaintiff,

vs.

STELLAR J CORPORATION, a
Washington corporation; TACOMA
ELECTRIC SUPPLY, LLC, a Washington
limited liability company; TRAVELERS
CASUALTY AND SURETY
COMPANY, a foreign corporation; and
THE CITY OF CHEHALIS,
WASHINGTON,

Defendants,

STELLAR J CORPORATION, a Texas
corporation,

Third Party Plaintiff,

JAMES C. HEWITT and TARINA
THOMAS, as individuals,

Third Party Defendants.

NO. 06 2 00913 2

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DEFENDANT STELLAR J
CORPORATION AND
TRAVELERS CASUALTY AND
SURETY COMPANY'S
PROPOSED SUPPLEMENTAL
JURY INSTRUCTIONS

[with citations]

DEFENDANT STELLAR J CORPORATION AND TRAVELERS CASUALTY AND SURETY
COMPANY'S PROPOSED SUPPLEMENTAL JURY INSTRUCTIONS - 1
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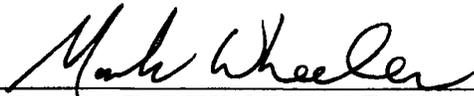
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1 DEFENDANTS' SUPPLEMENTAL INSTRUCTIONS TO THE JURY

2 Defendants Stellar J Corporation and Travelers Casualty and Indemnity Company
3 request that the Court give to the jury in writing the attached supplemental instruction.
4

5 DATED this 13th day of January, 2010.
6

7 DUGGAN SCHLOTFELDT & WELCH PLLC

8 
9

10 ALBERT F. SCHLOTFELDT, WSBA# 19153
11 MARK A. WHEELER, WSBA# 31492
12 SHAWN A. ELPEL, WSBA# 21898
13 Of Attorneys for Defendant Stellar J Corporation
14 and Travelers Casualty and Surety Company
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29 DEFENDANT STELLAR J CORPORATION AND TRAVELERS CASUALTY AND SURETY
30 COMPANY'S PROPOSED SUPPLEMENTAL JURY INSTRUCTIONS - 2

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INSTRUCTION NO. D-38

If notice of claim provisions is in a parties' contract, and if the notice provisions indicate that failure to follow a notice provision will bar a claim for money, the party who is bound to follow the notice provision must properly complete the notice provision or the claim is barred. The party who benefits from the notice provision in the parties' contract may waive the notice provision either expressly, such as in writing, or through conduct.

A right may be waived in either of two ways. A party may directly state an intent to waive a contractual right, or a party may imply such an intent through his or her statements or conduct. An implied waiver, however, may be based only on unequivocal, rather than doubtful or ambiguous, statements or conduct.

In this case, Coastal Construction Group's duty to follow the contractual notice provisions was excused if Coastal Construction Group has proved, by a preponderance of the evidence, that Stellar J Corporation waived its right to that performance under the contract.

Mike M. Johnson, Inc. v. County of Spokane, 150 Wn.2d 375, 386-87, 78 P.3d 161 (2003);
WPI 302.07.

DEFENDANT STELLAR J CORPORATION AND TRAVELERS CASUALTY AND SURETY
COMPANY'S PROPOSED SUPPLEMENTAL JURY INSTRUCTIONS - 3

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DIVISION II

NO. 40481-8-II

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

STATE OF WASHINGTON
BY _____
DEPUTY

STELLAR J CORPORATION, Appellant,

vs.

**COASTAL CONSTRUCTION GROUP, INC., JAMES HEWITT,
and TARINA THOMAS, Respondents.**

AFFIDAVIT OF SERVICE

Albert F. Schlotfeldt, WSBA #19153
Mark A. Wheeler, WSBA# 31492
Attorneys for Appellant

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MARK A. WHEELER, being first duly sworn upon oath, hereby deposes and says:

1. I am one of Appellants' attorneys, am competent to testify herein, and I base the following on my own, personal knowledge.

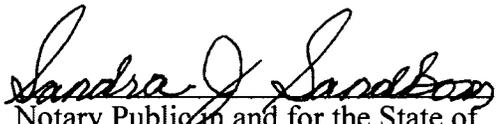
2. On December 10, 2010, I served Reply Brief of Appellants and this Affidavit of Service by regular mail, first-class postage prepaid, and e-mail to the following:

Kevin Roberts
Dunn & Black, P.S.
North 111 Post, Suite 300
Spokane WA 99201

William Hillier
Attorney for City of Chehalis
299 N.W. Center Street
Chehalis, WA 98532


MARK A. WHEELER, WSBA# 31492

SUBSCRIBED AND SWORN to before me this 10 day of December, 2010.


Notary Public in and for the State of Washington, residing at Vancouver
Commission expires: 9-1-2012

SANDRA J. SANDBOM
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
SEPTEMBER 1, 2012