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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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CERNTY

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

79001-9

No. 33446-1

AMERICAN SAFETY CASUALTY INSURANCE COMPANY,

Appellant,

v.

CITY OF OLYMPIA

Respondent.

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

A. Appellant American Safety Casualty Insurance Company assigns error to the trial court's entry of the Order Granting Defendant's Motion for Summary Judgment, dismissing Appellant's claims. (CP 421-23)

B. American Safety also assigns error to the trial court's entry of the Order Granting Defendant's Motion for an Award of Attorneys' Fees. (CP 478-79)

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

American Safety (as assignor) continued negotiations with the City of Olympia to recover amounts owed under a public works contract ("Contract"). Despite their continuing negotiations, the City asserted it owed American Safety nothing because American Safety and its assignor failed to follow the Contract's protest and claim provisions. Did the trial court err in dismissing American Safety's contract claims against the City? Specifically:

1. Did American Safety present evidence establishing a material issue of fact as to whether the City waived the Contract's 180-day suit limitation period?

2. Did American Safety present evidence establishing a material issue of fact as to whether the City waived the Contract's time requirements for submitting a protest?

3. Did American Safety present evidence establishing a material issue of fact as to whether the City's own behavior prevented American Safety from complying with the Contract's claim information requirements?

III. STATEMENT OF THE CASE

A. Facts Relating to American Safety's Claim for Equitable Adjustment

This matter arises from a contract ("the Contract") between Katspan and the City of Olympia. (CP 70-71¹) The

¹ This two-page "Agreement" sets out the general agreement of the parties and lists the various documents that make up the entire contract. The relevant portions of the contract documents appear in various places throughout the Clerk's Papers.

Contract was for the construction of the Downtown Olympia Segment of the LOTT² Southern Connection Pipeline project.

(CP 61) The project is a system of major sewer pipelines that re-route Tumwater wastewater outflows to the LOTT Wastewater Treatment Plant in downtown Olympia. (*Id.*) LOTT managed Katspan's performance under the Contract.³ (*Id.*)

During the course of construction, Katspan began experiencing financial difficulties. Eventually, American Safety, Katspan's surety, investigated and paid numerous claims by Katspan's subcontractors and suppliers with regard to the Contract. (CP 7) Katspan assigned to American Safety all rights to receive payment from the City for the LOTT project. (*Id.*)

² LOTT stands for the Lacey, Olympia, Tumwater, and Thurston County Wastewater Management Partnership.

³ Some of the relevant acts in this matter were performed by LOTT and/or its attorneys and some of the relevant acts were performed by the City and/or its attorneys. It is undisputed that any actions taken by LOTT and/or its attorneys are binding on the City. For simplicity, American Safety will, therefore, refer to all acts as having been performed by or on behalf of the City.

This case is being pursued by American Safety under that assignment. (CP 6)

Because of the difficulties Katspan was experiencing completing its work under the Contract, the City unilaterally declared the closing date of the Contract to be September 10, 2001. (CP 106-107) On November 15, 2001, American Safety submitted its Request for Equitable Adjustment, seeking an additional \$767,995.02. (CP 116-321) American Safety divided the claim into four categories: (1) Relief of Assessed Liquidated Damages, (2) Compensation for Delays Caused by the LOTT Project Administrators, (3) Individual Force Account Costs Directed by the LOTT Administrators, and (4) Existing Contract Balance. (CP 117-18) With its Request for Equitable Adjustment, American Safety submitted documentation relating to each category. (CP 123-321)

The City did not respond to the claim until American Safety's attorney called the City's attorney on March 14, 2002.

(CP 323, 329) In response to that call, the City's attorney sent American Safety's counsel⁴ a list of questions and a request for additional documentation. (CP 345-47) Thereafter, the City's attorneys sent several letters to American Safety's counsel regarding the need for additional information. (CP 349-50, 331, 354-55) On January 22, 2003, American Safety's counsel notified the City's counsel that American Safety had received four or five bankers boxes of documents from Katspan. (CP 334) The City reviewed the additional documents but was still not satisfied and continued to request additional documentation. On April 23, 2003, the City's counsel wrote to American Safety's attorney, stating that, if the additional documentation was not received by May 16, 2003, the City would deny the claim. (CP 357-59) American Safety was still awaiting additional information from Katspan and was unable to meet the City's May 16, 2003,

⁴ American Safety's present counsel on appeal did not previously represent American Safety in this matter.

deadline. On July 31, 2003, the consultant who had been assisting American Safety with its claim contacted the City's consultant regarding the additional information the City required. (CP 412) The consultants exchanged emails on August 4 and 8, 2003, regarding the additional information needed to assess the claim. (CP 414, 416, 418-19) On May 21, 2004, American Safety's counsel notified the City's counsel that the additional information was ready for review. (CP 335) The City's attorney responded by stating that the claim had been denied and any lawsuit would be untimely under the terms of the Contract. (CP 370)

B. Procedural History

American Safety filed suit on August 17, 2004. (CP 6-9) The City filed a Motion for Summary Judgment on April 5, 2005. (CP 19-44) The trial granted the motion on April 29, 2005. (CP 421-23) The City filed a Motion for Award of Attorney's Fees on May 13, 2005. (CP 431-52) The court granted that motion on

May 27, 2005. (CP 478-79) American Safety then timely filed this appeal of both orders. (CP 484-90)

IV. SUMMARY OF ARGUMENT

American Safety presented evidence establishing materials issues of fact with regard to all arguments raised in the City's summary judgment motion. The City argued the suit was time-barred by the Contract's 180-day suit limitation period. The record contains ample evidence showing the City intended to waive that requirement. Not only did the City fail to mention the suit limitation provision any time during the parties' continuing discussions regarding the claim, on at least two occasions, the City referred to the fact that American Safety would have to prove its claim if there was a lawsuit. Had the City not intended to waive the suit limitation period, a lawsuit would have been time-barred and American Safety would not have had the opportunity to prove its claim. Thus, the City's earlier statements directly contradicted its position on summary

judgment with regard to waiver of the suit limitation provision.

At the very least, the evidence creates a material issue of fact as to whether the suit limitation provision was waived.

Similarly, throughout the claim discussions, the City demonstrated an intent to waive the Contract's time requirements for submitting a protest. In fact, long after the Contract's deadline had expired, the City set a new deadline by which American Safety was to submit the claim information. When that deadline passed, the City continued to acknowledge that American Safety's claim would be considered. This evidence creates a material issue of fact as to whether the City waived the time requirements for submitting a claim under the Contract.

When American Safety had prepared the claim information, the City refused to consider it. Any failure of American Safety to satisfy the Contract's information requirements was, therefore, the direct result of the City's own

actions. This evidence creates a material issue of fact as to whether, by refusing to consider the information offered by American Safety, the City waived the Contract's information requirements.

V. ARGUMENT

A. Standard of Review

The standard of review for a summary judgment order is *de novo*.⁵

B. Material issues of fact preclude summary judgment on all arguments raised City's motion.

The City moved for summary judgment on three grounds: (1) that American Safety had not timely filed suit under the Contract's suit limitation provision, (2) that American Safety had waived its claim by failing to comply with the Contract's protest provisions, and (3) that American Safety had waived its claim by failing to comply with the Contract's claim provisions. (CP 34)

⁵ *Snohomish County Fire Dist. No. 1 v. Snohomish County*, 128 Wn. App. 418, 422, 115 P.3d 1057 (2005).

In response to the City's motion, American Safety presented evidence that, at the least, created issues of material fact with regard to the City's waiver of each of the subject contract provisions. Summary judgment was therefore not appropriate, and the trial court's decision should be reversed.

1. American Safety presented evidence showing the City waived the suit limitation period in the Contract.

American Safety presented sufficient evidence to create an issue of fact as to whether the City waived the suit limitation period in the Contract between Katspan and the City. The Contract provides that "any claims or causes of action which the Contractor has against the State of Washington⁶ arising out of the contract shall be brought within 180 calendar days from the date of final acceptance" of the contract. (CP 55) The City established the final closing date as September 10, 2001. (CP 106-

⁶ This dispute does not involve the state of Washington. The contract between Katspan and Olympia included the Standard Specifications form, which includes references to the state of Washington as a party instead of the City of Olympia.

7) The 180-day period, therefore, expired on March 9, 2002.

Despite that fact, as discussed in detail below, the City never raised the suit limitation period as a defense to Katspan's claim during the parties' discussions of the claim.

A statute of limitation is subject to waiver.⁷ Generally, Washington courts have afforded contractual limitation periods the same treatment as statutory limitation periods.⁸ A contractual suit limitation period is, therefore, also subject to waiver. Waiver of a contract provision need not be expressly declared by the waiving party; it may be implied from that party's conduct.⁹ Waiver is essentially a matter of intention.¹⁰

⁷ *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 810, 818 P.2d 1362 (1991); *State of Wash. v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671 (1997).

⁸ See *Wothers v. Farmers Ins. Co.*, 101 Wn. App. 75, 76, 5 P.3d 719 (2000).

⁹ *Reynolds Metals Co. v. Elec. Smith Constr. Co.*, 4 Wn. App. 695, 700, 483 P.2d 880 (1971).

¹⁰ *Id.*

Assessing a party's intention, based upon his actions, is a question for the finder of fact. As Division One has noted:

Commonly, [waiver] is sought to be proved by various species of proofs and evidence, by declarations, by acts and by non-feasance, permitting differing inferences and which do not directly, unmistakably or unequivocally establish it. Then it is for the jury to determine from the facts as proved or found by them whether or not the intention existed.¹¹

In response to the City's summary judgment motion, American Safety presented sufficient evidence to create an issue of fact as to whether the City intended to waive the contractual limitation period. That issue should be, therefore, resolved by a trier of fact.

After March 9, 2002, the City's attorneys sent several letters to Katspan and American Safety relating to the request for equitable adjustment. The City's counsel sent letters or emails on March 25, 2002 (CP 345-47), August 1, 2002 (CP 349-50),

¹¹ *Id.*, 4 Wn. App. at 700-01 (quoting *Alsens Am. Portland Cement Works v. Degnon Contracting Co.*, 118 N.E. 210 (N.Y. 1917)).

October 2, 2002 (CP 331), November 12, 2002 (CP 354-55), and April 23, 2003 (CP 357-59). Not one of those communications refers in any manner to the contractual limitation period for filing suit. Rather, these communications evidence the City's intent to consider the claim if the necessary information was provided. For example, in its March 25, 2002, letter, the City's attorney stated:

Pursuant to your telephone conversation with Tom Wolfendale, attached is a primary set of questions and document requests regarding the claim that LOTT received from PCA Consulting Group for Katspan, Inc.'s work on the Southern Connection Project. Please provide us with responses to the questions and requests as soon as possible. Once we receive these responses, LOTT and its consultant can better analyze your client's claim and determine whether a quick resolution of the claim was practicable.

(CP 345) This letter does not mention the contractual limitation period, nor does it evidence any intent the City may have had to rely on the contractual limitation period. Rather, the letter shows the City intended to consider the claim if information was

provided and also, therefore, supports the claim that the City intended to waive the suit limitation period.

In subsequent communications with American Safety, the City remained silent regarding the contractual limitation period. For example, in a letter to American Safety's attorney dated August 2, 2002, the City's attorney confirmed the City had reviewed the documents provided by American Safety and requested additional documents "in order to complete" the City's review of the claim. (CP 349) The letter makes no mention of the contractual limitation period having expired.

The City's October 2, 2002, email provides further support for the conclusion that the City intended to waive the suit limitation provision. (CP 331) In that email, the City stated, "Obviously if negotiations fail, then Katspan will be required to produce all documentation, in whatever form, to substantiate any court claim." (*Id.*)

Similarly, in an April 23, 2003, letter the City set forth the information it still needed to assess the claim and stated, "There is no reason for Katspan to continue to withhold information that allegedly supports its claim, especially because this information will be available to LOTT if the matter is litigated." (CP 358) Thus, the City clearly anticipated a potential court claim, but did not anticipate asserting the suit limitation period as a defense to that claim.

This conclusion finds further support in an October 22, 2002, letter from the City's attorney to the Washington State Auditor. (CP 408-10) The City was responding to an audit inquiry regarding the accounts of LOTT. (CP 408) That letter disclosed the law firm's representation of LOTT with regard to Katspan's claim for equitable adjustment, stating LOTT "would defend any legal action vigorously if Katspan or its surety files a lawsuit." (*Id.*) However, the law firm was "unable to evaluate the likelihood of an unfavorable outcome because the [sic]

Katspan has not responded to our requests for copies of records necessary to substantiate its claims.” (CP 409) Had the City intended to rely on the contractual limitation period, evaluating the likelihood of success would not have depended upon whether Katspan had provided the necessary information. This letter is, therefore, additional information a trier of fact should be allowed to consider in determining whether the City intended to waive the suit limitation provision.

In its November 12, 2002, letter to American Safety, the City’s attorney made the generic statement that it was willing to negotiate the claim “without waiving any of its defenses,” but, once again, there was no specific mention of the contractual limitation period having expired. (CP 354)

On May 21, 2004, American Safety’s attorney notified the City’s attorney that American Safety had finally received additional information it had long been trying to obtain from Katspan. (CP 335) In response, the City’s counsel mentioned the

suit limitation period for the first time, stating that the claim had been denied and any lawsuit would be untimely. (CP 370)

This evidence establishes a material issue of fact as to whether the City intended to waive the suit limitation period. That is an issue to be resolved by the trier of fact. Summary judgment was therefore inappropriate, and the trial court's decision should be reversed.

2. **American Safety submitted evidence creating a material issue of fact as to whether the City waived the Contract's protest and claim requirements.**

Section 1-04.5 of the Contract sets forth the procedure for protesting "a change order, another written order, or an oral order from the Engineer, including any direction, instruction, interpretation, or determination by the Engineer." (CP 46) This provision required Katspan to give written protest to the Project Engineer and to supplement the protest within 15 days with a written statement providing certain information. (*Id.*) If a protest under section 1-04.5 was unsuccessful, the more

formalized claim procedures of section 1-09.11(2) would apply.

(CP 53-54)

Section 1-09.11(2) sets forth additional information Katspan would have to submit regarding a claim. (*Id.*) Section 1-04.5 states that failure to comply with the requirements of sections 1-04.5 and 1-09.11 results in a waiver of the claim. (CP 47)

Section 1-09.11(2) does not include a time requirement for compliance with its terms. The only time requirement in section 1-09.11, other than the deadlines regarding when the City must respond to a claim, is the suit limitation provision addressed in the preceding section. Thus, the only time requirements in the policy regarding a claim, other than the period for filing suit, are those set forth in section 1-04.5.

The Contract's requirements regarding a claim may, therefore, be placed into two categories: (1) the time requirements for providing the information set forth in section 1-

04.5 and (2) the informational requirements of both 1-04.5 and 1-09.11(2). American Safety presented evidence creating issues of material fact as to whether the City had waived the Contract requirements with regard to both categories.

a. American Safety presented evidence showing the City waived the Contract's time requirements for a protest and claim.

On summary judgment, the City argued that, because Katspan did not satisfy the time requirements of section 1-04.5, its claim was waived. However, American Safety presented sufficient evidence to create an issue of fact as to whether those requirements were waived.

Under Washington law, contractual claim requirements may be waived.¹² As with the statute of limitations, waiver of

¹² *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 388, 78 P.3d 161 (2003); *Weber Constr., Inc. v. County of Spokane*, 124 Wn. App. 29, 32, 98 P.3d 60 (2004); *Absher Constr. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 142, 890 P.2d 1071 (1995).

the contractual claim requirements may be by conduct.¹³ Here, the record shows the City waived the time requirements of section 1-04.5. In a letter dated April 23, 2003, the City's attorney acknowledged the information received from American Safety to date and then set a deadline of May 16, 2003, for receiving the remaining information. (CP 357-59) Setting this new deadline for providing the required information is evidence of the City's intent to waive the original time requirements of section 1-04.5.

When American Safety was unable to meet the new deadline, the City again waived the time requirement by its conduct. On July 31, 2003, Thomas Presnell, American Safety's consultant, sent an email to the City's consultant, Paul Pederson, confirming that they had spoken earlier that day about Presnell's request to sit down and talk about "exactly what [Pederson] will need to complete [his] audit." (CP 412). Pederson responded on

¹³ *Absher*, 77 Wn. App. at 143 (citing *Birkeland v. Corbett*, 51 Wn.2d 554, 565, 320 P.2d 635 (1958)).

August 4, 2003, stating he had "been given the green light to discuss the LOTT matter" with Presnell. (CP 414) On August 8, 2003, Presnell sent a list of all the files he had received from Katspan and stated he believed had sufficient information to prepare the job cost for the City's cost analysis. (CP 416) Presnell then conducted the necessary work to prepare the job cost for the City. (CP 402-03) Neither the City nor its consultant told Presnell or American Safety that this work would be useless. Rather, by their conduct, the City and its consultant led American Safety to believe any time requirements in the Contract had been waived. When American Safety's attorney called the City's attorney on May 27, 2004, to let him know the information was ready, he was told, for the first time, that the claim was time-barred. (CP 335, 370)

By presenting this evidence in response to the City's summary judgment motion, American Safety established material issues of fact regarding whether the City waived the

time requirements of section 1-04.05. American Safety is entitled to have that issue decided by a finder of fact and the summary judgment should, therefore, be reversed.

- b. *The City's actions prevented American Safety from complying with the Contract's informational requirements.*

The other category of Contract claim requirements relates to the substantive information in support of the claim. Section 1-04.5 requires the following information:

- a. The date of the protested order;
- b. The nature and circumstances which caused the protest;
- c. The contract provisions that support the protest;
- d. The estimated dollar cost, if any, of the protested work and how that estimate was determined; and
- e. An analysis of the progress schedule showing the schedule change or disruption if the Contractor is asserting a schedule change or disruption.

(CP 46) The Contractor must also keep records of extra costs and time incurred and allow the Project Engineer to access those

records, as well as other records needed for evaluating the protest. (*Id.*) In addition, section 1-09.11(2) requires that 10 categories of information be provided. (CP 53-54) In its April 23, 2003, letter the City confirmed having received several documents from American Safety regarding the claim. (CP 357) However, the City still required additional information.

Specifically, the City requested the following:

- Detailed Job Cost Report or equivalent. Our review of the documentation provided to date indicates Katspan changed its job cost account codes at the end of 2000, so the report may be in two different formats and may cover two independent periods. Without detailed cost reports, we have no ability to compare the daily reports (i.e. time cards) to the cost records.
- Certified Payroll Records for the period prior to September 4, 2000 and for the period after January 6, 2001. We currently have no ability to verify the hours incurred and claimed for those periods in which certified payrolls were not provided.
- A listing of any and all payments made by American Safety on behalf of Katspan for the subject project.

(CP 358) As of April 23, 2003, this was the only information required by the Contract that American Safety had not yet provided. Moreover, Presnell's August 8, 2003, email to Pederson confirmed that he was working to put together a detailed job cost and that he had certified payroll records. Yet, when American Safety's attorney informed the City the information was ready for review, the City refused to consider it.

(CP 370) Thus, although American Safety has not yet complied with the all the informational requirements of the Contract, its failure to do so is a direct result of the City's refusal to consider the information it had compiled and offered to provide.

Because the City's conduct has prevented American Safety from complying with the Contract terms, this case fits squarely within the reasoning of *Weber Construction, Inc. v. County of Spokane*.¹⁴ In that case, the contractor submitted a protest to a change order. However, it was unable to provide a cost estimate

¹⁴ 124 Wn. App. 29.

because the County had failed to provide sufficient information to enable it to prepare the estimate. The contractor sued the County and the case proceeded to trial regarding the contractor's claim. At the conclusion of the contractor's case in chief, the trial court granted the County's motion for judgment as a matter of law under CR 50. In reversing that decision and remanding for a new trial, the court stated:

The County knew that Weber was required to provide a dollar cost estimate. It knew Weber was aware of this requirement and was attempting to meet it. Weber requested needed information in order to provide that estimate, but the County failed to give it to Weber. Weber offered substantial evidence that the county, by its conduct, waived strict compliance with the contract terms.¹⁵

Similarly, American Safety has presented sufficient evidence to create a material issue of fact as to whether its failure to comply with the Contract's informational requirements was a direct result of the City's own conduct. American Safety had the remaining information ready for the City's review, but the City

¹⁵ *Id.* at 35.

refused to accept it. That refusal should not now be a basis for supporting a claim that American Safety failed to provide the information. The summary judgment should, therefore, be reversed.

- c. **Mike M. Johnson, Inc. v. Spokane County**
does not preclude a finding of waiver in this matter.

Despite Respondent's anticipated argument to the contrary, *Mike M. Johnson, Inc. v. Spokane County*¹⁶ does not preclude a finding of waiver in this matter. In that case Mike M. Johnson, Inc., ("MMJ") entered a contract with Spokane County for two sewer projects. The county entered a change order with regard to one project. While carrying out the work under that change order, MMJ encountered buried telephone lines and work came to a halt while the county and the telephone company worked out the utility conflict.

¹⁶ *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 78 P.3d 161 (2003).

MMJ did not use the contract's mandatory notice, protest, and formal claim procedures regarding the additional costs and delays caused by the change order. Rather, MMJ wrote a letter to the county addressing seven concerns, only one of which was that particular change order.¹⁷ In response to MMJ's letter, the county specifically pointed out the claim requirements in the contract. MMJ wrote another letter regarding several issues on the project, including the change order. In response, the county stated that, to the extent MMJ considered the letter a formal notification of a claim, it was rejected because it did not satisfy the contract's claim requirements.¹⁸ Once again, MMJ responded by a letter that simply stated "we expect to be compensated for all costs and time associated with maintaining this road while waiting for others to complete their work."¹⁹ Thereafter, the

¹⁷ *Id.*, 150 Wn.2d at 380.

¹⁸ *Id.* at 381-82.

¹⁹ *Id.* at 382.

parties' attorneys exchanged letters regarding outstanding issues under the contract, but MMJ never submitted a formal claim. The county and its attorney stated in almost every letter to MMJ and its counsel that it did not intend to waive any claim or defense.

MMJ ultimately filed suit against the county for additional compensation in connection with the change order and also asserted claims for unpaid contract balances on both projects. The trial court dismissed the claim for additional compensation, holding that actual notice of a claim was insufficient to satisfy the contract's protest and claim procedures and that settlement negotiations did not amount to a waiver of the contract protest and claim requirements.²⁰ The Court of Appeals reversed the summary judgment and the Supreme Court reinstated it.

In holding there could be no waiver under the facts of that case, the Supreme Court noted that the county "repeatedly

²⁰ *Id.* at 385.

asserted" it was not waiving the contract provisions.²¹ In addition, the Court noted that the county had specifically notified MMJ of the need to follow claim provisions in the contract.²² Moreover, continued negotiations of the claim were insufficient to create a waiver because those negotiations related several issues, not just the change order.²³ Under those facts, there were no material issues of fact regarding waiver.²⁴

The present case differs significantly from *Mike M. Johnson*. First, the parties were not discussing multiple issues. Rather, their continued discussions related only to the claim for equitable adjustment. In addition, the City sent many communications to Katspan and American Safety and their attorneys that made no reference to the Contract's claim requirements. For example, letters sent on May 10, 2001 (CP 89),

²¹ *Id.* at 392.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

May 25, 2001 (CP 93), June 18, 2001 (CP 97), March 25, 2002 (CP 345), August 1, 2002 (CP 349-50), October 2, 2002 (CP 331), November 12, 2002 (CP 354-55), April 23, 2003 (CP 357-59), all relate to Katspan's claim for additional compensation and not one of those letters refers to the contract claim requirements. Rather, in all the letters, the City indicated a willingness to consider the claim without any reference to the Contract's requirements. Under these facts, there is at least a material issue of fact as to whether the City waived the Contract's requirements. The summary judgment should, therefore, be reversed.

C. The Order Granting Defendant's Motion for Award of Attorney's fees should be vacated.

The court awarded the City its attorney fees under RCW 39.04.240. That section makes the provisions of RCW 4.84.250 through 4.84.280 applicable to an action arising out of a public works contract. RCW 4.84.250 allows a reasonable attorney fee to the prevailing party. When the summary judgment order was

entered, the City became the prevailing party and the court granted its request for attorney fees. (CP 435, CP 479) However, when the summary judgment order is reversed, the City will no longer have prevailed and the attorney fee award should be vacated.²⁵

VI. CONCLUSION

For the reasons set forth above, American Safety respectfully requests that the trial court's decision granting summary judgment in favor of the City of Olympia be REVERSED and that the order awarding the City its attorney fees be VACATED.

²⁵ See *Indus. Coatings, Co. v. Fid. and Deposit Co. of Maryland*, 117 Wn.2d 511, 519, 817 P.2d 393 (1991) ("Because we reverse the trial court's granting of Fidelity's motion for summary judgment, the award of attorney fees is also reversed."); *Scoccolo Constr., Inc. v. City of Renton*, 102 Wn. App. 611, 619, 9 P.3d 886 (2000) ("Because of the reasons stated above, we reverse the summary judgment order and consequently vacate the attorney fees award.").

05 DEC 15 PM 2: 30

STATE OF WASHINGTON

DATED December 14, 2005.

BULLIVANT HOUSER BAILEY P~~Y~~ _____
DEPUTY

By Jerret E. Sale
Jerret E. Sale, WSBA #14101
Shawnmarie Yates, WSBA #20112

Attorneys for Appellant

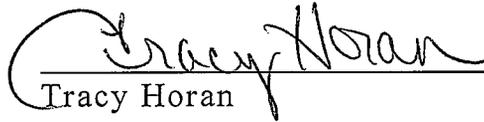
CERTIFICATE OF SERVICE

The undersigned certifies that on this 14th day of
December, 2005, I caused to be served Appellant's Opening
Brief to:

Athan E. Tramountanas via hand delivery.
Thomas H. Wolfendale via first class mail.
Preston Gates & Ellis LLP via facsimile.
925 Fourth Ave., Ste. 2900
Seattle, WA 98104-1158

I declare under penalty of perjury under the laws of
the state of Washington that the foregoing is true and
correct.

DATED this 14th day of December, 2005, at Seattle,
Washington.


Tracy Horan

3466785.1