

NO. 32305-6

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION III

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Court of Appeals
Division III
State of Washington

GENERAL CONSTRUCTION COMPANY, a Delaware corporation,

Respondent,

vs.

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, a
Washington municipal corporation,

Appellant.

**APPELLANT/CROSS-RESPONDENT'S RESPONSE AND REPLY
TO SECOND AMENDED BRIEF OF RESPONDENT/
CROSS-APPELLANT**

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TABLE OF CONTENTS

TABLE OF CONTENTSi-ii

TABLE OF AUTHORITIESiii-vi

I. INTRODUCTION.....1

II. PUD’S REPLY REGARDING FOUR ORDERS WHICH GCC APPEALS2

2.1 The Trial Court Correctly Dismissed GCC’s Claim 12 Selway Paint.....2

 GCC’s Claim.....2

 GCC-PUD Contract2

 GCC Actions.....3

 Motion to Dismiss.....4

 Analysis.....4

2.2 The Trial Court Correctly Rejected GCC’s Claim that an Undocumented, Alleged Writing on a Blackboard Constituted Compliance with GC-14, G-15, and GC-10.....6

 GCC’s Claim.....7

 Hanson Declaration.....8

 Kittle Declaration.....9

 Superior Court Ruling.....12

 Analysis.....12

2.3 The Trial Court Correctly Dismissed GCC’s Superior Knowledge Claim.16

 GCC’s “Superior Knowledge” Claim.....16

 Motion to Dismiss.....16

 Factual Background16

 Analysis.....19

2.4 The Trial Court Correctly Dismissed GCC’s Mistake Claim...24

 GCC’s Mistake Claim.....24

 Motion to Dismiss.....24

 Analysis.....25

 GCC’s Request for Extra Money and Extra Time has No Legal Basis.....25

 Mistake Claim – Non-Timely.26

 Burden of Proof.....28

 No Mistake.....29

 Risk31

 Future Event.....32

III. REPLY TO GCC RESPONSE RE PUD ORDERS	33
3.1 The “Matter of Law Rulings” which are the Subject of the PUD’s Request for Review are Properly before this Court.	33
3.2 GCC’s Claim 1: Slot Sequence.....	34
GCC’s Argument.....	34
GCC-PUD Contract.....	36
GCC’s Allegation.....	36
Waiver	37
Non-Waiver is a Verity on Appeal.....	37
Neither GCC Nor the PUD Sought Review of Waiver	38
Regardless, GCC’s Waiver Argument Fails	39
Express Waiver	39
Implied Waiver	40
Authority to Waive	43
Apparent Authority.....	44
No Admissible Evidence	45
GCC’s Declaration Necessitates Dismissal	46
3.3 Claim 2.2: Concrete Bulge and 2.3: Guiderail Support.....	48
3.4 Claims 7 and 16	51
3.5 Claim 10: Coffor Cell Flooding.....	53
3.6 Claim 11.1: Prefit and 11.2: Shrinkwrap.....	54
 IV. GCC’S NONCOMPLIANCE WITH RAP 10.3(a)(5) AND RAP 10.4(f)	 56
 V. CONCLUSION.....	 62
 VI. TABLE OF APPENDICES	 vii

TABLE OF AUTHORITIES

Washington Cases

<i>Absher Constr. Co. v. Kent Sch. Dist. No. 415</i> , 77 Wn. App. 137, 890 P.2d 1071 (1995).....	passim
<i>Am. Safety Cas. Ins. Co. v. City of Olympia</i> , 162 Wn.2d 762, 174 P.3d 54 (2007).....	passim
<i>Auburn Mech., Inc. v. Lydig Constr., Inc.</i> , 89 Wn. App. 893, 951 P.2d 311, <i>rev. denied</i> , 136 Wn.2d 1009 (1998).....	25-26
<i>Baldwin v. Silver</i> , 165 Wn. App. 463, 269 P.3d 284 (2011).....	11
<i>Bayley v. Lewis</i> , 39 Wn.2d 464, 236 P.2d 350 (1951).....	26
<i>Bennett v. Shinoda Flora, Inc.</i> , 108 Wn.2d 386, 739 P.2d 648 (1987).....	31
<i>Casper v. Esteb. Enter., Inc.</i> , 119 Wn. App. 759, 82 P.3d 1223 (2004).....	49
<i>Chemical Bank v. Wash. Pub. Power Supply Sys.</i> , 102 Wn.2d 874, 691 P.2d 524 (1984).....	28
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	37-38
<i>CPL (Delaware) LLC v. Conley</i> , 110 Wn. App. 786, 40 P.3d 679 (2002).....	31
<i>Danaxas v. Sandstone Court of Bellevue, LLC</i> , 148 Wn.2d 654, 63 P.3d 125 (2003).....	31, 32
<i>DC Farms LLC v. Conagra Foods Lamb Weston, Inc.</i> , 179 Wn. App. 205, 317 P.2d 543 (2014).....	50
<i>Dennis v. N. Pac. Ry. Co.</i> , 20 Wash. 320, 55 P. 210 (1898)	25
<i>Donald B. Murphy Constr., Inc. v. State</i> , 40 Wn. App. 98, 696 P.2d 1270, <i>rev. denied</i> , 103 Wn.2d 1039 (1985).....	44

<i>Dunlap v. Wayne</i> ,	7
105 Wn.2d 529, 535-36, 716 P.2d 842 (1986)	
<i>Fines v. West Side Implement Co.</i> ,	
56 Wn.2d 304, 352 P.2d 1018 (1960).....	27
<i>Grimwood v. University of Puget Sound</i> ,	
110 Wn.2d 355, 359, 753 P.2d 517 (1988).....	6, 51
<i>Hazard v. Warner</i> ,	
122 Wash. 687, 211 P. 732 (1923)	25
<i>In re Sego</i> ,	
82 Wn.2d 736, 513 P.2d 831 (1973).....	28
<i>Kelly v. Foster</i> ,	
62 Wn. App. 150, 813 P.2d 598, rev. denied,	
118 Wn.2d 1001 (1991).....	26
<i>King County Fire Protection Districts No. 16, No. 36</i> <i>and No. 40 v. Housing Authority of King County</i> ,	
123 Wn.2d 819, 826, 872 P.2d 516 (1994).....	6-7
<i>Lincoln v. Keene</i> ,	
51 Wn.2d 171, 316 P.2d 899 (1957).....	20
<i>Lynn v. Labor Ready, Inc.</i> ,	
136 Wn. App. At 306.....	7, 9, 23-24
<i>Marshall v. AC&S, Inc.</i> ,	
56 Wn. App. 181, 782 P.2d 1107 (1989).....	29
<i>Mike M. Johnson v. Cnty. of Spokane</i> ,	
150 Wn.2d 375, 78 P.3d 161 (2003).....	passim
<i>Murray v. Sanderson</i> ,	
62 Wash. 477, 114 P. 424 (1911)	25
<i>Nat'l. Union Ins. Co. of Pittsburgh, PA v. PSP&L</i> ,	
94 Wn. App. 163, 181, 972 P.2d 481 (1999).....	23
<i>Nelson Constr. Company v. Port of Bremerton</i> ,	
20 Wn. App. 321, 582 P.2d 511, rev. denied,	
91 Wn.2d 1002 (1978).....	19-20, 21
<i>N. State Constr. Co. v. Robbins</i> ,	
76 Wn.2d 357, 457 P.2d 187 (1969).....	43

<i>Park Hill Corp. v. Don Sharp, Inc., Better Homes and Gardens,</i> 60 Wn. App. 283, 287 n. 4, 803 P.2d 326 (1991).....	39
<i>Realm, Inc. v. City of Olympia,</i> 168 Wn. App. 1, 277 P.3d 679, <i>rev. denied</i> , 175 Wn.2d 1015 (2012).....	passim
<i>Red-Samm Mining Co., Inc. v. Port of Seattle, Inc.,</i> 8 Wn. App. 610, 508 P.2d 175, <i>rev. denied</i> , 82 Wn.2d 1009 (1973).....	27-28
<i>Rice-Price Recreation, LLC v. Connells Prairie Cmty. Council,</i> 146 Wn.2d 370, 46 P.3d 789 (2002).....	38
<i>Simonson v. Fendell,</i> 101 Wn.2d 88, 675 P.2d 1218 (1984).....	29
<i>Thompson v. Hanson,</i> 168 Wn.2d 738, 239 P.3d 537 (2009).....	39
<i>Town of LaConner v. Am. Constr. Co.,</i> 21 Wn. App. 336, 585 P.2d 162 (1978), <i>rev. denied</i> , 91 Wn.2d 1023 (1979).....	26-27
<i>Valley Constr. Co. v. Lake Hills Sewer Dist.,</i> 67 Wn.2d 910, 410 P.2d 796 (1965).....	4-5
<i>Woody v. Stapp,</i> 146 Wn. App. 16, 189 P.3d 807 (2008).....	28-29
Federal Cases	
<i>Aleutian Constr. v. U.S.,</i> 24 Cl. Ct. 372 (1991).....	21
<i>Austin Co. v. U.S.,</i> 314 F.2d 518 (Ct. Cl.), <i>cert. denied</i> , 375 U.S. 830, 84 S. Ct. 75, 11 L. Ed. 2d 62 (1963).....	21
<i>Celotex Corp. v. Catrett,</i> 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).....	51
<i>Holm v. Shilencky,</i> 269 F. Supp. 359 (S.D.N.Y.), <i>aff'd.</i> , 388 F.2d 54 (2nd. Cir. 1968).....	25

<i>Simpson Timber Co. v. Palmberg Constr. Co.</i> , 377 F.2d 380 (9th Cir. 1967)	20
<i>Westinghouse Elec. Corp. v. U.S.</i> , 41 Fed. Cl. 229 (1998)	32
Statutes	
RCW 54.12.010	44
Rules	
RAP 2.4.....	38
RAP 5.2.....	37, 38
RAP 5.3.....	38
RAP 10.3.....	1, 56, 57, 60, 61, 62
RAP 10.4.....	1, 56, 57, 60, 61
ER 408	59
Other Authorities	
Restatement (Second) of Contracts, 6 Intro. Note (1981)	25

I. INTRODUCTION

The Second Amended Brief of Respondent/Cross-Appellant General Construction Company (“GCC”) (“GCC Brief”) argues at pages 51-62 that the superior court erred in dismissing GCC’s Selway Paint, Writing on Blackboard, Superior Knowledge, and Mistake Claims. This Reply outlines the law and indisputable facts that required dismissal of these claims.

The Brief of Appellant Public Utility District No. 2 of Grant County (“PUD”) (“PUD Brief”) discussed Washington law that necessitates dismissal of GCC’s Claim 1: Slot Sequence, Claim 2.2: Concrete Bulge, Claim 2.3: Guiderail Support, Claims 7 and 16: Unsigned District Instructions, Claim 10: Coffe Cell Flooding, Claim 11.1: Prefit, and Claim 11.2: Shrinkwrap. The GCC Brief for the most part ignores the contents of the PUD Brief. Instead, the GCC Brief disregards GCC’s obligation under RAP 10.3(a)(5) to present “a fair statement of the facts ... relevant to the issues presented for review” with an accurate “reference to the record,” its obligation under RAP 10.4(f) to “designate the page” in its reference to the record, and its obligation under CR 56(e) to submit “affidavits (declarations) ... made on personal knowledge” that “set forth such facts as would be admissible in evidence.” This results in the GCC Brief presenting a distorted, misleading caricature of the “facts ... relevant

to the issues presented for review.” This further results in the GCC Brief providing no legitimate basis for reversing the orders dismissing GCC’s Selway Paint, Writing on Blackboard, Superior Knowledge and Mistake Claims, or for not reversing the orders on GCC’s Claim 1: Slot Sequence, Claim 2.2: Concrete Bulge, Claim 2.3: Guiderail Support, Claims 7 and 16: Unsigned District Instructions, Claim 10: Coffe Cell Flooding, Claim 11.1: Prefit, and Claim 11.2: Shrinkwrap. Accordingly, the PUD requests that the Court affirm those orders that GCC appeals and reverse those orders that the PUD appeals.

II. PUD’S REPLY REGARDING FOUR ORDERS WHICH GCC APPEALS

2.1 The Trial Court Correctly Dismissed GCC’s Claim 12: Selway Paint.

GCC’s Claim. GCC’s 5/22/09 Supplemental Answer to

Interrogatory 6 identified its Claim 12: Selway Paint:

Flow fairing modules for the Project were fabricated and painted by Selway corporation ... The Contract Specifications required that a certified NACE CIP Level 2 inspector be on site during coating operations. PUD changed the specifications by adding the requirement that the NACE inspector be an independent third party, rather than an employee of the fabricator. CP 13542.

GCC-PUD Contract. T-40 1.06C of the Technical Specifications of the GCC-PUD contract required GCC to utilize a “certified NACE CIP

Level 2 inspector”¹ to inspect the painting of steel components that it supplied:

C. NACE Inspector: A certified NACE CIP Level 2 inspector shall be on site during coating operations. The inspector shall inspect and document the following: paint material quality, surface preparation, proper application methods, coating thickness, proper environmental conditions, recoat cure times, and other variables critical to coating quality... CP 14004-14005.

GCC Actions. GCC subcontracted to Selway Corporation (“Selway”) the fabrication and painting of certain steel components. CP 13824-13825. GCC forwarded to the PUD’s engineer its 5/24/06 Submittal 130 seeking to substitute Selway’s quality assurance (“QA”) manager for the contract required “certified NACE CIP Level 2 inspector.” CP 13589-13590. Selway’s QA manager not only was not a “certified NACE CIP Level 2 inspector,” but he had no NACE certification at all. CP 13590; CP 13602-13603. Accordingly, the PUD engineer, by 6/5/06 letter, declined GCC’s request to deviate from the contract specifications. CP 13882. GCC filed no written protest of the engineer’s declination. CP 13575-13576.

After completion of the contract-required painting inspection, Selway submitted to GCC an 11/8/06 claim for additional money for using

¹ “NACE” is the acronym for National Association of Corrosion Engineers, and “CIP” is the acronym for “Coating Inspection Program.” To become a “NACE CIP Level 2 inspector,” one must take the NACE specified course, pass a written certification test, meet defined field experience requirements, and pass an oral examination.

a “certified NACE CIP Level 2 inspector.” CP 13575-13576. Upon receipt, GCC’s onsite project engineer (and later CR 30(b)(6) designee) emailed GCC’s home office based (Poulsbo, WA) project sponsor and other GCC personnel:

A really brief review of the **specs** reveals that:
...**1.06 C Quality Assurance requires a NACE CIP Level 2 inspector** be on site during coating. ...
Selway submitted their QC manager’s resume in lieu of specified NACE certification. Grant County did not approve the deviation. Had Selway submitted an inspector with the specified credentials we would have a strong argument for Selway’s change request. Since **Selway did not submit an individual that meets the specifications** our case is much weaker. The comment on the submittal review about the “intent” of the spec may give us a bit of ammunition.
CP 13578 (emphasis added).

Motion to Dismiss. The PUD’s 6/22/09 motion requested dismissal of GCC’s Claim 12: Selway Paint for at least two reasons. CP 13508-13509. By 3/5/10 Order, the trial court dismissed GCC’s Claim 12: Selway Paint (CP 15137-15138), and by 6/24/10 Order denied GCC’s Motion for Reconsideration. CP 4606-4607.

Analysis. *Valley Constr. Co. v. Lake Hills Sewer Dist.*, 67 Wn.2d 910, 915-916, 410 P.2d 796 (1965), recites the “well-settled” rule of law that necessitated dismissal of GCC’s Claim 12: Selway Paint:

Contractors have no right to depart from working plans made a part of the contract... An express contract admits of no departure from its terms ... unless a deviation was mutually agreed upon.

Here, the GCC-PUD contract required a “certified NACE CIP Level 2 inspector” to inspect the painting of the steel components that GCC had Selway fabricate and paint. CP 14004-14005. GCC’s onsite project engineer contemporaneously admitted this and further admitted that GCC’s Submittal 130 request to deviate from this contract requirement was not approved. CP 13578 (“Grant County did not approve the deviation.”). GCC’s claim for extra money and extra time for doing only what the GCC-PUD contract required fails as a matter of Washington law.

In addition, GCC neither protested the engineer’s 6/5/06 declination nor asserted its Claim 12: Selway Paint until after Selway had completed the contract-required painting inspection. CP 13575-13576. This noncompliance with the notification and claim submittal requirements of the GCC-PUD contract, specifically GC-14, G-15, GC-10 and GC-18,² likewise necessitated dismissal of GCC’s Claim 12: Selway Paint. *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 770, 174 P.3d 54 (2007) (“failure to comply with contractual procedures bars relief”); *see also Mike M. Johnson v. Cnty. of Spokane*, 150 Wn.2d 375,

² See Appendices A1-A5 for complete copies of GC-14, G-15, GC-10, and GC-18.

386, 78 P.3d 161 (2003); *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 3, 277, P.3d 679, *rev. denied*, 175 Wn.2d 1015 (2012); *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 142, 890 P.2d 1071 (1995).

2.2 The Trial Court Correctly Rejected GCC’s Claim that an Undocumented, Alleged Writing on a Blackboard Constituted Compliance with GC-14, G-15, and GC-10.

CR 56(e) mandates that affidavits/declarations in summary judgment motions “be made on personal knowledge”:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence...

Grimwood v. University of Puget Sound, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) explains this requirement and the consequences of noncompliance with it:

Thus, there is a dual inquiry as to whether an affidavit sets forth “material facts creating a genuine issue for trial”: Does the affidavit state material facts, and, if so, would those facts be admissible evidence at trial? **If the contents of an affidavit do not satisfy both standards, the affidavit fails to raise a genuine issue for trial, and summary judgment is appropriate.** (emphasis added).

When ruling on a motion for summary judgment, a court will not consider any affidavit/declaration or portion thereof that does not satisfy these requirements. *King County Fire Protection Districts No. 16, No. 36 and No. 40 v. Housing Authority of King County*, 123 Wn.2d 819, 826, 872

P.2d 516 (1994); *see also Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 115 P.3d 201 (2006) (“Moreover, like the trial court, in deciding whether summary judgment was proper, we only consider admissible evidence. We review de novo whether a statement [declaration] was inadmissible hearsay.”) (citing *Dunlap v. Wayne*, 105 Wn.2d 529, 535-36, 716 P.2d 842 (1986) (“A court cannot consider inadmissible evidence when ruling on a motion for summary judgment.”)).

GCC’s Claim. No document providing notice, as GC-14, G-15, and GC-10 required, exists or ever has existed for GCC’s Claim 1: Slot Sequence. Accordingly, GCC argued in its 6/14/10 Opposition to the PUD’s Motion to Dismiss:

At the meeting, the PUD directed GCC to abandon the ... Two Slot Method. ...

During the January 6, 2005 meeting, GCC gave written notice to the PUD of GCC’s Two Slot Method Claim by writing on a blackboard, in the presence of the PUD’s Engineer, that the PUD’s direction would have cost and time consequences for which the PUD would be responsible. CP 375 (emphasis omitted).

No contemporaneous document so much as mentions any such directive or any “writing on a blackboard.” GCC therefore filed a 6/9/10 declaration that it had its Poulsbo-based project sponsor, Scott Hanson, sign, and a

6/9/10 declaration that it had its concrete superintendent, Ed Kittle,³ sign. CR 56(e) renders the assertions in both declarations inadmissible.

Hanson Declaration. The GCC Brief cites the Hanson declaration as GCC's first reference to the record for that on which it bases its Claim 1: Slot Sequence, i.e., that on 1/6/06 the PUD allegedly "direct[ed] GCC to stop performing according to its then-accepted Two-Slot Method." GCC Brief at 12.⁴ The PUD objected to inadmissible assertions in the Hanson declaration. CP 2649-2650.

The Hanson declaration recites:

I, SCOTT HANSON, declare ... the following in support of GCC's ... Two-Slot Method Claim **I ... have personal knowledge of the matters set forth herein.**

...

On January 6, 2006, GCC was directed to discontinue performance of the work in accordance with the July 31, 2005 schedule and was further directed to resequence and reschedule its work in a fashion requiring slot work to be performed essentially sequentially rather than according to the Two-Slot Method GCC had proposed... CP 1289, 1296 (emphasis added).

However, Mr. Hanson testified:

Q: You couldn't tell us specifically **what allegedly was directed**, correct?

A: I guess. **I wasn't there, so I don't know.** I wasn't -- I didn't witness it.

Exhibit C to 4/1/15 Lewis Decl. at 3 (emphasis added)

³ GCC authorized only Ben Hugel, its onsite project manager, to speak and act on GCC's behalf. CP 2648. GCC did not authorize Mr. Kittle to speak for it. See CP 2648; 19567.

⁴ The GCC Brief cites the Hanson declaration 49 times.

Mr. Hanson’s testimony that “I wasn’t there, so I don’t know” confirms that his declaration is not based on “personal knowledge” as CR 56(e) requires, rendering it inadmissible for the proposition for which GCC cites it. This inadmissibility precludes consideration of the inadmissible assertion in this Court’s de novo review of the superior court’s summary judgment orders. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. at 306 (“Like the trial court, in deciding whether summary judgment was proper, we only consider admissible evidence.”)

Kittle Declaration. GCC cites the Kittle declaration as its second reference to the record for that on which it bases its Claim 1: Slot Sequence, i.e., that the PUD “direct[ed] GCC to stop performing according to its then-accepted Two-Slot Method.” GCC Brief at 12.⁵ The PUD objected to inadmissible assertions in the Kittle declaration. CP 2649-2650.

The Kittle declaration recites:

I, ED KITTLE, declare ... I have **personal knowledge** of the matters set forth herein ...
During the January 6, 2006 meeting ... The PUD **unequivocally directed** GCC to abandon the then-approved Two Slot Method and schedule for pouring concrete. The PUD also **unequivocally directed** ... CP 1444; 1446 (emphasis added).

⁵ The GCC Brief cites the Kittle declaration 17 times.

However, Mr. Kittle testified:

Q: Could you define for us the word “unequivocally”?

A: **Not for 100 percent sure.**

Q: What do you mean by the word “unequivocal”?

A: **Not 100 percent sure.** CP 11101.

...

Q: The [E. Kittle Declaration] contains the words “The PUD unequivocally directed GCC.” ...

...

Q: So ... what then was the unequivocal direction?

A: To stop and figure out a way to do it different.

Q: **Anything else?**

A: **No.**

...

Q: **And they told you nothing more?**

A: **That’s correct.** CP 11103, 11104, 11105. (emphasis added)

...

Q: Can you identify any change in the schedule that is Exhibit 29 [GCC’s 12/19/05 schedule] that anyone from the PUD directed?

A: I don’t know that. CP 11108

As with the Hanson declaration, the assertion in the Kittle declaration remains inadmissible because it does not satisfy CR 56(e)’s “personal knowledge” requirement. Inadmissible assertions do not constitute evidence and consequently do not create an issue of fact. *Grimwood*, 110 Wn.2d at 359.

GC-31 of the GCC-PUD contract specified:

Progress meetings will be utilized to review the work schedule and **discuss any delays, unusual conditions, or critical items which have affected or could affect the progress of the work.** CP 19580. (emphasis added).

T-02 102.E of the GCC-PUD Contract required GCC to prepare and distribute minutes of the progress meetings and there note “significant decisions and action items.”

The Contractor [GCC] shall prepare and distribute meeting minutes for each project meeting within 5 (five) working days of the meeting. **Significant decisions and action items shall be noted.** CP 16901. (emphasis added)

On 1/12/06, one week after monitors detected slight movement of the top of future unit 11, the weekly progress meeting took place. Present were GCC’s onsite project manager, Ben Hugel, and two PUD engineers, Dana Jeske and George Thompson. CP 199-200. The minutes of that meeting record:

The previously agreed construction sequence for slots A, B, & C is still acceptable. CP 10519. (emphasis added).

GCC admits that, in compliance with the requirements of T-02 1.02 E, it prepared the minutes of this meeting. CP 10546. Mr. Kittle testified that he had no basis for disputing that which GCC contemporaneously recorded. CP 11123. “Genuine issues of material fact cannot be created by a declarant who submits an affidavit that contradicts his or her own deposition testimony.” *Baldwin v. Silver*, 165 Wn. App. 463, 472, 269 P.3d 284 (2011).

Superior Court Ruling. In response to the PUD's 5/19/10 motion to dismiss GCC's Claim 1: Slot Sequence (CP 171-172), GCC argued that an undocumented, alleged writing on a blackboard by Mr. Kittle constituted compliance with the notice and claim submittal requirements of the GCC-PUD contract – GC-14, G-10, GC-15. (CP 363, 370, 375). The trial court correctly rejected this. CP 16795.

Analysis. GC-14 of the GCC-PUD contract designated those authorized to make changes to the GCC-PUD Contract and the scope of their authority:

- Only the PUD's Board of Commissioners had authority to approve change orders exceeding \$10,000. CP 209.
- The PUD's Manager and Division Directors had authority to approve Change Orders up to \$10,000. CP 209.
- The Engineer had authority to instruct GCC "to make minor changes in the work" that did "not involve any additional cost" and did "not require an extension of the Contract completion date." CP 210.
- With the above exceptions, "no official, employee, agent or representative of the District" had any authority to "approve any change" in the contract. CP 209.

GC-12 of the GCC-PUD contract required GCC to "designate in writing" ("shall designate") its "authorized site representative who shall be authorized to represent and act for the Contractor [GCC] in all matters relating to the Contract." CP 19567 (emphasis original). It specified: "The Contractor's letter designating this representative shall clearly define the scope of his authority to act for the contractor and define any limitations

of this authority.” *Id.* For all activities that make up GCC’s Claim 1: Slot Sequence, GCC in its 11/28/05 letter designated only its second onsite project manager, Ben Hugel, “to represent and act for” it. CP 2648. GCC designated no one else; Mr. Kittle had no authority to speak for GCC.

As a precondition to any change order work, GC-14 required a “written Change Order” “executed by the District and the Contractor,” and it placed responsibility on the contractor, “before proceeding with any change,” to satisfy itself that a written change order had been “properly authorized” by the PUD. CP 209. GC-14 recited the consequences of non-compliance:

The District shall not be liable for any payment to Contractor, or claims arising therefrom, for Change Order work which is not first authorized in writing as set forth in this Section GC-14. CP 209 (emphasis original).

G-15 required GCC to timely make any time extension request “in writing to the District” and further specified that all changes to the construction time or construction schedule “shall be made by Change Orders to the Contract pursuant to Section GC-14.”⁶ CP 212. GC-10 required GCC to make any claim for damages timely and “in writing.” CP 211.

GCC did not provide any document to the PUD, before it

⁶ GC-14 required a “writing ... signed by the waiving or consenting party” for any “waiver of any provision of the contract” or any “consent to departure therefrom.” CP 210.

completed its Claim 1: Slot Sequence activities, that so much as mentions a PUD directive about slot sequence or a GCC notice of claim for extra money or extra time for any such directive. Consequently, GCC attempts to sidestep the notification and claim submittal requirements of GC-14, G-15 and GC-10 by arguing that:

- A concrete superintendent, Mr. Kittle, who had no authority to represent GCC (*See* CP 2648; 19567),
- in the presence of a PUD engineer, Mr. Jeske, whose sole authority was to instruct GCC “to make minor changes in the work” that did “not involve any additional cost” and did “not require an extension of the Contract completion date” (CP 210),
- allegedly, “to the best of [Mr. Kittle’s] recollection” four and a half years before, had written on a “blackboard that abandoning the Two Slot Method and complying with the PUD’s directive to work in one slot at a time would cost GCC both time and money.” CP 1446.

In *Mike M. Johnson*, the contractor submitted several letters to the owner claiming that changes to the project were causing it increased costs and time, stating in its 8/14/98 letter: “we expect to be compensated for all costs and time ...” *Mike M. Johnson*, 150 Wn.2d 375, 382. The court held these letters insufficient to constitute compliance with the notice and claim submittal requirements of the owner-contractor contract. *Id.* at 390. (“MMJ’s notice to the County concerning its grievances did not excuse MMJ from complying with the contractual requirements.”).

Here, an undocumented, alleged writing on a blackboard cannot meet GC-14’s requirement of a “properly authorized” “written change

order” “executed by the [PUD] and [GCC],” G-15’s requirement of a claim “in writing to the District” reduced to a change order “pursuant GC-14,” or GC-10’s requirement of a claim “made in writing,” any more than did the contractor’s letters in *Mike M. Johnson*. To hold otherwise would render meaningless the written notice and claim submittal requirements of the GCC-PUD contract– something that the Washington Supreme Court and Division II of the Court of Appeals have held impermissible:

Moreover, to hold that a contractor’s notice of protest to the owner serves to excuse the contractor from complying with mandatory claim procedures would render contractual claim requirements meaningless.

Id. at 391-392.

Realm attempts an end run around section 1-04.5 by claiming that it may hold any disputes in reserve until after the contract’s termination, at which point notice is no longer required. But such an interpretation, in addition to being inconsistent with *Mike M. Johnson*, would render section 1-04.5 a nullity.

Realm, Inc. v. City of Olympia, 168 Wn. App. at 11.

The superior court properly rejected GCC’s argument that an undocumented, alleged writing on a blackboard by a GCC employee who had no authority to represent GCC before an engineer who had no authority to change the GCC-PUD contract constituted compliance with GC-14, G-15 and GC-10:

Here, GCC claims it ... made the required claim under the contract by writing something on a blackboard at a

meeting held with the PUD's engineers. This constitutes neither notice nor claim under the contract. See Mike M. Johnson, Inc. v. County of Spokane, *supra*, 150 Wash. 2d at 382-83. CP 7805.

To hold otherwise would defeat the entire purpose of the GCC-PUD Contract's written notification and claim submittal requirements.

2.3 The Trial Court Correctly Dismissed GCC's Superior Knowledge Claim.

GCC's "Superior Knowledge" Claim. Under the heading "FIRST CLAIM FOR RELIEF (Breach of Contract)," GCC's Complaint alleged its "superior knowledge" claim:

23. The PUD also failed to disclose its superior knowledge with respect to the stability of the Wanapum Dam. ... The PUD even failed to disclose its superior knowledge with respect to the stability of the Wanapum Dam and the effect that would have on GCC's 2-slot protocol when the PUD and its engineer accepted the 2-slot protocol. CP 7-8.

Motion to Dismiss. By 5/19/10 motion (CP 15167-15168), the PUD requested dismissal of GCC's superior knowledge claim. By 1/12/12 order, the superior court dismissed GCC's claim. CP 16801.

Factual Background. On 5/31/05, GCC signed the GCC-PUD contract to modify future unit 11 by constructing a fish bypass through it. CP 13592-13593; CP 219. Contemporaneous documents, including those that GCC's first onsite project manager authored, provide examples of what GCC knew about the stability of future unit 11 of Wanapum Dam

before it signed the GCC-PUD contract:

- SR-15 of the Bid Specifications stated that a copy of the Quality Control Inspection Program (QCIP) was available by written request. CP 19595. Appendix G of the QCIP was the FERC Stability Report on which the Wanapum Fish Bypass Project design was based. CP 15486, 15491, 15493.
- The Stability Analysis Report was made available to GCC's representative, Ben Hugel, on 4/15/05, two weeks before GCC submitted its 5/5/05 bid. CP 15212-15213. Mr. Hugel participated in preparation of GCC's bid. CP 15206-15207.
- GCC's first onsite project manager, David Bishop, a GCC engineer who participated in GCC's preparation of its bid (CP 15206-15207), documented in his 5/11/05 job diary entry: "Design permits only one slot to be bulkheaded and dewatered at a time." CP 143.
- GCC's Mr. Bishop further documented in his 5/11/05 job diary entry the stability analysis ("Wanapum Intake Tipping Analysis") that he performed for GCC for the revised sequence that GCC proposed. CP 142.
- GCC's Mr. Bishop, in his 5/18/05 job diary entry, outlined his pre-contract award and pre-contract signing conversation with the lead design engineer of the Project, Reece Voskuilen of Jacobs:
 - **future unit stay in place due to anchors @ u/s [upstream] face**
 - **FERC concerned about stability**
 - **anchors placed during construction in 1960's**
 - **a large portion of stability is generated by anchors.** CP 147 (emphasis added).
- On 5/26/05, five days before GCC signed the GCC-PUD contract, GCC received the design engineer's ("Jacobs") "Review of General Construction Sequence laid out in the General Construction Fax of 5/19/05." CP 153. The design engineer's review reported to GCC that GCC's proposed preliminary sequence was "unacceptable" because of "[t]he **stability analysis prepared for FERC** as part of project planning ..." CP 153 (emphasis added).

Appendix B to this reply lists examples of information about the stability of future unit 11 of Wanapum Dam that GCC had prior to signing the GCC-PUD contract.

GCC's first onsite project engineer (and CR 30(b)(6) designee) testified that before GCC moved onto the Project site, the PUD had told GCC that working on more than one slot at a time potentially impacted the stability of Wanapum Dam:

Q: And before you moved on-site, the owner [PUD] had told you that working on more than one slot at a time **potentially impacted the stability** of the dam. They told you that, correct?

A: I believe so. CP 4668-4669 (emphasis added).

GCC's 6/13/05 internal memorandum, titled "Proposed Construction and Dewatering Sequence for the Future Unit Fish Bypass Construction" recited:

[The] revised construction sequence is needed because the bid construction sequence **would reduce the stability** of unit 11 to unacceptable levels. CP 15951 (emphasis added).

G-1 of the GCC-PUD contract (CP 19583) specified GCC's contract obligation: "perform **all work** necessary for the construction of the Wanapum Future Unit Fish Bypass" (emphasis added). In its submittals⁷, GCC acknowledged that a part of the work necessary to

⁷ SR-18 of the GCC-PUD contract required GCC to provide submittals. CP 19595.

construct the fish bypass was utilizing a Slot A, B, and C construction sequence that maintained the stability of future unit 11 throughout GCC's construction. GCC's 10/10/05 Submittal 8A exemplifies:

The sequence of the concrete pours is dictated by the requirement to maintain stability of the dam through the dewatering, pouring of concrete, and subsequent re-watering of the slots. CP 10240 (emphasis added).

GCC's 12/20/05 Submittal 58 provides another example:

The construction and de-watering sequence shown is essentially the same as those submitted since our July update. This sequence reflects **General Construction Company's understanding** of the agreement reached in July with Jacobs and Grant County. **The purpose of this agreement was to assure the dam remains stable during construction.** CP 10496 (emphasis added).

GCC never asked the PUD for any information about Wanapum Dam or its stability that the design engineer or PUD engineer did not provide to it.

Analysis. A party breaches the duty to disclose information in its possession only if (a) it willfully withholds information within the scope of its own knowledge and not readily obtainable by the other party; or (b) it fails to give a complete and truthful answer to a broad inquiry by the other party. *Nelson Constr. Co. v. Port of Bremerton*, 20 Wn. App. 321, 327-328, 582 P.2d 511, *rev. denied*, 91 Wn.2d 1002 (1978). In *Nelson*, the excavation contractor sued the Port of Bremerton, alleging, as one of its three theories of recovery, that the Port's not mentioning in the bid

specification the report of the soils engineer, or not providing information in that report that “the excavation was expected to be slow and difficult” and “rocks of varying sizes may be encountered,” entitled the contractor to additional money and additional time under a theory of “superior knowledge.” *Id.* at 323-324, 327. Division II affirmed the trial court’s matter of law dismissal of the contractor’s “superior knowledge” claim on the basis that the contractor “knew of the general substance of the pertinent portion of the report by other means.” *Id.* at 328.

The Ninth Circuit held similarly in *Simpson Timber Co. v. Palmberg Const. Co.*, 377 F.2d 380 (9th Cir. 1967). There, a dredging contractor (“Palmberg”) sued a timber company (“Simpson”) for “compensation over and above that provided for in the contract,” alleging, among other claims, that Simpson failed to disclose superior knowledge regarding excessive amounts of debris in the dredging area. *Id.* at 382, 383. Applying Washington law, the Ninth Circuit rejected Palmberg’s superior knowledge claim, finding “no evidence from which a jury could justifiably infer that Simpson knew any facts which it willfully withheld” because “businessmen dealing at arm’s length are rarely under a duty to speak.” *Id.* at 385; *see also Lincoln v. Keene*, 51 Wn.2d 171, 173, 316 P.2d 899 (1957) (“Mere silence does not constitute fraud when it relates to matters ... discoverable by the exercise of ordinary diligence.”).

Similarly, the court in *Aleutian Constr. v. U.S.*, 24 Cl. Ct. 372, 384 (1991) granted summary judgment dismissal of the contractor’s “superior knowledge” claim. As in *Nelson Construction* and *Simpson*, the court held that the absence of evidence that the owner concealed knowledge, as a matter of law, precluded the contractor from pursuing a “superior knowledge” claim:

“Superior knowledge” is defined as knowledge that is vital to performing a government contract, but which is unknown and not reasonably available to bidders, who are thereby misled.

...

Because defendant did not conceal knowledge, and plaintiff, in fact, applied a significant factor of safety, plaintiff cannot prevail on a superior knowledge claim.

Id. at 384, 385.⁸

Here, the bid specification for construction of the fish bypass through future unit 11 of Wanapum Dam specified the construction sequence for slots A, B, and C. CP 15222. GCC’s first onsite manager, who participated in GCC’s preparation of its bid (CP 15606-15607), memorialized in his job diary and in correspondence with the design

⁸ *Aleutian Contractors* also recited the legal consequence of GCC’s proposing a slot sequence different than what the bid document specified (*See* GCC Brief at 11): “When defendant [owner] has provided design specifications and drawings, and plaintiff [contractor] persuades defendant to change them in accordance with plaintiff’s [contractor’s] ideas, plaintiff [contractor] assumes the risk that performance under its proposed specifications may be impossible. **In general, the party that drafts or changes design specifications is responsible for losses** suffered by the other party **due to defects in the specifications** (emphasis added.) *Aleutian Contractors*, 24 Cl. Ct. at 384; *see also Austin Co. v. U.S.*, 314 F.2d 518, 520-21 (Cl. Ct.), *cert. denied*, 375 U.S. 830, 84 S. Ct. 75, 11 L. Ed. 2d 62 (1963) (party who “drew up” design specifications responsible for losses).

engineer knowledge that GCC had before it signed the GCC-PUD contract:

- The design for the Project permitted only one slot to be bulkheaded and dewatered at a time. CP 143.
- GCC had calculated the “net tipping moment” and the “overturning moment” of future unit 11. CP 143.
- GCC had discussed with the lead design engineer that future units stay in place due to anchors at the upstream face, that the anchors were placed during construction in the 1960s, that the anchors generated a large portion of the stability of the future units, and that **FERC was concerned about stability**. CP 147 (emphasis added).
- The design engineer notified GCC that the preliminary construction sequence that GCC proposed was “unacceptable” because of “[t]he **stability analysis prepared for FERC** as part of project planning ... CP 153 (emphasis added).

SR-15 of the GCC-PUD bid document (CP 19595) informed GCC of the availability upon request of the QCIP, Appendix G of which was the Stability Analysis Report. CP 15211, 15216-15220. Both the Stability Analysis Report and the Geotech Report documented that Future Unit 11 had “a system of post-tensioned tiedown anchors” consisting of 13 anchors, the purpose of which was to “prevent overturning... by the horizontal thrust of ... water behind the dam.” CP 15234-15235; *see* CP 15211. With the knowledge outlined above, GCC signed the GCC-PUD contract. The trial court correctly ruled that GCC’s possession of this information required dismissal of GCC’s superior knowledge claim.

GCC argues that the 769-page Anderson declaration provides the evidentiary basis for its superior knowledge claim.⁹ The PUD objected to inadmissible portions of the Anderson declaration. CP 2649-2650. The Anderson declaration states:

I, DAVE ANDERSON, declare ... I make this declaration **based on ... personal knowledge...**
CP 18681 (emphasis added).

GCC acknowledges that (1) Mr. Anderson is a Kiewit employee in Omaha, Nebraska (CP 18695); (2) he had no involvement with the Wanapum Fish Bypass Project (CP 18681; CP 18695-96; *See also* Ex. A to 5/4/15 Lewis Decl.); and (3) his only information about the Project stems from looking at selected documents “during the Spring and Summer of 2009,” one year after GCC had left the Project. CP 18681; *see also* GCC’s Answer to the PUD’s Motion to Strike at 15. As a consequence, Mr. Anderson could not possibly have personal knowledge of what took place on, during, or related to the Project. “It is not enough that the affiant be ‘aware of’ or be ‘familiar with’ the matter, **personal knowledge is required.**” *Nat’l. Union Ins. Co. of Pittsburgh, PA v. PSP&L*, 94 Wn. App. 163, 181, 972 P.2d 481 (1999) (emphasis added). The absence of personal knowledge renders the Anderson declaration inadmissible and GCC’s superior knowledge claim without evidentiary basis. CR 56(e);

⁹ The GCC Brief cites the Anderson declaration 47 times.

Lynn, 136 Wn. App. at 306.

2.4 The Trial Court Correctly Dismissed GCC's Mistake Claim.

GCC's Mistake Claim. In its 10/10/08 Complaint, GCC, for the first time, asserted that an alleged mistake entitled it to "equitable recovery" that it identified as extra money (damages) and extra time:

EIGHTH CLAIM FOR RELIEF

...

55. Either on the basis of a mutual mistake of fact by the parties or, alternatively, a unilateral mistake of fact by GCC, coupled with inequitable conduct by PUD, the 2-slot concurrent protocol was rejected ultimately and GCC was required to perform the slot work on a one-by-one basis.¹⁰

56. ... GCC is entitled to recover, on the basis of mutual mistake ... or unilateral mistake ... the sum of \$20,000,000 ... and GCC is entitled to an extension of time ... CP 14.

Motion to Dismiss. By 1/12/11 motion, the PUD sought dismissal of GCC's "Mistake Claim" for at least seven reasons. CP 16060-16061.

The superior court granted the motion by Order dated 4/13/12. CP 17051-17052.

¹⁰ As above noted, T-02 1.02 E. of the GCC-PUD contract obligated GCC to "prepare and distribute meeting minutes for each project meeting within 5 (five) working days of the meeting." It required those minutes to note: "Significant decisions and action items." CP 16901 ("shall be noted"). The 1/12/06 "Progress Meeting Minutes" that GCC prepared, record the decision that Ben Hugel, the person whom GCC authorized to "represent and act for [GCC] in all matters relating to the [GCC-PUD] contract" (CP 2648), and PUD engineers Dana Jeske and George Thompson reached: "The previously agreed construction sequence for slots A, B, & C is still acceptable." CP 10518, 10519. Thus, GCC contemporaneously, expressly admitted the falsity of this allegation.

Analysis.

GCC's Request for Extra Money and Extra Time has No Legal Basis. GCC's 10/10/08 Complaint claimed that "mistake" entitled it to "equitable recovery" that it identified as extra money and extra time. CP 14. However, as a matter of law, the sole remedy available for mistake, if established, is rescission or reformation – not extra money or extra time.

It is a fundamental tenet of both Washington and Anglo-American jurisprudence that relief from a mistake about a contract sounds in equity. *See Hazard v. Warner*, 122 Wash. 687, 691, 211 P. 732 (1923); *Murray v. Sanderson*, 62 Wash. 477, 480-81, 114 P. 424 (1911) (relief from mistake is "an unquestioned principle of equity"); *Dennis v. Northern Pac. Ry. Co.*, 20 Wash. 320, 323, 55 P. 210 (1898) (equity has jurisdiction to reform written instruments); *Holm v. Shilencky*, 269 F. Supp. 359, 364 (S.D.N.Y. 1967), *aff'd.*, 388 F.2d 54 (2nd. Cir. 1968) ("It must be clear that there can never be money damages for a contract induced by a mutual mistake. Rescission of the contract or its reformation might in some circumstance be just, but never money damages."); Restatement (Second) of Contracts, 6 Intro. Note (1981) (appropriate relief for mistake is either avoidance or reformation); *see also Auburn Mech., Inc. v. Lydig Constr., Inc.*, 89 Wn. App. 893, 905, 951 P.2d 311, *rev. denied*, 136 Wn.2d 1009

(1998) (action is at law and not equity when “relief given is simple money judgment”); *Kelly v. Foster*, 62 Wn. App. 150, 154, 813 P.2d 598, *rev. denied*, 118 Wn.2d 1001 (1991) (plaintiff claimed no equitable remedy – “[h]er action [was] one to recover damages for herself, a traditional legal remedy”).

Accordingly, the remedy that GCC sought for alleged mistake, i.e., extra money and extra time, is not available as a matter of law. Because governing law barred GCC’s claim for extra money and extra time for alleged mistake, the superior court properly dismissed GCC’s mistake claim.

Mistake Claim – Non-Timely. As a matter of law, no legally viable claim for mistake exists when the party asserting mistake fails, on discovery of the alleged mistake, to **promptly** assert its equitable remedies. *Town of LaConner v. Am. Constr. Co.*, 21 Wn. App. 336, 340, 585 P.2d 162 (1978), *rev. denied*, 91 Wn.2d 1023 (1979) ([R]escission of an agreement once made must be prompt upon discovery of the facts warranting such an action.”); *see also Bayley v. Lewis*, 39 Wn.2d 464, 469, 236 P.2d 350 (1951) (same). “When a party fails to take steps to rescind within a reasonable time and instead follows a course of conduct inconsistent therewith, the conclusion follows that he has waived his right of rescission and chosen to continue the contract.” *LaConner*, 21 Wn.

App. at 340 (citing *Fines v. West Side Implement Co.*, 56 Wn.2d 304, 309, 352 P.2d 1018 (1960)).

GCC posited as the alleged “mistake” “the understanding ... that work could be performed on a 2-slot concurrent basis.” CP 14. GCC did not mention any claim of mistake until its 10/10/08 Complaint. Instead, GCC proceeded with its Slot A, B, and C concrete pours, completing those two years before its first assertion of “mistake.” See CP 11046. Furthermore, before alleging “mistake” in its 10/10/08 Complaint, GCC had in each of the four change orders that it signed, and in the Release and Settlement Agreement that it also signed expressly affirmed the terms and conditions of the GCC-PUD contract – agreeing that “all other Contract terms and conditions shall remain unchanged.” CP 3542; CP 14612; CP 4858. As a matter of law, GCC’s failure to assert any claim of mistake and to pursue the equitable remedies available for that claim, and its repeated affirming “all other Contract terms and conditions” necessitated matter of law dismissal of GCC’s mistake claim:

[I]nstead of rescinding, plaintiff, with full knowledge of its mistake, proceeded to perform the contract, and it cannot now compel defendant to pay the amount which it claims it intended to bid or obtain recover on a quasi-contractual basis as if no contract existed. Such a result would not only be contrary to settled legal principles, but it could also create uncertainty and confusion in the field of competitive bidding.

Red-Samm Mining Co., Inc. v. Port of Seattle, Inc., 8 Wn. App. 610, 615-

616, 508 P.2d 175 (1973) (internal citation omitted).

The trial court correctly dismissed GCC's mistake claim.

Burden of Proof. To state a *prima facie* claim of “mutual mistake” or “unilateral mistake,” a party “must show by clear, cogent, and convincing evidence that the mistake was independently made by both parties.”¹¹ *Chemical Bank v. Wash. Pub. Power Supply Sys.*, 102 Wn.2d 874, 898, 899, 691 P.2d 524 (1984). *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973) defines “clear, cogent, and convincing:”

[T]he ultimate fact in issue must be shown by evidence to be **‘highly probable’**. (emphasis added).

Woody v. Stapp, 146 Wn. App. 16, 22, 189 P.3d 807 (2008) explains that because of the “clear, cogent, and convincing evidence” burden that GCC bore, GCC could not avoid dismissal of its mistake claim by relying on inference:

Initially, Mr. Woody argues his burden of proof is lowered because when we review a summary judgment order, we must construe all facts and reasonable inferences in a light most favorable to the non-moving party. ... **However, when reviewing a civil case in which the standard of proof is clear, cogent, and convincing evidence, this court “must view the evidence presented through the prism of the substantive evidentiary burden.”** ... Thus, we must determine whether, viewing the evidence in the light most favorable to the nonmoving party, **a rational trier of fact could find that the nonmoving party supported his or her claim with clear, cogent, and**

¹¹ The GCC Brief erroneously argues that to state a *prima facie* claim of mistake it “needs only to present evidence from which a reasonable trier of fact could infer...” GCC Brief at 59.

convincing evidence. (emphasis added).

“A summary judgment motion will not be denied on the basis of an unreasonable inference.” *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 184, 782 P.2d 1107 (1989). GCC put forward no admissible evidence of mistake, let alone “clear, cogent, and convincing evidence.”

No Mistake. Mistake is a belief “not in accord with the facts.” *Simonson v. Fendell*, 101 Wn.2d 88, 91, 675 P.2d 1218 (1984). GCC asserts that an understanding that the Slots A, B, and C construction could be performed on a 2-slot concurrent basis constituted “mistake.” CP 14. However, GCC’s testimony and its own contemporaneous project records establish that no mistake existed. The testimony of GCC’s first onsite project engineer and CR 30(b)(6) designee provides one example:

Q: You knew that before you moved on-site the owner [PUD] had informed you that you could not do more than one slot at a time, correct?

A: Yes.

...

Q: And before you moved on-site, the owner had told you that working on more than one slot at a time potentially impacted the stability of the dam. They told you that, correct?

A: I believe so. CP 7094.

GCC’s 12/20/05 Submittal 58, in which it described its proposed “construction and de-watering sequence,” provides a second example:

The construction and dewatering sequence shown is essentially the same.... This sequence reflects General

Construction Company's understanding of the agreement reached in July with Jacobs and Grant County. The purpose of this agreement was to assure the dam remains stable during construction. CP 10496.

The 1/12/06 Progress Meeting Minutes, in which GCC noted "significant decisions and action items," establish that no mistake existed about the concrete pour sequence of Slots A, B, and C. CP 10518-10519. On 1/5/06, two days after GCC made its first Slot B concrete pour, monitors registered slight movement of the top of future unit 11. CP 199. GCC's representative Ben Hugel and PUD engineers Dana Jeske and George Thompson discussed this at the 1/12/06 Progress Meeting. CP 199-200. The 1/12/06 Progress Meeting Minutes, that GCC prepared, in compliance with T-02 1.02, record the decision reached:

The previously agreed construction sequence for slots A, B, & C is still acceptable. CP 10519.

GCC proceeded with its "previously agreed construction sequence," completing its slots A, B, and C structural concrete pours on 7/10/06, two months and ten days before the 9/20/06 date that GCC listed in its 12/20/05 Submittal 58 Schedule. CP 10498; CP 10502; CP 11046.

GCC's failure to put forward any admissible evidence, let alone "clear cogent, and convincing" evidence, of a belief "not in accord with the facts" necessitated dismissal of GCC's mistake claim.

Risk. To avoid summary judgment dismissal of a claim of mistake, the party asserting “mistake” must establish by clear, cogent, and convincing evidence that it did not bear the risk of the alleged mistake. *Danaxas v. Sandstone Court of Bellevue, LLC*, 148 Wn.2d 654, 668, 63 P.3d 125 (2003). “In a contractual setting, a party bears the risk of a mistake if he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient.” *CPL (Delaware) LLC v. Conley*, 110 Wn. App. 786, 791-792, 40 P.3d 679 (2002) (quoting *Bennett v. Shinoda Flora, Inc.*, 108 Wn.2d 386, 396, 739 P.2d 648 (1987)). “In other words, a party’s willingness to enter a contract notwithstanding limited knowledge of certain facts shows that those facts were not essential elements of the contract.” *Id.*

Here, GCC alleged that GCC’s mistake consisted of its “understanding ... that the work could be performed on a 2-slot concurrent basis.” CP 14. GCC testified through its CR 30(b)(6) designee that before it mobilized to the project site, it was told that it “could not do more than one slot at a time” because “working on more than one slot at a time potentially impacted the stability of the dam.” CP 7094. Accepting GCC’s allegation that it proceeded in accordance with its “Two Slot Method” as true, GCC, with knowledge that it “could not do more than

one slot at a time,” bore the risk of its doing so. GCC’s proceeding with knowledge of the risk that it took in doing so necessitated dismissal of GCC’s mistake claim.

Future Event. To avoid dismissal of its mistake claim, GCC had to establish by clear, cogent, and convincing evidence that the alleged mistake was “held at the time the contract [was] made.” *Danaxas*, 148 Wn.2d at 668. *Westinghouse Elec. Corp. v. U.S.*, 41 Fed. Cl. 229, 237 (1998), in granting summary judgment dismissal of the plaintiff’s mistake claim, explained this requirement – a future event cannot, as a matter of law, constitute the basis of a mistake claim:

To establish a mutual mistake of fact the party seeking reformation must show that the parties to the contract held an erroneous belief as to **an existing fact.** Furthermore, “there is uniformity among the circuit courts of appeals and the commentators that mutual **mistake of fact cannot lie against a future event.** (internal citation omitted) (emphasis added).

Here, GCC asserted as mistake “the understanding ... that the work could be performed on a 2-slot concurrent basis” and alleged that either it alone or it and the PUD held this understanding at the time GCC on 5/31/05 signed the GCC-PUD contract. CP 14. What GCC posits as “mistake” relates to a “future event,” i.e., slight movement detected on 1/5/06, that does not provide a legally cognizable basis for a claim of mistake. This necessitated dismissal of GCC’s mistake claim.

III. REPLY TO GCC RESPONSE RE PUD ORDERS

3.1 The “Matter of Law Rulings” which are the Subject of the PUD’s Request for Review are Properly before this Court.

The GCC Brief argues “none of the Assignments of Error or issues involve a ruling the trial court actually made.” GCC Brief at 3; *see also id.* at 29, 39, 46, 47. The trial court’s 1/31/14 Order Certifying for Appeal establishes the error of GCC’s argument:

4. The Court has issued its letter rulings and orders on the motions for summary judgment (Exhibit C attached) and motions for reconsideration based on statements of law contained in each of the following proposed orders:

- Order on Motion for Reconsideration: GCC’s Claim 1: Slot Claim
- Order on Motion for Reconsideration: GCC’s Claim 2: Upstream Stoplog Guiderails
- Order on Motion for Reconsideration: GCC’s Claim 7 & 16
- Order on Motion for Reconsideration: GCC’s Claim 10: Coffe Cell Flooding
- Order on Motion for Reconsideration: GCC’s Claim 11: Flow Fairings

The matter of law rulings in each of the orders are final determinations of law of this Court.¹² CP 10903-10904 (emphasis added).

The “proposed orders” listed (CP 10904) recite each “matter of law ruling” that is the subject of the PUD’s appeal. CP 10844-10848, 10857-

¹² Counsel for GCC agreed to the language quoted from the superior court’s 1/31/14 Certification Order. CP 18658-18660.

10862, 10869-10873, 10880-10882, 10891-10896.

3.2 GCC's Claim 1: Slot Sequence

GCC's Argument. GCC bases its Claim 1: Slot Sequence on its argument that after it made its 1/3/06 first concrete pour in Slot B, the "PUD directed GCC to abandon the July 31, 2005 schedule and the December 2005 schedule and resequence all slot work on a sequential basis." CP 8733-8734. However, GCC has put forward no admissible evidence to controvert the following three facts:

(1) There exists not one document that GCC provided to the PUD before its completion of the Slot A, B, and C concrete pours, which form the basis of GCC's Claim 1: Slot Sequence, that notifies the PUD (or even mentions) any alleged directive "to abandon the July 31, 2005 schedule and December 2005 schedule and resequence all slot work on a sequential basis" or any claim for extra money or extra time for any such directive. CP 8733-8734.

(2) GC-31 of the GCC-PUD contract specified:

Progress meetings will be utilized to review the work schedule and **discuss any delays, unusual conditions, or critical items which have affected or could affect the progress of the work.** CP 19580. (emphasis added),

T-02 1.02 "Progress Meetings," 1.02E "Meeting Minutes" of the GCC-

PUD contract required:

The Contractor [GCC] shall prepare and distribute meeting minutes for each project meeting within 5 (five) working days of the meeting. **Significant decisions and action items shall be noted.** CP 16901. (emphasis added)

GCC admits, in response to Request for Admission 19 (CP 10546), that it prepared the 1/12/06 Progress Meeting Minutes that recorded the decision on the construction sequence for slots A, B and C after 1/5/06:

The previously agreed construction sequence for slots A, B, & C is still acceptable. CP 10519. (emphasis added).

No Progress Meeting Minutes for any progress meeting before GCC's completion of the Slot A, B, and C concrete pours so much as mentions any claim or potential claim for the sequence that GCC used to construct Slots A, B, and C.

(3) Ben Hugel, GCC's onsite project manager during all Slot A, B, and C concrete pours that make up GCC's Claim 1: Slot Sequence, whom GCC "authorized to act for the contractor on all contract issues and construction phases of this project" and "to negotiate and settle all contract changes with regard to both time and cost," (CP 10495) testified:

Q: Now, the statement says "the previously agreed construction sequence for slots A, B, C is still acceptable." My question to you is this: Can you show us any document that memorializes a change in that position before GCC's completion of the slot work?

A: No. CP 10486.

GCC-PUD Contract. GC-14 of the GCC-PUD contract authorized the PUD to “make changes by altering, adding or deducting from the work” but required, as a condition precedent to any change order work, a written change order. CP 19569. G-15 authorized a time extension for any delay caused by “any unforeseeable causes beyond the control of the Contractor” but required the Contractor to submit a timely written claim for a time extension. CP 19587. GC-10 required the contractor to make any claim for damages in writing “no later than ten calendar days after the beginning of the event or occurrence giving rise to the claim.” CP 19567. The Contractor’s noncompliance with the notification and claim submittal requirements of GC-14, G-15, or GC-10 waived the claim. CP 19567.

GCC’s Allegation. In its Complaint, under the heading “FACTS COMMON TO ALL CLAIMS FOR RELIEF” (CP 2), GCC alleged that “in accordance with the Contract Documents” it timely notified the PUD of its Claim 1: Slot Sequence and all other claims:

10. At all times, GCC **timely notified PUD** of the 2-slot claim... CP 3-4 (emphasis added).
12. GCC has **timely and in accordance with the Contract Documents provided notice of these claims** ... CP 4-5 (emphasis added).

GCC’s Complaint further alleged:

45. **Any delays** in the Project ... **GCC provided**

timely notice to the PUD of any such impediments to timely performance **and, in each instance, requested a reasonable extension of time.** CP 12 (emphasis added).

Waiver. Because GCC could not and cannot produce any admissible evidence that it “timely and in accordance with the Contract Documents provided notice” of its Claim 1: Slot Sequence (and other of GCC’s claims), GCC argues that the PUD “unequivocally waived” the notification and claim submittal requirements of GC-14, G-15, GC-10, and GC-18. GCC Brief at pages 4, 7, 12-17, 27, 29-34, 37, 38, 51, 52 and 62.

Non-Waiver is a Verity on Appeal.

In its Notice of Review, GCC stated that, “pursuant to RAP 5.2(f)” it “is seeking relief from the same Order Certifying for Appeal and Reconsideration Order from which PUD seeks review in its Notice of Discretionary Review,” that is, the superior court’s 1/31/14 Certification Order. CP 17568. Finding No. 3 of the 1/31/14 Certification Order recites: “[T]he PUD did not waive the notice and claim submittal requirements of the GCC-PUD contract.” CP 10903. GCC’s Notice did not seek review of—or even mention—this express finding. CP 17567-17570. Unchallenged superior court findings are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992) (“The finding is unchallenged. It is therefore a verity on

appeal.”). Thus, GCC’s failure to assign error to the superior court’s finding, that is to ‘challenge’ the finding, renders the finding that “the PUD did not waive the notice and claim submittal requirements of the GCC-PUD contract” a “verity” that precludes GCC’s arguing waiver on appeal.

Neither GCC Nor the PUD Sought Review of the Court’s Finding of No Waiver.

A notice for review must “designate the decision or part of decision which the party wants reviewed.” RAP 5.2(b); RAP 5.3(a)(3). Generally, an appellate court will review only “the decision or parts of the decision designated in the notice for discretionary review.” *Rice-Price Recreation, LLC v. Connells Prairie Comm. Council*, 146 Wn.2d 370, 378, 46 P.3d 789 (2002) (citing RAP 2.4(a)).

Here, GCC’s 3/13/14 “Notice of Discretionary Review to Court of Appeals Division III” identified the “specific” decisions and parts of decisions for which GCC sought review:

Specifically,... GCC seeks discretionary review of the following four (4) orders underlying the Order Certifying for Appeal in their entirety: [identifying the four Orders].

...

GCC seeks discretionary review **only** of the following two (2) portions of the Reconsideration Order:

[identifying 2 portions of the Order].¹³ CP 17569.
(emphasis added).

None of the four orders or the portions of the Reconsideration Order for which GCC sought review mention “waiver.” CP 15136-16143; 167954-16795; 16800-16801; 17050-17054; 11016-11017. Moreover, the five orders for which the PUD sought review, orders which GCC’s counsel drafted and signed, do not mention “waiver.” See CP 10077-10079, 9936-9938, 9983-9985, 9724-9726,¹⁴ 10030-10032.

In short, neither GCC nor the PUD sought review of the superior court’s finding: “The Court has ruled that the PUD did not waive the notice and claim submittal requirements of the GCC-PUD Contract.” CP 10903. Accordingly, waiver is not before this Court, and this Court should not consider GCC arguments of waiver.

Regardless, GCC’s Waiver Argument Fails.

Even if GCC had properly sought appellate review of the superior court’s finding, GCC’s waiver argument fails for at least six reasons.

Express Waiver: First, GC-14 required as a condition precedent to waiver “of any provision of the Contract” or any “consent to departure

¹³ GCC’s Brief contains no mention of these “two (2) portions of the Reconsideration Order.” GCC has thereby abandoned its appeal of these two rulings. *Park Hill Corp. v. Don Sharp, Inc., Better Homes and Gardens*, 60 Wn. App. 283, 287 n. 4, 803 P.2d 326 (1991) (issues raised in cross appeal but not briefed deemed abandoned), *overruled on other grounds, Thompson v. Hanson*, 168 Wn.2d 738, 239 P.3d 537 (2009).

¹⁴ GCC Counsel drafted, but did not sign this Order. CP 9726.

therefrom” a written waiver “signed by the waiving or consenting party.” CP 210. No “writing ... signed by the waiving ... party” waiving the notice and claim submittal requirements of the GCC-PUD contract exists or ever has existed. Thus, no express waiver here exists. Notwithstanding this fact, GCC argues with no factual support: “The factual record establishes that PUD **expressly waived** notice provisions under the Contract ...” GCC Brief at 7 (emphasis added).

Implied Waiver. Second, because no express waiver of the notification and claim submittal requirements of the GCC-PUD contract ever occurred, GCC had to establish implied waiver. The Washington Supreme Court in *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, reiterated the burden that Washington courts require a contractor to meet to establish a *prima facie* claim of implied waiver of contract notification and claim submittal requirements:

[W]aiver by conduct requires **unequivocal acts** of conduct evidencing an intent to waive.... The ‘unequivocal acts’ standard is **demanding** for good reason. *Waiver permanently surrenders an established contractual right. ...*

Id. at 770, 771 (emphasis added, italics original).

The *American Safety Casualty* Court rejected the contractor’s claim that the owner had “implicitly waived its right to demand compliance with” the contract's notification and claim submittal requirements and reinstated the

trial court's summary judgment dismissal of the contractor's claim:

Because American Safety admittedly did not comply with the contractual provisions, and because the City did not **unequivocally** waive its right to demand compliance with these provisions, we find that the trial court was correct in granting summary judgment to the City.

Id. at 771-72 (emphasis added); *see also id.* at 764.

Here, records generated during GCC's involvement on the Project, including GCC's own internal records, establish that GCC did not and could not meet its burden of establishing "unequivocal acts of conduct evidencing an intent to waive." The contents of contemporaneous records, examples of which appear in Appendix C, document both GCC's and the PUD's ongoing recognition of the necessity of GCC's compliance with the notice and claim submittal requirements of the GCC-PUD contract – GC-14, G-15, GC-10, and GC-18, i.e., the opposite of implied waiver. The minutes of the 6/8/05 Preconstruction Conference, that six GCC representatives attended, recorded:

F. Change Orders: Addition and/or deduction of the work is permitted provided an executed change order is properly authorized. Refer to Article GC-14 titled Changes in Work, of the Contract for details regarding change orders. CP 14619-14620.

GCC's first onsite project manager (until 11/28/05), David Bishop, entered in his job diary on 6/13/05: "No work without signed change order – Board approval." CP 14630. GCC's own internal 7/05 Contract

Administration Plan and its 8/06 update to that plan both spelled out:

4.4.1 Specification GC-14 gives the District's Manager and Division Directors authority to approve change orders up to \$10,000. Only the District's Board of Commissioners can approve change orders over \$10,000.

...

4.4.3 GC-14 requires ... signed change order before change work is performed.

4.4.4 GC-14 allows the Engineer to make minor changes to the work via a written District Instruction. No additional cost or time is allowed for District Instruction. The Contractor may not proceed with work under District Instruction if the Contractor believes the District Instruction will result in additional cost or time. CP 2634-2635; CP 2641.

GCC's 11/30/06 internal Monthly Project Narrative Report from its fourth onsite project manager on the Project site to GCC's home office in Poulsbo stated:

Project Specifications limit the ability of Grant County's [the PUD's] employees to order or recognize changes. Change orders must be approved by the County Board of Commissioners. CP 14116.

GCC's president, Mr. Morford, in his 4/10/07 email to GCC's fourth onsite project manager and to GCC's project sponsor recited:

I told Joe [Joe Lukas, PUD Assistant Manager] that General considered the installation of "shrink wrap" to be a change to our contract and that **we would not be able to proceed with the changed work without an executed change order approved by the PUD Commission, in accordance with their contract.** CP 6389. (emphasis added).

GCC's implied waiver argument fails because Project records, including GCC's own internal records, establish that GCC neither did nor could meet the "unequivocal acts" burden that Washington courts require to avoid summary judgment dismissal of its claim of implied waiver.

Authority to Waive. For a third reason, GCC's waiver argument fails as a matter of law. GCC argued that the conduct of one man, PUD engineer Dana Jeske, waived for the PUD the notice and claim submittal requirements of the GCC-PUD Contract. CP 13749; GCC Brief at 12-15, 31-34.

N. State Constr. Co. v. Robbins, 76 Wn.2d 357, 457 P.2d 187 (1969), articulates Washington law--the engineer/architect **cannot** modify the contractor-owner contract absent specific authorization to do so:

Even though the architect may be defendant's agent, he is not, without specific authorization, empowered to modify a contract entered into between his employer and a builder.

N. State Constr., 76 Wn.2d at 364; *see also Absher Constr. Co. v. Kent School District*, 77 Wn. App. 137, 143 ("Where the contract is silent, an architect and its subconsultants [engineers] are not a general agent of his or her employer and have no implied authority to make a new contract or alter an existing one for the employer.").

The GCC-PUD contract was anything but silent about the authority of a PUD engineer to waive contract requirements. GC-14 limited the

engineer's authority to "minor changes ... not involv[ing] any additional cost" or "an extension of the Contract completion date," but otherwise precluded any employee, agent or representative of the PUD from approving any change. CP 19570. GCC's own documents, including both its original July 2005 Contract Administration Plan and its August 2006 update of that plan, expressly acknowledged this limitation of authority. CP 2634-2635; CP 2641. As a matter of law, the alleged conduct of one contractually unauthorized engineer could not waive for the PUD the notice and claim submittal requirements of the GCC-PUD Contract.

Apparent Authority. For a fourth reason, GCC's waiver argument failed as a matter of law. "Apparent authority can only be established from the conduct of the principal, and not by the conduct of the agent." *Donald B. Murphy Constr., Inc. v. State*, 40 Wn. App. 98, 110, 696 P.2d 1270, *rev. denied*, 103 Wn.2d 1039 (1985). Attempts to "establish apparent authority only from the conduct of the agents" are insufficient. *Id.* Consistent with the holding in *Donald B. Murphy*, the superior court ruled:

Here, the parties agreed when they entered into their contract that Mr. Jeske had no authority to modify the contract or approve extra work. There is no evidence before me that Defendant as principal did anything to lead Plaintiff to any other conclusion. CP 28.

Only the conduct of the principal, the PUD, through its board of commissioners, could waive the PUD's rights. RCW 54.12.010. As a

matter of law, alleged conduct of a limited agent, an engineer, could not. GCC based its entire waiver argument on alleged conduct of a limited agent, engineer.¹⁵ GCC Brief at 12-16, 32-34. As a matter of law, such neither did nor could establish waiver.

No Admissible Evidence of Waiver. For a fifth reason, GCC's wavier argument fails. GCC argues that the 7/1/09 declaration that its first onsite project manager, David Bishop, (project inception until 11/28/05) signed establishes implied waiver.¹⁶ The PUD objected to inadmissible assertions in the Bishop declaration. CP 18675-18676.

Mr. Bishop left the project on 11/28/05 and never returned. CP 13904. His departure preceded by months any claim that GCC is making in this suit, and his declaration makes assertions about a claimed waiver of contract requirements relating to rock excavation, something that neither is nor ever has been a claim in this lawsuit.¹⁷ See CP 13904-13906. Accordingly, the contents of the Bishop declaration about any GCC claim in this suit prove inadmissible and irrelevant because Mr. Bishop lacks the

¹⁵ GC-14 of the GCC-PUD contract spelled out the limitations on the authority of the Engineer:

The Engineer may instruct the Contractor to make minor changes in the work where such changers are not inconsistent with the proposes of the Contract, do not involve any additional cost and will not require an extension of the Contract completion date. CP 19570.

¹⁶ The GCC Brief cites the Bishop declaration 23 times.

¹⁷ GCC's attempt to argue waiver based on the Bishop declaration fails. GC-14 of the GCC-PUD Contract spells out the parties' agreement: "no such waiver ... shall extend beyond the particular case and purpose involved." CP 19570.

“personal knowledge” that CR 56(e) requires to render statements in that document admissible. Moreover, Mr. Bishop’s testimony demonstrates that he, just like Mr. Kittle, does not even know the meaning of words in the declaration that he signed. The Bishop declaration contains the word “unequivocal” twice, “unequivocally” once, and “equivocation” once. CP 13905-13907. Mr. Bishop testified:

Q: Please define for us the word “unequivocal.” Just define it. ...

A: Unequaled.

...

Q: Is that what you mean by the word?

A: If you ask me, that would be my definition.

Q: Any other definitions you are aware of?

A: No. CP 11159-11160.

No admissible evidence of waiver exists.

GCC’s Declaration Necessitates Dismissal. For a sixth reason, GCC’s argument that the PUD waived the requirements of GC-14, G-15, and GC-10 fails. The 7/9/09 declaration of GCC’s president, Mr. Morford, that GCC submitted in opposition to the motion to dismiss GCC’s Claim 12: Selway Paint, if accepted,¹⁸ necessitates dismissal of GCC’s Claim 1: Slot Sequence. That declaration states: “Contract changes ... were

¹⁸ The PUD moved to strike portions of this declaration (and others) because they did not constitute the competent evidence that CR 56(e) requires. (“[A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that affiant is competent to testify to the matters stated therein.”) CP 18675-18679. The superior court entered no order on the motion to strike.

discussed ... at Project Meetings ... and then fully documented in the meeting minutes” and “notices with respect to these matters were dealt with through the weekly meeting minutes ... and documented in the minutes ...” CP 13823-13824. Acceptance of the above inadmissible statement dictates the following result. Monitors registered slight movement of the top of future unit 11 on 1/5/06. CP 199. One week later, the 1/12/06 weekly Progress Meeting took place. In compliance with T-02, 1.02 E of the GCC-PUD Contract, GCC documented in the 1/12/06 Progress Meeting Minutes, the decision reached:

The previously agreed construction sequence for slots A, B, & C is still acceptable. CP 10519.

Accepting the inadmissible statement signed by GCC’s president at face value, GCC’s 1/12/06 Weekly Progress Meeting minutes document the opposite of what GCC alleges as its Claim 1: Slot Sequence, i.e., a PUD directive “to abandon the 7/31/05 schedule and the December 2005 schedule and resequence all slotwork on a sequential basis.” CP 87334. No entry in any of GCC’s Progress Meeting Minutes predating GCC’s completion of the Slot A, B, and C concrete pours that make up its Claim 1 so much as mentions, let alone “fully documents,” any such directive or any notice of any such directive. The statement of GCC’s own president, if accepted, necessitates dismissal of GCC’s Claim 1: Slot

Sequence.

In summary, GCC failed to comply with the notice and claim submittal requirements of the GCC-PUD contract for its Claim 1: Slot Sequence (and its Claims 2.2, 7, 11.1, 11.2, and 16)¹⁹. No express waiver of GC-14, G-15, GC-10, or GC-18 anywhere exists. GCC's argument of implied waiver failed as a matter of law for the six reasons outlined above. GCC's noncompliance with the notification and claim submittal requirements of its contract necessitates summary judgment dismissal of GCC's Claim 1: Slot Sequence and all other claims for which it failed to comply with the notice and claim submittal requirements of the GCC-PUD contract. *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 770 ("failure to comply with contractual procedures bars relief"); *see also Mike M. Johnson v. Cnty. of Spokane*, 150 Wn.2d 375, 386; *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 3; *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 142.

3.3 Claim 2.2: Concrete Bulge and 2.3: Guiderail Support.

The PUD Brief pointed out that, for the Upstream Stoplog Guiderails that make up GCC's Claim 2, the GCC-PUD contract obligated GCC to "verify the size and location of all existing items affecting the

¹⁹ See PUD Brief at 30-34.

work **prior to fabrication**” and “to ensure that all interferences are resolved.” PUD Brief at 17; CP 4862. The Brief further pointed out that GCC through its CR 30(b)(6) designee: (1) memorialized in GCC’s Contract Administration Plan that he, its designee, prepared, the risk that GCC took by not surveying the existing concrete at Future Unit 11 before fabricating steel components such as the upstream stoplog guiderails: “Misalignment of the existing concrete may prevent installation” (PUD Brief at 17; CP 2633); (2) testified that GCC expected “irregularities on the face of the dam, given that it’s a dam that had been constructed in ... approximately 1960” (PUD Brief at 16; CP 4874); and (3) reported in its internal Weekly Report that GCC’s “failure to verify” prior to fabricating the stoplog guiderails that “existing concrete in the B slot interferes” with their installation made what GCC later asserted as its Claim 2.2 GCC’s problem (“making this our problem.”) (PUD Brief at 17; CP 4899).

The GCC Brief ignores all of the above. The GCC-PUD contract specified GCC’s obligation. GCC, through its CR 30(b)(6) designee, acknowledged that GCC’s failure to perform its contract obligation rendered what constitutes GCC’s Claim 2.2 GCC’s problem. The testimony of GCC’s CR 30(b)(6) designee binds GCC. *Casper v. Esteb. Enterprises, Inc.*, 119 Wn. App. 759, 767, 82 P.3d 1223 (2004) (“CR 30(b)(6) testimony is binding”). This necessitates dismissal of GCC’s

Claim 2.2.

The GCC Brief likewise ignores that GCC testified through its CR 30(b)(6) designee that GCC's Claim 2 consisted of three subparts: 2.1: "Installation of Guiderail"; 2.2: "Concrete Bulge"; and 2.3 "Guiderail Support," but that GCC seeks neither extra money nor extra time for subpart 2.3. CP 4912-4913. This testimony establishes the absence of any damages for GCC's Claim 2.3. The failure to establish any damage -- an indispensable element of a *prima facie* breach of contract claim -- necessitates dismissal of GCC's claim 2.3. *DC Farms LLC v. Conagra Foods Lamb Weston, Inc.*, 179 Wn. App. 205, 227, 317 P.2d 543 (2014) ("court may dismiss a breach of contract action if damages have not been suffered").

GCC argues that its subpart 2.3 claim should not be dismissed because that component "provides a broader picture of the context in which the monetary and schedule impacts arise," yet fails to paint any "broader picture" for this Court. GCC Brief at 5. GCC's argument constitutes nothing but "argumentative assertion," unsupported by citation to law and insufficient to survive summary judgment dismissal. *Absher*, 77 Wn. App. at 141-42 ("argumentative assertions will not defeat summary judgment"). Recognizing GCC's argument for what it is—an obfuscation by which GCC seeks to avoid dismissal of GCC's Claims 2.2

and 2.3—necessitates dismissal of these claims.²⁰

3.4 Claims 7 and 16

The PUD Brief pointed out GCC's burden to avoid summary judgment – “to make a showing sufficient to establish the existence of each element essential to” GCC's case on which GCC will bear the burden of proof at trial. PUD Brief at 30; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Compliance with contractual notification and claim submittal requirements constitutes one such element. *See Am. Safety*, 162 Wn.2d at 770 (“failure to comply with contractual procedures bars relief”). The PUD Brief further pointed out that argumentative assertions and conclusions of fact will not defeat summary judgment. PUD Brief at 30. *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) directs:

A fact is an event, an occurrence, or something that exists in reality. ... It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. ... The “facts” required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. ... Likewise, conclusory statements of fact will not suffice. (citations omitted).

The PUD Brief documented that for at least 27 of the 28 District

²⁰ GCC argues that dismissal from “sub-components 1 and 3” “would be inappropriate.” GCC Brief at 5. GCC ignores that the superior court dismissed subcomponent 1 because the 2/8/07 Release and Settlement Agreement precluded that claim. CP 11016-11017, CP 11019.

Instructions (“DIs”) that make up GCC’s Claims 7 and 16, GCC did not comply with the notification and claim submittal requirements of the GCC-PUD contract – GC-14, G-15, GC-10, and GC-18. PUD Brief at 21-22.

GCC’s Brief ignores the above. It cites no contemporaneous document demonstrating compliance with GC-14, G-15, GC-10 or GC-18 for the DIs that make up GCC’s Claims 7 and 16. *See* GCC Brief at 22-23. GCC ignores its own admission that it did not timely provide the notifications that the contract required for 10 of the 21 DIs that make up its Claims 7 and 16 (CP 5411; 5424; 5430) and its representation that “GCC is not pursuing any additional time or money for DI ... 257.” CP 5424.

Moreover, the GCC Brief cites to no “facts” as *Grimwood* requires; it merely responds with “conclusory statements of fact,” such as “When it became apparent ... GCC notified PUD in writing” (GCC Brief at 22-23) and “[DI 257] provides a broader picture of the context in which the actual monetary and schedule impacts ... arose.”²¹ (GCC Brief at 46). Washington law holds that such conclusory statements of fact do not

²¹ Again, GCC’s Brief fails to paint any “broader picture” for this Court that it argues exists. In support of its conclusory statements, GCC cites not to any ‘written notification’, i.e., not to any “fact,” but rather to a 9/10/10 declaration of one of its employees, Mark Ereksen (GCC Brief at 22-23), a declaration that consists primarily of inadmissible conclusory statements of fact, e.g. “when it became apparent... GCC promptly delivered written notice ...” CP 5443.

suffice to defeat summary judgment. *See Absher*, 77 Wn. App. at 141-42 (“conclusory allegations ... will not defeat summary judgment”).

3.5 Claim 10: Coffe Cell Flooding

The PUD Brief at 22-25 and 42-50 listed multiple reasons why GCC’s Claim 10: Coffe Cell Flooding fails as a matter of law. The GCC Brief addresses none of these. Instead, GCC attempts to change its Claim 10 from what it identified in its response to Interrogatory 6 and its 4/5/07 “notification” letter. GCC’s response to Interrogatory 6 identified its Claim 10: Coffe Cell Flooding as for “direct costs incurred **resulting from flooding of the coffe cell.**” CP 89. (emphasis added). GCC identifies its 4/5/07 letter (CP 15162-15163), titled “High River Flows and **Flooding of Coffe Cell,**” as the document that GCC asserts constitutes written notice of that claim. CP 2293. That letter stated “We consider all work to dewater, repair, and re-dewater the coffe cell to be a **change of conditions** in accordance with the Specification Section GC-14 ‘Changes to the Work’.” CP 15163 (emphasis added).

Notwithstanding GCC’s above quoted statements, GCC’s Brief responds: “GCC’s Claim 10 (the coffe cell claim) is not a ‘changed conditions’ claim.” GCC Brief at 47. GCC’s attempt to change its Claim 10 fails because GCC cannot avoid three indisputable facts: (1) but for the flooding of its coffe cell when the level of the Columbia River at the

Wanapum Dam tailrace on four days exceeded 496.5', GCC's Claim 10: Coffe Cell Flooding disappears; (2) in its 4/5/07 letter GCC identified its Claim 10: Coffe Cell Flooding as a "claim" for "a change of conditions"; and (3) Section T-11, 3.04 the GCC-PUD Contract allocated to GCC the responsibility to "maintain dewatering on a continuous basis" on the four days that the Wanapum Dam tailrace exceeded 496.5':

Provide complete standby equipment, installed and available, for immediate operation as may be required, to adequately **maintain dewatering on a continuous basis** in the event that all or part of the system **may become inadequate** or fail. CP 19651 (emphasis added).

GCC's Claim 10: Coffe Cell Flooding fails as a matter of law for all reasons that the PUD Brief lists. GCC's attempt to avoid dismissal by changing its claim constitutes nothing but a subterfuge. Recognition of this necessitates dismissal of the claim.

3.6 Claim 11.1: Prefit and 11.2: Shrinkwrap.

The PUD Brief documented at pages 26-28 the facts that underlie subpart 1 "Prefit" of GCC's Claim 11. The PUD's engineer, in DI-8, accepted the RFI 227 request of GCC's fourth onsite project manager to change the flow fairings from the 5-3 module configuration that GCC's second onsite project manager had requested to a 4-4 configuration. CP 6045-6046. DI-8 specified: "The Contractor shall assure that the bolting

between the module sections will still fit-up with the revised module section locations.” CP 6045. GCC’s fourth onsite project manager signed DI-8 representing “[T]here will be no change in Contract Price or time of completion and [GCC] waives any claim thereto.” CP 6045-6046. One week after GCC’s 3/28/07 performing the prefit of Module 2, GCC sent its 4/2/07 letter claiming that the prefit that it had performed the week before was “compensable for both money and time in accordance with Specification Section GC-14.” CP 6047-6048.

The GCC Brief ignores the above. The GCC Brief further ignores that if GCC had complied with GC-14 and G-15 by notifying the PUD before the prefit that it would, after the fact, submit a claim for extra time and extra money for its RFI 227 request, the engineer could have declined GCC’s RFI 227 request, thereby avoiding a claim. GCC’s noncompliance with GC-14’s and G-15’s notice and claim submittal requirements necessitates dismissal of subpart 1: “Prefit” of GCC’s Claim 11. *Am. Safety Cas. Ins. Co.*, 162 Wn.2d 762, 770 (“failure to comply with contractual procedures bars relief”); *see also Mike M. Johnson v. Cnty. of Spokane*, 150 Wn.2d 375, 386; *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 3; *Absher*, 77 Wn. App. 137, 142.

The GCC Brief likewise ignores the facts underlying GCC’s Claim 11.2 “Shrinkwrap” that the PUD Brief listed at pages 28-29. Despite

representing in its Submittals 188 (3/5/07) and 188A (3/15/07) that “if required to protect fish during the time of fish runs” (CP 6051) it would shrinkwrap the module, GCC did nothing to comply with the notification and claim submittal requirements of the GCC-PUD contract. Instead, three days after its failed attempt to shrinkwrap Module 3 (4/10/07), GCC’s president, Mr. Morford, sent an email to GCC personnel stating that GCC “considered installation of ‘shrinkwrap’ to be a change” and that GCC “would not be able to proceed with this changed work without an executed change order approved by the PUD Commission in accordance with their contract.”²² CP 6389. GCC placed no shrinkwrap after this email. Again, GCC’s noncompliance with GC-14 and G-15 required dismissal of GCC’s Claim 11.2 “Shrinkwrap.” *Am. Safety Cas. Ins. Co.*, 162 Wn.2d at 770 (“failure to comply with contractual procedures bars relief”); *see also Mike M. Johnson*, 150 Wn.2d at 386; *Realm*, 168 Wn. App. at 3; *Absher*, 77 Wn. App. at 142.

IV. GCC’S NONCOMPLIANCE WITH RAP 10.3(a)(5) AND RAP 10.4(f)

The 3/9/15 Commissioner’s Ruling held that the 12/18/14 GCC

²² As above noted, this email of GCC’s president provides another example of GCC’s contemporaneous, ongoing recognition of the necessity of GCC’s compliance with the notice and claim submittal requirements of the GCC-PUD contract. It further contemporaneously documents GCC’s understanding of the limits of the engineer’s authority to bind the PUD.

Brief violated RAP 10.3(a)(5) and RAP 10.4(f) and directed GCC to file an amended brief:

This Court agrees that the foregoing examples constitute argument and violate RAP 10.2(a)(5) [sic]. Accordingly, it directs GCC to remove the above argument from its statement of the case.

...

This Court agrees that the foregoing examples violate RAP 10.3(a)(5) and 10.4(f). Accordingly, it directs GCC to substitute specific page cites to the record for its citations to spans of multiple pages.

...

3/9/15 Commissioner Ruling at 2 and 3.

GCC filed its 3/19/15 Amended Brief. The Amended Brief continued to violate RAP 10.3(a)(5) and RAP 10.4(f). Accordingly, the 7/9/15 Commissioner's Ruling not only directed GCC to file a second amended brief, but ordered GCC to remove certain language from its brief. For example, the Commissioner's Ruling directed GCC to remove the word "private":

[T]his Court directs GCC to remove that word [private] ... from a second amended brief.

7/9/15 Commissioner Ruling at 3 (emphasis added).

GCC's Second Amended Brief did not comply with this directive:

The consensus reached during the **private** meetings regarding the potential for catastrophic failure of the Dam...."

7/16/15 Second Amended Brief at 10 (emphasis added).

The 7/9/15 Commissioner's Ruling directed:

5. Page 12 of the Amended Opening Brief: Change "would" to "could".

7/9/15 Commissioner's Ruling at 4.

GCC twice ignored the Court Commissioner's directive. The word "would" remains at two places on what had been page 12 of GCC's Brief. *See* 7/16/15 Second Amended Brief at 11-12.

The 7/9/15 Commissioner's Ruling directed:

7. Pages 15-16 of Amended Opening Brief: Delete portion of sentence as follows: "Rather GCC, complied with PUD's insistence that". Insert "did" after "GCC". Sentence will then read, "GCC did not submit..."

Commissioner's Ruling at 4.

GCC did not comply, writing the offending sentence as it chose:

Approximately 2 years into the project, PUD executed \$6 million worth of Change Orders with a nearly one year time extension to address those issues, even though GCC had not provided formal written notice for some of them.

7/16/15 Second Amended Brief at 15.

The "PUD's Motion to Strike and for Sanctions" listed the following as one example of GCC's "presenting a distorted, misleading caricature of the facts ... relevant to the issues presented for review":

- D. Example 4.** Instead of stating fact, GCC misleadingly argues:

The negotiations surrounding change orders ... culminated in February 2007 with the execution of a Settlement Agreement Stated otherwise, PUD insisted on no notice and on that basis executed almost 2 years later \$6 Million worth of Change Orders with a nearly one-year time extension. (quoting GCC Brief at 16).

The 3/9/15 Commissioner's Ruling "direct[ed] GCC to remove the above quoted argument from its Statement of the Case." 3/9/15 Commissioner's Ruling at 2. The 3/9/15 Commissioner's Ruling effectively directed GCC to comply with ER 408:

... **evidence** of (1) furnishing or (2) accepting ... consideration in **compromising ... a claim** which was disputed as to either validity or amount, **is not admissible to prove liability** for ... the claim or its amount. **Evidence of conduct or statements made in compromise negotiations is likewise not admissible.** (emphasis added).

It likewise enforced the explicit holding of the Washington Supreme Court in *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 772, 174 P.2d 54 (2007):

If we found that by agreeing to enter into negotiations the City waived its rights under the contract, we would deter future parties from attempting settlement before resorting to the use of the courts. Such would be directly contrary to established public policy..."

Finally, it required GCC to comply with the express terms of the 2/8/07

Release and Settlement Agreement:

NO ADMISSION OF LIABILITY. It is understood and agreed that the **settlement contained in this agreement is a compromise of disputed claims** and that **neither the release... nor any other covenants by the parties shall be construed as an admission of liability** by either party, its directors, officers, commissioners, agents, sureties or employees. CP 14544. (emphasis added).

Nevertheless, GCC's Brief persists in repeatedly presenting this same inadmissible, distorted, misleading caricature as fact:

With respect to most of the changes that had arisen by that point in the Project, the negotiations took place in February of 2007 and culminated with the execution of a Settlement Agreement and Change Orders 2 and 3, which resolved several of the then-existing claims with PUD agreeing to pay GCC an additional approximately \$6 Million and granting an extension of time of more than 350 days.

Second Amended Brief at 15. *See also id.* at 2, 15, 32-33.

Despite two commissioner's rulings, GCC's Brief continues to repeatedly violate RAP 10.3(a)(5) and RAP 10.4(f). Another example follows. GCC's Brief lists five citations to the record for its argument that "PUD actually designed the specific Two-Slot Method it [the PUD] ultimately approved." Second Amended Brief at 57-58 (citing CP 1407, 20049, 20051, 6150-6156, and 20045). None of these five citations to the record support GCC's argument. "CP 1407" is an excerpt from GCC's 5/5/05 "Narrative Report for Bid Schedule" (*see* CP 1405), which demonstrates that GCC – not the PUD – "designed the specific Two Slot

Method”: “General Construction Company has provided this narrative to explain our means and methods...” (emphasis added). “CP 20049” is a draft of a 5/5/05 memorandum recommending that GCC be awarded the project, which draft nowhere mentions a “Two Slot Method” or who “designed” it. Similarly, “CP 20051” consists of an email chain that contains no mention of methods of construction and no mention of any particular method or who designed it. “CP 6150-6156” is a 10/26/10 declaration of GCC counsel to which is attached a transcript of a 5/16/05 PUD commission meeting. The transcript records a discussion among four “unidentified speakers” that nowhere discusses any method of construction or identifies who designed any method of construction. Last, “CP 20045” is a “Bid Comparison” attached to a 5/5/05 email, comparing GCC’s bid against the bid of two others. Again, the document contains no mention of a “Two Slot Method” or who designed it.

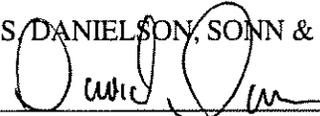
In summary, GCC’s Brief asserts false statements and misleading and false innuendo based primarily on inadmissible statements and false argument. GCC’s references to the record frequently do not “designate the page” as RAP 10.4(f) directs and do not state what GCC’s Brief recites that they state. The PUD’s two Motions to Strike and for Sanctions provided only examples of GCC’s violations of RAP 10.3(a)(5) and RAP 10.4(f).

V. CONCLUSION

For the reasons outlined above, the GCC Brief provides no legitimate basis for reversing the superior court's dismissal of GCC's Selway Paint, Blackboard as Notice, Superior Knowledge, and Mistake claims. Likewise, GCC's Claims 1, 2.2, 2.3, 7 and 16, 10, 11.1, and 11.2 fail as a matter of law, and the GCC Brief provides no legitimate basis for denying their dismissal. Instead, the GCC Brief persists with GCC's unsupported, distorted and misleading caricature of the "facts... relevant to the issues presented for review" (RAP 10.3(a)(5)) and incorrectly states governing law. GCC misstates the record to create the illusion of genuine issues of material fact where none exist. Because the arguments contained in GCC's Brief fail as a matter of law, this Court should affirm the superior court's dismissal of GCC's Selway Paint, Blackboard as Notice, Superior Knowledge, and Mistake claims and reverse the superior court orders denying dismissal of GCC's Claims 1, 2.2, 2.3, 7 and 16, 10, 11.1, and 11.2.

Respectfully submitted this 14th day of September, 2015.

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.

By 

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VI. TABLE OF APPENDICES

APPENDIX A	
• A-1, A-2	GC-14 of GCC-PUD Contract
• A-3	G-15 of GCC-PUD Contract
• A-4	GC-10 of GCC-PUD Contract
• A-5	GC-18 of GCC-PUD Contract
APPENDIX B	Timeline consisting of examples of information about the stability of future unit 11 of Wanapum Dam that GCC had prior to signing the GCC-PUD contract.
APPENDIX C	Timeline consisting of examples of contemporaneous records that document both GCC's and the PUD ongoing recognition of the necessity of GCC's compliance with the notice and claim submittal requirements of the GCC-PUD contract.

CC-14 CHANGES IN WORK

Without invalidating the Contract, the District may make changes by altering, adding or deducting from the work, and/or make changes in the drawings and specifications requiring changes in the work and/or materials and equipment to be furnished under this Contract; provided such additions, deductions or changes are within the general scope of the Contract. Except as provided herein, no official, employee, agent or representative of the District is authorized to approve any change in this Contract and it shall be the responsibility of the Contractor before proceeding with any change, to satisfy himself that the execution of the written Change Order has been properly authorized on behalf of the District. The District's Manager and Division Directors, under certain conditions as set forth in District Resolution No. 7687, have authority to approve Change Orders up to \$10,000.00 or less. Only the District's Board of Commissioners may approve Change Orders in excess of \$10,000.00.

Charges or credits for the work covered by the approved changes shall be determined by one or more, or a combination of the following methods, at the District's option.

- A. Unit prices specified in the Unit Prices for changes in work submitted with the Contractor's Bid Proposal, if any
- B. An agreed lump sum
- C. The actual cost of:
 - 1. Labor, including foreman.
 - 2. Materials entering permanently into the work.
 - 3. The Districtship or rental cost of construction plant and equipment during the time of use on the project. The equipment rental rates paid by the District shall not exceed eighty-five percent (85%) of the price given in the current W.S.D.O.T. - AGC agreement.
 - 4. Power and consumable supplies for the operation of power equipment.
 - 5. Insurance.
 - 6. Social Security and old age and unemployment contributions.
 - 7. To the sum of items 1, 2, 4, 5, and 6 inclusive, there shall be added a fixed fee of fifteen percent (15%). The fee shall be compensation to cover the cost of supervision, overhead, bond, profit and any other general expenses.

When a change is ordered by the District, as provided herein, a Change Order shall be executed by the District and the Contractor before any Change Order work is performed. The District shall not be liable for any payment to Contractor, or claims arising therefrom, for Change Order work which is not first authorized in writing as set forth in this Section CC-14. All terms and conditions contained in the Contract Documents shall be applicable to Change Order work. Change Orders shall be issued on the form attached as Exhibit A and shall specify any change in time required for completion of the work caused by the Change Order and, to the extent applicable, the amount of any increase or decrease in the Contract Price.

If any such change or alteration in the work shall result in a decrease of the work to be performed or materials, equipment, and apparatus to be furnished, no allowance shall be made to the Contractor in computing any resulting decrease in the Contract Price for loss of anticipated profits, but if the Contractor, before receiving the District's notice of intention pursuant to this Article, shall have incurred any expense in connection with the proper performance of the

Contract which shall be rendered unnecessary by such change or alteration, such allowance shall be made therefore to the Contractor as the District shall determine to be fair and reasonable.

The Engineer may instruct the Contractor to make minor changes in the work where such changes are not inconsistent with the purposes of the Contract, do not involve any additional cost and will not require an extension of the Contract completion date. The Contractor shall make no such changes without receipt of a District Instruction, Exhibit C, setting forth the changes to be made. Contractor's compliance therewith shall constitute its acknowledgment that such changes will not result in any claim for additional payment or extension of the Contract completion date. If the Contractor believes the instruction will result in additional costs or time extensions, Contractor shall promptly notify the District of the same and not proceed with the changes. District's Instructions, when issued, will be in writing and signed by the Project Engineering Manager or by the Project Engineer on behalf of the Project Engineering Manager.

No waiver of any provision of the Contract, and no consent to departure therefrom, by either party, shall be effective unless in writing and signed by the waiving or consenting party, and no such waiver or consent shall extend beyond the particular case and purpose involved.

GC-15 PAYMENT/RETAINAGE

Contractor shall submit an invoice for approval and payment by District for each Bid Item as shown on Bid Form for work satisfactorily completed.

Each request for payment shall be accompanied by an executed Prevailing Wage Affidavit as required in GC-28.

Invoices shall be addressed as follows:

Attn: Chris Akers
Contracts Officer
Public Utility District No. 2
of Grant County, Washington
15655 Wanapum Village Lane SW
Beverly, Washington 99321

The District will withhold the sum of five percent (5%) of the amount of each progress payment to the Contractor as retainage in accordance with R.C.W. Chapter 60.28 of the Revised Code of the State of Washington.

If the District is requested in writing by the Contractor, the monies reserved hereunder (retainage) shall be placed in escrow with a bank or trust company located in Grant County, State of Washington by the District and interest on such escrowed funds shall be paid to the Contractor as said interest accrues, all as more fully provided in R.C.W. Chapter 60.28. However, any payments made to the Contractor hereunder shall not relieve the Contractor from responsibility under provision of the Contract and warranties.

in such event sustain, and said amount is agreed to be the amount of damages which the District would sustain, and said amount shall be retained from time to time by the District from current periodical estimates.

G-15 DELAYS AND EXTENSIONS OF TIME

If the Contractor is delayed at any time in the progress of work by any unforeseeable causes beyond the control of the Contractor, the Contract time shall be extended for such reasonable time as the Engineer shall determine. The Contractor agrees to complete the work within the Contract time as thus extended. Such extensions shall postpone the beginning of period for payment of liquidated damages but they and the events producing them shall not be grounds for claim by the Contractor of damages or for additional costs, expenses, overhead or profit or other compensation. Except for delays caused by the acts or omissions of the District or persons acting for it, extensions of time granted by the Engineer to the Contractor shall be the Contractor's sole and exclusive remedy for any delays due to causes beyond the control of the Contractor.

All claims for extension of time shall be made in writing to the District no more than 3 days after the Contractor knows or by reasonable diligence should know of the event causing or likely to cause the delay; otherwise, they shall be waived. In the case of a continuing cause of delay only one claim is necessary. Contractor's failure to give such notice promptly and within such time limit shall be deemed sufficient reason by the Engineer for denial of any time extension request.

Avoidable delays in the prosecution or completion of the construction, for which no time extension shall be granted, shall include all delays which in the opinion of the Engineer could have been avoided by the exercise of care, prudence, foresight and diligence on the part of the Contractor or his Subcontractors. Additionally, delays in the prosecution of parts of the construction which may in themselves be unavoidable but do not necessarily prevent or delay the prosecution of other parts of the construction nor the completion of the whole construction within the time herein specified shall constitute avoidable delays for which no time extension shall be granted.

All changes of the construction time or changes of the construction schedule shall be made by Change Orders to the Contract pursuant to Section GC-14.

G-16 ROCK EXCAVATION

No additional payment shall be made to Contractor for excavation of rock or because of subsurface conditions encountered in the performance of the work. Contractor's bid price shall include all such work.

G-17 NONCOMPLIANCE

The Contractor shall, upon receipt of written notice of noncompliance with any provision of this Contract and the action to be taken, immediately correct the conditions to which attention has been directed. Such notice, when served on the Contractor or his representative at the site of the work, shall be deemed sufficient. If the Contractor fails or refuses to comply promptly, the Engineer may issue an order to suspend all or any part of the work. When satisfactory corrective action is taken, an order to resume work will be issued. No part of the time lost due to any such suspension order shall entitle the Contractor to any extension of time for the performance of the Contract or to reimbursement for excess costs or damages.

Contractor. In the event of damages to person or property caused by or resulting from the concurrent negligence of District or its agents or employees and the Contractor or its agents or employees, the Contractor's indemnity obligation shall apply only to the extent of the Contractor's (including that of its agents and employees) negligence.

- F. Contractor acknowledges that by entering into a contract with the District, he has mutually negotiated the above indemnity provisions with the District. Contractor's indemnity and defense obligations shall survive the termination or completion of the Contract and remain in full force and effect until satisfied in full.

GC-9 LAWS, REGULATIONS, PERMITS

The Contractor represents that he has familiarized himself with, and will be governed by, all Federal, State and local statutes, laws, ordinances, and regulations.

Unless the Contract Documents provide otherwise, all permits and licenses necessary to the prosecution of the work shall be secured by the Contractor at his own expense, and he shall give all notices necessary and incident to the due and lawful prosecution of the work.

GC-10 DAMAGES

Any claims arising under the Contract by the Contractor shall be made in writing to the Engineer no later than ten calendar days after the beginning of the event or occurrence giving rise to the claim. Failure to make written claim prior to the time specified in the Contract Documents shall constitute waiver of any such claim.

GC-11 AUTHORITY OF ASSISTANTS AND INSPECTORS

The Engineer may appoint assistants and inspectors to assist him in determining that the work performed and materials furnished comply with contract requirements. Such assistants and inspectors shall have authority to reject defective material and suspend any work that is being done improperly, subject to the final decisions of the Engineer, or to exercise such additional authority as may be delegated to them by the Engineer. All work done and all materials furnished shall be subject to inspections by the Engineer or his inspectors at all times during construction and manufacturing.

GC-12 INDEPENDENT CONTRACTOR, SUPERINTENDENT, AND EMPLOYEES

It is understood and agreed that in all work covered by the Contract, the Contractor shall act as an independent contractor, maintaining complete control over his employees and all of his Subcontractors. The Contractor shall perform the work in accordance with his own methods, subject to compliance with the Contract. The Contractor shall perform the work in an orderly and workmanlike manner, enforce strict discipline and order among his employees and assure strict discipline and order by his Subcontractors, and shall not employ or permit to be employed on the work any unfit person or anyone unskilled in the work assigned to him.

The Contractor shall designate in writing before starting work a competent, authorized site representative who shall be authorized to represent and act for the Contractor in all matters relating to the Contract. The Contractor's letter designating this representative shall clearly define the scope of his authority to act for the Contractor and define any limitations of this authority. Said authorized representative shall be present at the site of the work at all times when work is in

reasonable time, take action on the Contractor's final request for payment, and on acceptance of construction. Such action shall be subject to the condition of the Performance Bond, legal rights of the District, required warranties, and correction of faulty construction discovered after final payment. The District shall have the right to retain from any payment then due the Contractor, so long as any bills or claims remain unsettled and outstanding, a sum sufficient, in the opinion of the District, to provide for the payment of the same. It is also understood and agreed that, in the case of any breach by the Contractor of the provisions hereof, the District may retain from any payment or payments which may become due hereunder, a sum sufficient, in the opinion of the District, to compensate for all damages occasioned by such breach including any such damages arising out of any delay on the part of the Contractor.

Sixty (60) days after completion of all Contract work, including Contractor's delivery of a properly completed Certificate of Completion and Release to the Engineer, retainage may be claimed by the Contractor; provided, however, that there are no claims filed of materialmen or laborers and that the District has received the certificate of the Washington State Department of Revenue of payment in full of all taxes and affidavit showing payment of prevailing wages. If any liens remain unsatisfied after final payment is made, the Contractor shall refund to the District such amounts as the District may have been compelled to pay in discharging such liens including all costs and reasonable attorney's fees.

GC-18 ENGINEER'S STATUS, AUTHORITY AND PROTEST PROCEDURE:

The Engineer shall represent the District. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the Contract. He shall also have authority to reject all work, equipment, and materials which do not conform to the Contract and to decide questions which arise in the execution of his work.

Approval by the Engineer signifies favorable opinion and qualified consent. It does not carry with it certification, assurance of completeness, assurance of quality, nor assurance of accuracy concerning details, dimensions, and quantities. Such approval will not relieve the Contractor from responsibility for errors or for deficiencies within his control.

All claims of the Contractor and all questions relating to the interpretation of the Contract, including all questions as to the acceptable fulfillment of the Contract on the part of the Contractor and all questions as to compensation, shall be submitted in writing to the Engineer for determination within the applicable time period specified in the Contract Documents.

All such determination and other instructions of the Engineer will be final unless the Contractor shall file with the Engineer a written protest, stating clearly and in detail the basis thereof, within ten (10) calendar days after the Engineer notifies the Contractor of such determination or instruction. The protest will be forwarded by the Engineer to the District, which will issue a decision upon each such protest within a reasonable period of time. The District's decision will be final. Pending such decision, the Contractor, if required by the Engineer, shall proceed with the work in accordance with the determination or instructions of the Engineer.

APPENDIX B

- (1) Jacobs Engineering, Inc. ("Jacobs") served as the design engineer for the Wanapum Fish Bypass Project with Reece Voskuilen, P.E., as Jacobs' project manager and lead design engineer. CP 15210.
- (2) Jacobs prepared a 2/18/05 "Future Unit Fish Bypass Stability Analysis" ("Stability Analysis Report") for the Project. CP 15211. The Stability Analysis Report contained a comprehensive, detailed analysis of the stability of Future Unit 11 at Wanapum Dam. CP 15211.

Excerpts from the Stability Analysis Report follow:

1.1 INTRODUCTION

...These modifications are to be constructed in stages, thus requiring multiple stability analyses to establish that the modified Future Unit is stable when complete and during all intermediate construction stages.

...

Additional analyses will be required when the contractor develops a detailed construction sequence. ...

1.2 FUTURE UNIT INTAKE

... There are thirteen post-tensioned anchors per monolith installed near the upstream face of the Future Unit Intake structure to maintain stability. ...

1.8 REFERENCES

"Stability Analysis of the Wanapum Development Concrete Structures, FERC Part 12 Inspection Report," MWH, December 2002.

- (3) Based on the Stability Analysis Report, the specifications for the Project delineated the sequence of Slot A, B, and C construction:

2. SOME PORTIONS OF THE WORK ON AND WITHIN EXISTING FUTURE UNIT 11 MUST BE PERFORMED IN A SPECIFIC SEQUENCE AS GENERALLY DESCRIBED IN THE FOLLOWING NOTES.

...

7. PHASES 2A AND 2B MAY NOT OCCUR CONCURRENTLY, BUT MUST BE DONE SEQUENTIALLY.

8. BOTH PHASES 2A AND 2B MUST BE COMPLETED BEFORE PHASE 4 MAY BEGIN.

CP 15211.

- (4) SR-15 of the GCC-PUD bid specification notified bidders that a copy of the Quality Control Inspection Program (QCIP) was available by written request:

The work conducted under this Contract is subject to inspection ... according to the provisions of the **Quality Control Inspection Program (QCIP)** document. **This document, a copy of which is available from the District Engineer by written request,** was developed in compliance with the Federal Energy Regulatory Commission's "Engineering Guidelines for the Evaluation of Hydro Power Projects," Chapter VII. The Contractor shall be aware of the QCIP's inspection requirements, particularly the portions about stopping work. CP 19595 (emphasis added).

Appendix G of the QCIP was the FERC Stability Report on which the project design was based. CP 15486; CP 15489; CP 15491-15492.

- (5) GeoEngineers, Inc., Jacob's geotechnical consultant, prepared a 4/4/05 "Geotechnical Constructability Consultation Services" ("Geotech Report") for the Project. The Geotech Report stated:

A system of post-tensioned tiedown anchors was installed in the six future units to prevent overturning of these units by the horizontal thrust of the impounded water behind the dam. ...

There are 13 anchors in each of the six future units. ...

CP 15234-15235.

- (6) On 4/13/05, a pre-bid meeting took place. CP 137, 168-170. This meeting was mandatory for all who planned to bid on the Project. CP 19559. Four GCC representatives attended. CP 137, 168-170. At that meeting, Reece Voskuilen informed all present that the Stability Analysis Report and the Geotech Report were both available for review. CP 15212.
- (7) On 4/15/05, GCC's representative, Ben Hugel, came to Jacobs' office where Reece Voskuilen, Jacobs' project manager and lead design engineer, made both the Stability Analysis Report and the Geotech Report available for Mr. Hugel's review. CP 15212-15213.
- (8) On 5/5/05, bidders submitted bids on the Project. CP 5866.
- (9) David Bishop, a GCC engineer, participated in the preparation of GCC's bid and acted as GCC's first onsite project manager (project inception through 11/27/05). CP 15206-15207.

- (10) Mr. Bishop documented in his 5/11/05 job diary entry the stability analysis (“Wanapum Intake Tipping Analysis”) that he performed for GCC for the revised sequence that GCC was proposing:

WANAPUM
INTAKE TIPPING ANALYSIS

Slot	Slot	Slot
C	B	A

Design permits only one slot to be bulkheaded & dewatered at a time.

∴ design allows for net **tipping moment** of

$$(7550K)(36.67 \text{ FT}) = \rightarrow - 276,858$$

∴ Begin Slot B

Pour conc. Slot B – added weight replaces water & counters **overturning moment** caused by water on the bulkhead.

CP 142 (emphasis added).

- (11) Mr. Bishop outlined in his 5/18/05 job diary his conversation with Jacobs’ lead design engineer, Reece Voskuilen:

Jacobs - 425-452-8000
- Reece Voskuilen

- **future unit stay in place due to anchors @ u/s face**
- **FERC concerned about stability**
- **anchors placed during construction in 1960’s**
- **a large portion of stability is generated by anchors**

CP 147.

- (12) For GCC, Mr. Bishop prepared a 5/18/05 letter that stated:

Contained within our bid, submitted on May 5, was a narrative report detailing our bid schedule. **General Construction Co. is proposing a revised sequence of work** that places approximately 2,080CY of concrete in Slot “B” prior to dewatering Slot “C.”

...

Please advise **whether the new sequence will maintain a sufficient factor of safety against tipping.**

CP 149 (emphasis added).

- (13) On 5/19/05, Mr. Bishop forwarded GCC's "Facsimile Transmittal" to Jacobs' lead design engineer, Reece Voskuilen, that stated:

Reece:

Attached find a schedule **that we are considering**. Does this sequence meet your **requirements to guard against tipping?**

CP 15256 (emphasis added).

- (14) On 5/23/05, the PUD mailed to GCC a letter notifying GCC "that your bid has been accepted ... in accordance with the referenced Contract Documents." CP 274. GC-26 set the order of precedence for the components of the Contract Documents. GCC's Bid Proposal ranked last in that order of precedence. CP 19578-19579.

- (15) On 5/26/05, GCC received Jacobs' 5/25/05 "Review of General Construction's Preliminary Construction Sequence laid out in the General Construction Fax of 5/19/05." That review stated:

The stability analysis prepared for FERC as part of project planning limited the foundation crack length to 8.64 feet. **As can be seen this value was exceeded** for steps 4, 7, and 8; with step 7 exceeding this value by over 40 percent. **This excess is judged to be unacceptable.** (emphasis added.)

CP 153.

- (16) On 5/31/05, GCC signed the GCC-PUD contract to construct the fish bypass through future unit 11 on Wanapum Dam and mailed it to the PUD. CP 219, 13592-13593.

APPENDIX C

06/08/05 PRECONSTRUCTION CONFERENCE MEETING MINUTES

(Six GCC attendees include GCC's first onsite project manager, David Bishop (project inception till 11/27/05); GCC's home office, Poulsbo, WA, based project sponsor, Scott Hanson; GCC's onsite project engineer, Jim Durnford; and three others.) CP 14626.

3. CONTRACT ADMINISTRATION

...

F. Change Orders: Addition and/or deduction of the work is permitted provided an executed change order is properly authorized. Refer to Article GC-14 titled Changes in Work, of the Contract for details regarding change orders. CP 14620.

06/13/05 Entry in Job Diary of GCC's first onsite project manager (D. Bishop)

Dana [Jeske] ...

- No work without signed change order
- Board approval

CP 14630.

07/05 GCC Wanapum Future Unit Fish Bypass Contract Administration Plan (internal GCC document prepared by GCC onsite project engineer and CR 30(b)(6) designee, J. Durnford)

4.4.1 Specification GC-14 gives the District's Manager and Division Directors authority to approve change orders up to \$10,000. Only the District's Board of Commissioners can approve change orders over \$10,000.

...

4.4.3 GC-14 requires ... signed change order before change work is performed.

4.4.4 GC-14 allows the Engineer to make minor changes to the work via a written District Instruction. No additional cost or time is allowed for District Instruction. The Contractor may not proceed with work under District Instruction if the Contractor believes the District Instruction will result in additional cost or time.

CP 2634.

7/12/05-7/13/05 GCC's onsite project engineer, J. Durnford, who prepared GCC's Wanapum Future Unit Fish Bypass Contract Administration Plan, identified at his deposition the instruction that Kiewit's representative gave to him and those GCC employees involved in the Wanapum Fish Bypass Project.

Q: Now, my question is, when you said that you were discussing during the July 12, July 13 contract administration training with Mr. Fourier the changes provisions of the contract, tell me what it was that you

were discussing.

...

Q: Do you recall that you were instructed that you needed to comply with the provisions of the contract related to changes GC-14?

A: In that meeting we were.

...

Q: But at any rate, you do recall that you were told that it was a necessity of complying with GC-14 at that meeting.

A: Yes.

CP 2628-2629.

07/29/05 GCC Serial Letter 0013 from GCC's first onsite manager (D. Bishop) to PUD engineer (D. Jeske)

To facilitate a safe transport of craft workers to their work areas, General Construction will need to provide a small crew bus and consequently incur additional costs. ...

This letter will serve as notification of a condition that requires a change order to be issued. We request a change order be issued to cover these additional costs.

CP 14024.

11/16/05 Change Order No. 1. (GCC President, R. Morford, signs Change Order No. 1)

The following changes are hereby incorporated into this Contract:

- A. Description of Change: ... The following provisions shall apply for the remainder of the Contract ...
- B. Time of Completion: The required completion date (1/15/07) remains the same.
- C. Except as specifically provided herein, all other Contract terms and conditions shall remain unchanged.

11/16/05

CONTRACTOR (General Construction Co.)

s/ Ronald H. Morford, President

PUBLIC UTILITY DISTRICT NO.2 OF GRANT COUNTY

s/Leon Hoepner, Hydro Director

CP 14551.

- 12/08/05 GCC Proposed Change Order:
 “To: Grant County PUD
 Subject: Proposal – Expansion Joint between Unit 10 and 11 Change Order
 Date: 12/08/05
 Proposal Includes:
 • Scope of work
 • Proposed Material
 • Proposed Methods
 ...
 (signed) Ben Hugel – Project Manager” (11/28/05-7/17/06)
CP 14096-14097.
- 04/24/06 District Instruction (DI) No. 1.
 “INSTRUCTIONS:
 REMOVE REMAINDER OF GALLERY (AFP) PIPE
 ...
 OMIT FISH TUNNEL WITH END CLOSURES”
 (signed) B. Hugel – Project Manager (11/28/05-7/17/06)
CP 14679.
- 08/28/06 GCC’s Wanapum Future Unit Fish Bypass Contract Administration Plan - Update (prepared by GCC onsite project engineer and CR 30(b)(6) designee, J. Durnford)
 4.4.1 Specification GC-14 gives the District’s Manager and Division Directors authority to approve change orders up to \$10,000. Only the District’s Board of Commissioners can approve change orders over \$10,000.
 ...
 4.4.3 GC-14 requires ... signed change order before change work is performed.
 4.4.4 GC-14 allows the Engineer to make minor changes to the work via a written District Instruction. No additional cost or time is allowed for District Instruction. The Contractor may not proceed with work under District Instruction if the Contractor believes the District Instruction will result in additional cost or time.
CP 2634.
- 09/05/06 PUD Board of Commissioners approves Change Order No. 2. CP 14569.

11/30/06 GCC 11/06 “Confidential” Monthly Project Narrative Report (internal GCC report from GCC’s Project Manager onsite [10/31/06-9/24/07] to GCC home office in Poulsbo):

CHANGE ORDER STATUS:

Two change orders have been issued to date...

Change Order 3 is currently being negotiated

Project Specifications limit the ability of Grant County’s employees to order or recognize changes. Change orders must be approved by the County Board of Commissioners.

CP 14116.

03/08/07 GCC Letter from GCC’s fourth onsite Project Manager (10/31/06-9/24/07) to PUD engineer:

In accordance with Specification, Section GC-14, Changes In Work, GCC is notifying you of this change and will be tracking the associated costs and schedule impacts. These costs and the overall schedule impacts will be submitted to your office when they can fully be determined. CP 14028.

04/10/07 GCC Email from GCC’s president, R. Morford, to GCC’s fourth onsite project manager, J. Stubbs, (10/31/06-9/24/07) and GCC’s Poulsbo, WA, based project sponsor, Scott Hanson:

I told Joe [Joe Lukas, PUD Assistant Manager] that General considered the installation of “shrink wrap” to be a change to our contract and that we would not be able to proceed with the changed work without an executed change order approved by the PUD Commission, in accordance with their contract.” CP 6389.

04/24/07 GCC Letter from GCC’s fourth onsite Project Manager (10/31/06-9/24/07) to PUD engineer:

GC-14 Changes in Work requires that the contractor is to satisfy itself that the execution of a written change order has been properly authorized on behalf of the District before proceeding with any Change Order work.

CP 14039.

06/26/07 GCC 6/07 “Monthly Project Narrative Report. (Internal report from GCC’s onsite project manager (10/31/06-9/29/07) to GCC’s home office):

Specifications limit the ability of Grant County’s employees to order or recognize changes. Change orders must be approved by the County’s Board of Commissioners.

CP 13895.

CERTIFICATE OF SERVICE

I, Jeannette O'Donnell, hereby certify that

1. On September 14, 2015, on behalf of Appellant Public

Utility District No. 2 of Grant County, I electronically filed the :

**APPELLANT/CROSS-RESPONDENT'S RESPONSE AND
REPLY TO SECOND AMENDED BRIEF OF RESPONDENT/
CROSS-APPELLANT (with Appendices A-C)**

with the Court of Appeals Division III Clerk through the court's electronic filing system.

2. I sent a copy of this document via United States Postal

Service, postage prepaid, to Plaintiff's counsel addressed as follows:

Mr. John S. Stewart
Stewart Sokol & Larkin LLC
2300 SW First Avenue, Suite 200
Portland, OR 97201-5047

3. In addition, I emailed a copy of this document to GCC

counsel at:

Jstewart@lawssl.com;
TLarkin@lawssl.com;
TStorti@lawssl.com

DATED at Wenatchee, Washington this 14th day of September, 2015.



JEANNETTE O'DONNELL
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