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No. 92744-8
SUPREME COURT
OF THE STATE OF WASHINGTON

KING COUNTY,

Respondent,

v.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,
a Connecticut corporation; LIBERTY MUTUAL INSURANCE
COMPANY, a Massachusetts corporation; FEDERAL INSURANCE
COMPANY, an Indiana corporation; FIDELITY AND DEPOSIT
COMPANY OF MARYLAND, a Maryland corporation; and ZURICH
AMERICAN INSURANCE COMPANY, a New York corporation,

Petitioners.

SURETIES' SUPPLEMENTAL BRIEF

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I. ISSUE FOR REVIEW

Actions arising out of public works contracts are governed by a comprehensive statutory scheme that requires a party to better a timely settlement offer in order to be entitled to an award of attorney fees. RCW 39.04.240. When a governmental entity dictates the terms and conditions of a public works contract and its statutorily-required bond, chooses not to include a fee provision in either contractual document, and never makes a settlement offer under the statute, may the governmental entity rely on the equitable principles of *Olympic Steamship* as an alternate ground for an award against the statutory surety of all the fees it incurred in litigating its construction dispute with the contractor?

II. SUPPLEMENTAL ARGUMENT

Olympic Steamship fees are not recoverable by a governmental entity in equity, because a comprehensive statutory scheme governs fee awards in public works contracts. In the absence of a contractual fee provision, RCW 39.04.240 authorizes an award of fees in actions arising out of a public works contract only if the party seeking fees, including the governmental entity, betters a timely settlement offer. An *Olympic Steamship* fee award is not necessary to fulfill, but instead would undermine, this statutory

scheme. The County is not entitled to *Olympic Steamship* fees in any event because it failed to segregate claims and coverage fees.

A. ***Olympic Steamship* created a narrow equitable exception to the American Rule to protect insurance policy holders from insurers with superior bargaining and economic power, in the absence of a statutory or contractual right to attorney fees.**

This Court crafted a narrow exception to the American Rule that parties bear their own attorney fees in litigation in *Olympic Steamship Co., Inc. v. Centennial Insurance Co.*, 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991): When an insured must incur attorney fees to recover the benefits of an insurance policy, equity requires that the insurer bear the fees so that the insured is made whole.

Reasoning that insurance policies are “substantially different from other commercial contracts,” 117 Wn.2d at 52, this Court grounded its decision in *Olympic Steamship* on “equitable notions regarding the disparity in bargaining power between insureds and insurers, and attorney fees as damages.” *City of Seattle v. McCready*, 131 Wn.2d 266, 275, n.6, 931 P.2d 156 (1997); *see also Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 899, 16 P.3d 617 (2001) (*Olympic Steamship* “is an equitable exception to the American Rule on attorney fees.”); *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 149, 930 P.2d 288 (1997). *Olympic*

Steamship thus created “a narrow exception” to the American Rule applicable only “where the specific facts and circumstances warrant,” *Dayton v. Farmers Ins. Group.*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994) and consistent with this Court’s power to craft equitable remedies in the absence of governing statutes. *See, e.g., In re Parentage of L.B.*, 155 Wn.2d 679, 683, ¶ 3, 122 P.3d 161 (2005).

B. *Olympic Steamship* fees are not recoverable by a governmental entity because a comprehensive statutory scheme governs entitlement to fee awards in actions arising out of public works contracts.

1. Under RCW 36.32.250, the governmental entity dictates the terms of a public works contract and statutory performance bond, which the contractor and surety must accept as drafted by the governmental entity.

Like all contracts for public works projects, the statutory performance bond in this case was not negotiated, but was a contract of adhesion dictated by King County. Under RCW 36.32.250, the governmental entity dictates the terms of both a public works construction contract and the statutorily-required performance bond, which the contractor and surety must accept as drafted by the governmental entity as a matter of public policy. A “negotiated contract for a project which must be competitively bid [would be] invalid . . . because of the strong public policy favoring competitive bidding in this state.” *Hanson Excavating Co., Inc. v. Cowlitz County*,

28 Wn. App. 123, 126, 622 P.2d 1285 (1981). Petitioner Sureties issued the bond required by RCW 39.08.010 for the "Brightwater" public works contract between King County and Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV (VPFK) (Ex. 3001, attached as Appendix) in June 2006, 15 months before this Court's plurality decision in *Colorado Structures, Inc. v. Insurance Company of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007).

2. RCW 4.84.330 requires that any fee provision the governmental entity includes in its public works contract or bond must be bilateral.

If a governmental entity wants to recover attorney fees in the event of a public works contract dispute, it can certainly include a fee provision in the contract or the statutory bond, and the winning bidder and its surety will be obliged to accept it. There is a risk to such a contracting strategy, however. A contractual fee provision entitles any prevailing party (not just the governmental entity that drafted the contract and bond) to fees:

In any action on a contract . . . [that] specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract . . . shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract . . . or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

RCW 4.84.330. The governmental entity cannot “contract around” this requirement; the bilateral fee provisions of RCW 4.84.330 “shall not be subject to waiver by the parties.”

Cognizant of the bilateral fee provisions of RCW 4.84.330, King County chose not to include a fee provision in either the Brightwater construction contract or the statutory performance bond, each of which it alone drafted. The risk of having to pay a fee award was apparently one King County was unwilling to take, and the County was free to make that choice. But having made it, King County must live with the consequences: the public works fee statutes govern the County’s right to recover attorney fees in this action arising out of the Brightwater public works contract.

3. RCW 39.04.240 authorizes an award of fees in actions arising out of a public works contract only if the party seeking fees, including the governmental entity, betters a timely settlement offer.

In the absence of a contractual provision for fees, the public works fee statute, RCW 39.04.420, governs the recovery of fees in an “action arising out of a public works contract,” including the governmental entity’s right to recover on the statutory surety’s promise in the performance bond to “[f]aithfully perform” the public works contract if the contractor defaults. RCW 39.08.010(1)(a)(i).

King County does not dispute that this is an action arising out of a public works contract. *See Levinson v. Linderman*, 51 Wn.2d 855, 859, 322 P.2d 863 (1958) (statutory bond issued pursuant to RCW 39.08.010 is part of public works contract).

The public works fee statute authorizes an award of fees in actions arising out of a public works contract only if the party seeking fees, including the governmental entity, betters a timely settlement offer. RCW 39.04.240, incorporating RCW 4.84.250 and RCW 4.84.260: "The plaintiff, or party seeking relief, shall be deemed the prevailing party . . . when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff, or party seeking relief" The prevailing party's offer must be made between 30 and 120 days after filing and service of the complaint. RCW 39.04.240(1)(b). Just as with RCW 4.84.330, the bilateral fee statute, the "offer-of-settlement" provisions of the public works fee statute "may not be waived." RCW 39.04.240(2).

The Legislature's intent in enacting RCW 39.04.240 was to encourage early settlement of public works contract disputes. The Legislature enacted RCW 39.04.240 and extended the "offer-of-settlement" fee provision to all public works contracts because "[t]hese contracts are very one-sided, and . . . the public agency has

little incentive to compromise or settle now.” House Bill Report, H.B. 1671, 1999 Reg. Sess. RCW 39.04.240 “works very well to save both sides time and money. It . . . is a two-edged sword that will force both sides to act reasonably.” House Bill Report, H.B. 1671.

King County never made an offer of settlement under the statute in this case.

4. **An *Olympic Steamship* fee award to a governmental entity is not necessary to fulfill, but instead would undermine, the statutory scheme governing fee awards on public works contracts.**

When the Legislature establishes a condition precedent to particular relief, the courts will not “give relief on equitable grounds in contravention of [the] statutory requirement.” *Longview Fibre Co. v. Cowlitz County*, 114 Wn.2d 691, 699, 790 P.2d 149 (1990). “[W]herever the rights or the situation of the parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation . . .” *Williams v. Duke*, 125 Wash. 250, 254, 215 P. 372 (1923) (quoted case omitted). See also *Kingery v. Dep’t of Labor & Indus.*, 80 Wn. App. 704, 710, 910 P.2d 1325 (1996) (“Equitable principles cannot be asserted to establish equitable relief in derogation of statutory mandates.”), *aff’d*, 132 Wn.2d 162, 937 P.2d 565 (1997).

RCW 39.08.240's "offer-of-settlement" provisions establish a condition precedent to recovery of attorney fees by any party, including the governmental entity, in a dispute arising out of a public works contract. This Court therefore has no occasion to fashion or apply equitable remedies such as those crafted to protect insureds in *Olympic Steamship*.

In any event, the equitable grounds that justify an award of *Olympic Steamship* fees are not applicable here. This Court explained the reasons for its *Olympic Steamship* holding in *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 37, 904 P.2d 731 (1995): "(1) a disproportionate bargaining position of an insurer vis-à-vis the typical insurance consumer; and (2) actions of the insurer that cause an insured to suffer the costs of litigation." Neither of these reasons applies to the statutory performance bonds required on public works contracts.

a. The governmental entity, not the statutory surety, enjoys "a disproportionate bargaining position."

There is no equitable justification for fees premised on an insured's inability to bargain for a fee provision, or for other terms of the contract. The governmental entity, not the statutory surety, enjoys "a disproportionate bargaining position" both in drafting and in disputes arising out of a public works contract and its statutorily-

required performance bond. In this case, King County had the sole and absolute power to dictate and control the terms of both the public works contract and the statutory bond. The County alone drafted both the form of the bond and the terms of the underlying Brightwater construction contract. The County decided *not* to include an attorney fee provision in either the contract or the statutory bond.

Having thus protected itself from potential liability for *defendants'* fees, the County cannot, consistent with equity, recover its own fees. To allow King County to recover fees in this action would be tantamount to enforcing a unilateral fee provision allowing only the party that drafted the agreement to recover fees. *Olympic Steamship* allows only the insured, the party who did *not* draft the insurance contract, to recover fees. Unilateral contractual fee provisions are fundamentally unfair; RCW 4.84.330 and Washington public policy forbid them. *Mahler v. Szucs*, 135 Wn.2d 398, 426 n.17, 957 P.2d 632, 966 P.2d 305 (1998); *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 489, ¶ 15, 200 P.3d 683 (2009).

- b. The statutory surety does not cause the governmental entity to “suffer the costs of litigation” in a construction claims dispute with the public works contractor.**

The Sureties had no disproportionate power (or, indeed, any power at all) in enforcement of the Brightwater construction

contract, and did not cause King County to “suffer the costs of litigation” in this action. This action arose from a construction claim dispute between the County and VPFK. King County never asked the Sureties to remedy VPFK’s claimed default or otherwise “perform.” Rather, as set out in the Sureties’ opening merits brief at 8-13, the County and VPFK negotiated a means of completion of a portion of the Brightwater public works contract by another contractor without any participation by the Sureties whatsoever. Only after King County had reached its Interim Agreement with VPFK for completion of the work did the County demand the Sureties pay for the contract modification, giving the Sureties no opportunity to perform the bonded obligation, let alone adequate time to investigate the County’s demands. The County within days then withdrew its “demand” on the Sureties and filed suit against VPFK, still asserting no claim against the Sureties independent of its construction claim dispute with the contractor VPFK.

The cause of this litigation was not the Sureties or their failure to perform, but the County’s construction claim dispute with VPFK. King County had to overcome VPFK’s *contract* defenses and prove VPFK was in default before it could seek recovery under the statutory performance bond the County drafted. Litigating VPFK’s *contract*

defenses was not a dispute over coverage under the performance bond. Instead it was a *claim* dispute not subject to the imposition of the equitable *Olympic Steamship* remedy.

C. This Court should reject the reasoning of the *Colorado Structures* plurality and hold that *Olympic Steamship* fees are not available on performance bonds.

While there is scant precedent for extending *Olympic Steamship* to *any* performance bond dispute, there is *no* precedent authorizing a governmental entity to recover attorney fees against a statutory surety on a public works contract as a matter of equity. Although this Court can and should resolve this dispute based on the statutory scheme governing fee awards in public works contract disputes, the Court should also hold that *Olympic Steamship* fees are not recoverable for a surety's denial of a claim under any performance bond, be it for a public or private project, and should reject the plurality opinion to the contrary in *Colorado Structures, Inc. v. Insurance Company of the West*, 161 Wn.2d 577, 167 P.3d 1125 (2007).

This Court recognized “that *Colorado Structures* does not have a majority rule on . . . whether *Olympic Steamship* fees are available in the context of a performance bond as opposed to an insurance contract” in *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 660 n.5, 272 P.3d 802 (2012). This Court should now

hold that *Olympic Steamship* fees are not available in disputes arising out of performance bonds, which are designed to provide protection from the “business risk” of contractual non-performance, not to indemnify against fortuitous loss like insurance.¹

1. A performance bond is not an insurance policy.

“The surety bond is a financial credit product, not an insurance indemnity product.” Philip L. Bruner & Patrick J. O’Connor, Jr., *4A Bruner & O’Connor Construction Law* § 12:7 (2009). A performance bond is not an insurance policy. The purpose and nature of the surety relationship is fundamentally different from the relationship between insurer and insured under a casualty insurance policy.

An insurer’s obligation is to its insured. The insured relies upon the insurer to defend and indemnify it against the claims of an injured third party. *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 52-53, ¶ 17, 164 P.3d 454 (2007); *Colorado Structures*, 161 Wn.2d at 620, ¶ 69 (Madsen, J., addressing “the insured’s unique vulnerability

¹ *New Appleman On Insurance Law Library Edition*, Ch. 139.01[2][d], Performance Bonds (2015). See also *Harrison Plumbing & Heating, Inc. v. New Hampshire Ins. Group*, 37 Wn. App. 621, 627-28, 681 P.2d 875 (1984) (“Finally, Harrison contends that the . . . policy is meaningless if it does not cover the claims [for non-performance]. We disagree. *Accidental injury to persons and damage to property . . . constitute the risks covered by this comprehensive general liability policy. What Harrison really contends is that the policy was a performance bond. It was not.*”) (citation omitted; emphasis in original).

when faced with a casualty loss”). Performance of the obligation of another party to the contract to complete a partially finished construction project is not part of an insurance contract. By contrast, a surety has a contractual relationship with both the principal and the project owner/obligee, who often have conflicting interests. The surety is required to balance these conflicting interests when responding to claims under the bond. *4A Bruner & O'Connor* § 12:7.

“A surety essentially guarantees that the primary obligor will perform or the surety will step in and complete the primary obligor’s duties under the contract to the obligee. By way of comparison, insurance indemnifies (and defends) the insured for fortuitous loss.” 33 Wash. Prac., Wash. Construction Law Manual § 13:1 (2015-2016 ed.). A performance bond is called a *performance* bond for a reason: a surety has the right to investigate and to perform the bonded obligation in order to minimize its damages, not to act as merely a guarantor of payment of damages and fees to the project owner. The obligation of the surety to perform is a distinction with significance; material changes in the scope of the contractor’s obligation to the project owner can exonerate or limit the surety’s obligation under the bond. See *Kenney v. Read*, 100 Wn. App. 467, 474, 997 P.2d 455, 4 P.3d 862 (2000) (“Any material change in a surety’s obligation

without the surety's consent will discharge the surety's obligation.")
(quoted case omitted).

2. The performance bond surety, contractor, and project owner all owe duties to one another.

In a performance bond surety relationship (and reflective of its commercial contract nature), the contractor and the project owner also owe duties to the surety far more specific than the general obligation of good faith under RCW 48.01.030. See Restatement (Third) of Suretyship & Guaranty, § 1, cmt. a (1996) ("Suretyship status gives the [surety] a significant set of rights against both the principal obligor and the obligee."). The contractor is obligated to exonerate the surety upon demand by performing the bonded obligation and reimbursing the surety for any loss. Restatement of Suretyship, § 18. The owner cannot "fundamentally alter[] the risks imposed on the [surety] by . . . agreeing to a modification of the duties of the [contractor]." Restatement of Suretyship, § 37(2); see also § 41. The owner is also obligated to pay funds from a bonded contract to the surety, because the surety has a lien on that contract and its proceeds. See *Levinson v. Linderman*, 51 Wn.2d 855, 862-63, 322 P.2d 863 (1958).

These reciprocal obligations of performance and payment are distinctive hallmarks of the surety relationship that do not have a true parallel in an insurance contract. Their significance is highlighted

here, where the contractor VPFK and the project owner King County, with no notice to or involvement of the Sureties, made alternate arrangements for fulfillment of the Brightwater construction contract that the County then demanded the Sureties fund, “no questions asked.” The County’s claims that it lacked bargaining power in enforcement of the Brightwater contract and bond ring hollow in light of way in which the construction dispute between VPFK and the County developed, and was resolved.

This case also demonstrates the fact that a surety is customarily asked to assure performance of construction contracts that are sufficiently large to warrant bonding. *Cf.* RCW 39.08.010 (waiving statutory bond requirements for small public works projects). Unlike insurance policies, these contracts are typically entered into by commercially sophisticated parties with access to ample legal and technical advice. *4A Bruner & O’Connor* § 12:7. As a consequence, “a surety has the right to stand strictly on the expressed terms of its contract of suretyship and to insist that it be not held responsible for any liability or obligation not directly expressed within the contract.” *Grand Lodge of Scandinavian Fraternity of America, Dist. No. 7 v. U.S. Fidelity & Guar. Co.*, 2 Wn.2d 561, 570, 98 P.2d 971 (1940). King County – having dictated the construction contract and statutory bond – was not helpless in the face

of the Sureties' request to investigate the County's multi-million dollar claim before being required to provide a remedy or respond to its suit against VPFK.

3. The project owner, not the surety, controls the terms of a performance bond.

One of the primary bases for *Olympic Steamship* fees is that the insurer controls the contractual terms. That is not true for performance bonds, which are usually drafted and supplied by the project owner/obligee.² *4A Bruner & O'Connor* § 12:7. This Court has long recognized that when the obligee drafts a surety bond (as King County did here), the court need not “adopt a rule of construction weighted against” the surety. Instead, it is “reasonable to ascribe to the surety an intent to assume the least burdensome obligation consistent” with the terms of the bond drafted by the obligee:

Where . . . the language of the surety's promise is selected by the obligee, . . . it may be reasonable to ascribe to the surety an intent to assume the least burdensome obligation consistent with his words if such meaning could be understood by an ordinary person under the same or similar circumstances.

² The same is true of the underlying contract, the performance of which the bond assures. “[T]here is generally no issue of unequal bargaining power between the obligee and the surety, and indeed, the surety has little, if anything, to say about the drafting of the underlying contract.” Philip L. Bruner & Patrick J. O'Connor, Jr., *4A Bruner & O'Connor Construction Law* § 12:9, n.3 (2009) (quoted source omitted).

Nat'l Bank of Washington v. Equity Investors, 86 Wn.2d 545, 555, 546 P.2d 440 (1976) (quoting L. Simpson, *Law of Suretyship* 98-99 (1950)).

Under the performance bond as drafted by the County in this case, the Sureties committed only to “promptly remedy the default in a manner acceptable to the [County].” (Ex. 3001) This language required the Sureties either to make arrangements to complete the project or to pay the owner the reasonable costs of completing the project. *See, e.g., American Home Assur. Co. v. Larkin General Hosp., Ltd.*, 593 So.2d 195, 198 (Fla. 1992); *see also* 4A Bruner & O'Connor § 12:78. But under the terms of the Brightwater construction contract (which the County also drafted), the County’s “option” to “[c]all upon the surety to perform its obligations under the performance and payment bonds, if applicable,” was triggered only “[u]pon termination” of VPFK by the County. (Ex. 6, Art. 8.0A.3.c)) And even if the County had the “right to terminate” its contract with VPFK, it indisputably never did so. (*See* Ex. 6, Art. 8.0A.2)

4. **Allowing only a project owner to seek an “equitable” award of fees on a performance bond will increase construction costs for everyone.**

Finally, a performance bond premium is usually paid by the contractor to the surety out of the contract price, rather than directly

by the obligee to the surety. In contrast, an insured pays a premium for an insurance policy covering fortuitous losses to a third party. Allowing only the project owner to obtain an award of attorney fees in the event of a dispute arising from the construction contract will inevitably increase the contract price. And because the surety's pricing of the performance bond premium is not based upon the risk of a fortuitous loss, as in insurance, but assumes reimbursement to the surety from the principal and indemnitors, allowing only the project owner to obtain an award of attorney fees will increase the cost of construction. *4A Bruner & O'Connor* § 12:7.

In short, a performance bond is not an insurance policy, a surety is not an insurer, a project owner/obligee is not an insured, and this Court should hold that *Olympic Steamship* fees are not recoverable on performance bonds.

D. The County is not entitled to *Olympic Steamship* fees because it failed to segregate claims and coverage fees.

Even were this Court to extend *Olympic Steamship* to statutory performance bonds on public works contracts, the County is not entitled to any fees in this case because it indisputably failed to meet its burden to segregate coverage fees from fees expended litigating its construction claims with VPFK.

Olympic Steamship fees are intended to make an insured whole when it must incur fees to overcome an insurer's coverage position. *Leingang v. Pierce Cty. Med. Bureau, Inc.*, 131 Wn.2d 133, 149, 930 P.2d 288 (1997); *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 39-40, 904 P.2d 731 (1995). Fees are available under *Olympic Steamship* only for litigating coverage, not claims, disputes. *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 658, ¶ 26, 272 P.3d 802 (2012) ("An insured cannot claim attorney fees where the dispute is over the extent of the insured's damages or factual questions of liability."); *Colorado Structures, Inc. v. Insurance Company of the West*, 161 Wn.2d 577, 606, ¶ 26, 167 P.3d 1125 (2007) (Chambers, J.).

The County's complaint did not allege any coverage dispute with the Sureties. The Sureties were not independently represented and played no meaningful role in the lengthy trial; the County's efforts were devoted to proving VPFK's liability, quantifying the County's damages, and minimizing VPFK's recovery on its counterclaims. The jury was not even asked to find if the Sureties were liable under the bond. (CP 1316-29) This dispute over VPFK's performance under the construction contract was a claim, not a coverage, dispute.

The County bore the burden of showing that segregation of fees between its underlying contract dispute with VPFK and the

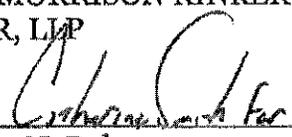
dispute with the Sureties was not reasonably possible – a burden it affirmatively disavowed. *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 690, 82 P.3d 1199, *rev. denied*, 152 Wn.2d 1023 (2004). This Court vacated a fee award to an insured because “dispute[s] over the value of the claim . . . are not properly governed by the rule in *Olympic Steamship*” in *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). Likewise here, King County is not entitled to any fees in this action because it did not meet its burden to segregate fees.

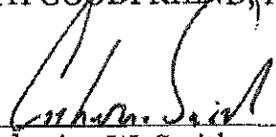
III. CONCLUSION

The Court should vacate the judgment for fees against the Sureties because *Olympic Steamship* fees are not recoverable by a governmental entity that is not entitled to fees under the comprehensive statutory scheme governing public works contracts, and in any event King County failed to segregate claims and coverage fees.

Dated this 7th of October, 2016.

OLES MORRISON RINKER & SMITH GOODFRIEND, P.S.
BAKER, LLP

By: 
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Thomas R. Krider
WSBA No. 29490

By: 
Catherine W. Smith
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Howard M. Goodfriend
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Attorneys for Petitioner Sureties

DECLARATION OF SERVICE

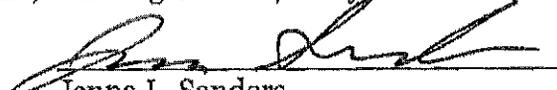
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 7, 2016, I arranged for service of the foregoing Sureties' Supplemental Brief, to the Court and to counsel for the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
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David R. Goodnight Karl E. Oles Hunter Ferguson Stoel Rives LLP 600 University St., Ste 3600 Seattle, WA 98101-4109 kfoles@stoel.com drgoodnight@stoel.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
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<p>John P. Ahlers Ahlers & Cressman, PLLC 999 3rd Avenue, Suite 3900 Seattle, WA 98104 <u>E.jahlers@ac-lawyers.com</u></p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>
<p>Michael P. Grace Groff Murphy, PLLC 300 E Pine Street Seattle, WA 98122-2029 <u>mgrace@groffmurphy.com</u></p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>

DATED at Seattle, Washington this 7th day of October, 2016.


Jenna L. Sanders

EXECUTED IN FOUR (4) COUNTERPARTS.

SECTION 00420
PERFORMANCE AND PAYMENT BOND

104758459,
049002364,4409024,
08837361, 82097516
Bond Numbers

VCGP / Parsons RCI / Frontier-Kemper, JV
Contractor

KNOW ALL BY THESE PRESENTS: That we, VCGP / Parsons RCI / Frontier-Kemper, JV, as Principal, and Travelers Casualty and Surety Company of America, Liberty Mutual Insurance Company, Fidelity and Deposit Company of Maryland, Zurich American Insurance Company and Federal Insurance Company, as Surety, all corporations legally doing business in the State of Washington, are held and firmly bound and obligated unto the State of Washington and King County, pursuant to Chapter 39.08 RCW, in the full sum of the Contract Price of Two Hundred Eleven Million Seventy Six Thousand Fifty Eight and No/100 Dollars (\$211,075,058.00), and including any and all adjustments to the Contract Amount, for the faithful performance of the Agreement referenced below, and for the payment of which sum we do bind ourselves, and each of our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, THE CONDITIONS OF THIS OBLIGATION ARE SUCH THAT the Principal entered into a certain Agreement with KING COUNTY, for Edgewater Conveyance System - Central Contract, Edgewater Tunnel, Sections 2 and 3 Contract C00006C06 incorporating herein by this reference all of the Contract Documents, as now and as hereinafter amended and modified.

NOW, THEREFORE, if the Principal shall faithfully perform all provisions of such Agreement and pay all laborers, mechanics and subcontractors and materialmen, and all persons who shall supply such person or persons, or subcontractors, with provisions and supplies for the carrying out of such work, then this obligation is void, otherwise to remain in full force and effect.

Provided, however, that the conditions of this obligation shall not apply to any money loaned or advanced to the Principal or to any subcontractor or other person in the performance of any such work.

IT IS FURTHER DECLARED AND AGREED that whenever Contractor shall be, and declared by Owner to be in default under the Contract, the Owner having performed Owner's obligations thereunder, the Surety, at the request of the Owner, shall promptly remedy the default in a manner acceptable to the Owner.

SIGNED this 28th day of June, 2008.

Principal: VCGP / Parsons RCI / Frontier-Kemper, JV

Surety: Travelers Casualty and Surety Company of America

By: _____

By: _____

Title: Thierry Portafak
Attorney-in-Fact

Title: Michael R. Mayberry,
Attorney-in-Fact

Address: 1216 140th Avenue Cl E

Address: 90 Market St., Mail Code 252B

City/Zip: Sumner WA 98390

City/Zip: Hartford CT 06183

Telephone: 253-853-5209

Telephone: 860-277-1503

C00006C06
2003 Rev 1 03/23/03

page 1 of 2

00420
Performance and Payment Bond

(FR) NOV 10 2008 18:54/ST. 18:54/NO. 0330011188 P 6

FROM LIBERTY MUTUAL SURETY

Surety: Liberty Mutual Insurance Company

By:

Title: Michael R. Murphy, Attorney-in-Fact

Address: 450 Plymouth Road, Suite 400

City/Zip: Plymouth Meeting PA 19462

Telephone: 610-332-8219

Surety: Fidelity and Deposit Company of Maryland

By:

Title: Michael Murphy, Attorney-in-Fact

Address: 3910 Keswick Road

City/Zip: Baltimore MD 21211

Telephone: 410-281-7868

Surety: Zurich American Insurance Company

By:

Title: Michael Murphy, Attorney-in-Fact

Address: 3910 Keswick Road

City/Zip: Baltimore MD 21211

Telephone: 410-281-7868

Surety: Federal Insurance Company

By:

Title: M.R. Murphy, Attorney-in-Fact

Address: 3 Mountain View Road

City/Zip: Myanna NJ 07061

Telephone: 908-908-4873

Note: A power of attorney must be provided which appoints the Surety's true and lawful attorney-in-fact to make, execute, seal and deliver the Performance and Payment Bond.

END OF SECTION

SMITH GOODFRIEND, PS

October 07, 2016 - 3:29 PM

Transmittal Information

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Appellate Court Case Number: 92744-8
Appellate Court Case Title: King County v. Liberty Mutual Insurance Company, et al.

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Comments:

Sureties' Supplemental Brief

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