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No. 66777-7

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

NORTHWEST INFRASTRUCTURE, INC., a Washington corporation,

Plaintiff/Appellant,

v.

PCL CONSTRUCTION SERVICES, INC., a Washington corporation,
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Defendants/Third-Party Plaintiffs/Respondents,

v.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a
Washington regional transit authority,

Third-Party Defendant/Respondent.

BRIEF OF APPELLANT

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I. OVERVIEW AND RELIEF REQUESTED

In *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 386-87, 78 P.3d 161 (2003), the Washington Supreme Court affirmed the rule that procedural requirements in construction contracts governing claims will be enforced unless the benefitting party has waived them or the parties have agreed to modify the contract. Waiver of contract claim procedural requirements by the benefitting party may be express or by conduct, but if by conduct requires proof of unequivocal acts evidencing an intent to waive. Like *Mike M. Johnson*, this case also involves a contractor's claim. But the similarities end there, both factually and legally.

This case arises from the Federal Way Transit Center Project ("the Project"). The Project owner was respondent Central Puget Sound Regional Transit Authority, better known as Sound Transit. The general contractor for the Project was respondent PCL Construction Services, Inc. ("PCL"). Appellant Northwest Infrastructure, Inc. ("NWI") was PCL's earthwork subcontractor.

During the Project, PCL/NWI submitted to Sound Transit a request for change order in June 2005 (the "June 2005 RFC"). The RFC was made under Article 4 of the Project Contract, and arose from Sound Transit's defective earthwork specifications causing NWI to perform a

substantial amount of additional site earthwork. NWI had completed the site earthwork months before submitting the June 2005 RFC. NWI and PCL followed the Project Contract claim requirements when they submitted the June 2005 RFC. Sound Transit repeatedly acknowledged NWI's entitlement to a change order for the additional earthwork. What the parties disagreed on was the dollar amount that would fairly compensate NWI for the extra work. Sound Transit issued a unilateral change order, Change Order 12, reflecting the dollar amount Sound Transit determined was adequate for the cost of NWI's additional earthwork.

Article 10 of the Project Contract contained claim procedures allowing the contractors to challenge the dollar amount of the unilateral change order issued by Sound Transit. Following those procedures precisely, NWI and PCL submitted a claim to Sound Transit in January 2006 asserting Change Order 12 underpaid the cost of the additional earthwork ("the January 2006 Article 10 Claim"). Sound Transit never challenged the timeliness of this claim under contract claim requirements. In fact, Sound Transit expressly affirmed twice in writing that if it had any timeliness defenses to PCL/NWI's claim, they were waived. Sound Transit denied the January 2006 Article 10 Claim on substantive grounds.

The parties then proceeded with mediation of that claim as required by Article 11 of the Project Contract.

At no time between the June 2005 RFC and the filing of this lawsuit did either Sound Transit or PCL assert that any NWI claim failed to comply with procedural contract requirements in either the Project Contract or the PCL/NWI subcontract. Nor at any time did either Sound Transit or PCL expressly reserve any contract rights or defenses otherwise available to contest NWI's claims.

In this lawsuit, NWI seeks damages based on its January 2006 Article 10 Claim, i.e. that Change Order 12 inadequately compensated for the additional earthwork. Well before the lawsuit, Sound Transit previously completed an audit of NWI's Project records in which it determined that NWI incurred nearly \$600,000 in additional earthwork costs beyond the amount paid in Change Order 12.

On this record, Sound Transit and PCL moved for summary judgment based on *Mike M. Johnson* principles, asserting NWI's claim was barred because it previously failed to meet contract time requirements. Respondents did not assert the January 2006 Article 10 Claim was itself untimely. Rather, Sound Transit and PCL reverted back in time and contended that the June 2005 RFC resulting in Change Order 12 was "unknowingly" untimely when originally made five years earlier.

Sound Transit and PCL argued they could attach and apply the alleged time deficiency of the RFC to the later and independent January 2006 Article 10 Claim.

Misapplying *Mike M. Johnson*, the trial court agreed with respondents. Based on the trial court's summary judgment order, even though Change Order 12 stands, the January 2006 Article 10 Claim was untimely under contract procedures because the earlier June 2005 RFC was deemed untimely. The trial court was wrong in view of the uncontested facts and applicable law. Although no longer relevant, the record showed the June 2005 RFC had been timely, as was the independent January 2006 Article 10 Claim. Further, the trial court ignored the uncontested facts that precluded respondent's defense based on the June 2005 RFC: Sound Transit's modification of the Project Contract by Change Order 12; Sound Transit's express written waiver of any contract claim time defense; and Sound Transit's waiver by unequivocal conduct.

NWI respectfully requests the Court to reverse the trial court's improper summary judgment ruling, and reinstate NWI's claims. In addition, the Court is requested to direct the trial court to enter summary judgment in favor of NWI on its summary judgment cross-motion, ruling

that any defenses by Sound Transit and PCL based upon *Mike M. Johnson* principles be dismissed and barred in this proceeding.

Following the summary judgment ruling, the trial court also erroneously awarded attorneys' fees and costs to Sound Transit directly against NWI based on RCW 39.04.240. The trial court's award of attorneys' fees in favor of Sound Transit against NWI should be reversed.

Finally, NWI requests on appeal an award of attorneys' fees and costs against PCL and the Contractor's Bond posed by Fidelity and Deposit Company of Maryland, based on the parties' subcontract and RCW 39.08.030.

II. ASSIGNMENTS OF ERROR

The trial court erred as follows:

1. The trial court erred in the entry of summary judgment in favor of Sound Transit and PCL dismissing NWI's claim for compensation for additional earthwork that was underpaid by Change Order 12.
2. The trial court erred in failing to grant NWI's cross-motion for summary judgment against PCL and Sound Transit.
3. The trial court erred in awarding attorneys' fees under RCW 39.04.240 in favor of Sound Transit against NWI.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Where a contractor's claim is otherwise timely made and is based on a change order, can an owner assert the claim is untimely because it considers a predecessor claim resulting in issuance of the change order was untimely?

2. Under *Mike M. Johnson*, can an owner attach contract defenses applicable to a prior contractor claim to a later, unrelated claim, where the owner had also voluntarily approved the prior claim notwithstanding any contract defenses available to that earlier claim?

3. Does a public owner's issuance of a change order and payment of the full amount of the change order without reservation of any contract defenses constitute unequivocal waiver precluding a later *ex post facto* challenge to the claim underlying the change order?

4. Can *Mike M. Johnson* support dismissal of a contractor's claim that complies with any applicable procedural contract requirements?

5. Where an owner has affirmatively and expressly waived any contract time requirements governing a contractor's claim, is the owner precluded from later asserting a time requirements defense to the same claim?

6. Is an award of attorneys' fees in favor of a defendant public owner against a subcontractor improper under RCW 39.04.240, where

there was no contract privity between the public owner and subcontractor, and the owner and the subcontractor had not asserted any contract-based claims against the other?

7. To be entitled to an award of attorneys' fees under RCW 39.04.240, is a defendant public owner required to provide notice of intent to seek fees under the statute by either (1) making an offer of settlement to the party opponent from whom a fee award will be subject; (2) pleading RCW 39.04.240 in its responsive pleading; or (3) providing some other form of written notice to the party opponent expressing intent to seek an award of fees under the statute?

IV. STATEMENT OF THE CASE

A. The Contract Provisions At Issue.

The subcontract between PCL and NWI incorporated by reference the contract change order and claim procedures found in the main Project Contract between Sound Transit and PCL. CP 450-451 (excerpts of NWI-PCL Subcontract, Article I, Sections 1.1 and 1.5). In the Project Contract drafted by Sound Transit, there are three articles that are relevant to this proceeding: Article 4, Article 10 and Article 11. CP 453-474.

Article 4 governs modification of the Project Contract by way of "change order," including the Contract Price, the Contract Documents, or the Contract Time. Article 4 specifies the change order process, including

changes to the scope of work impacted by Sound Transit's plans, drawings, and specifications. CP 454 (Section 4.01.B). The change order process begins with the contractor's "Request for Change" ("RFC") under Section 4.02A. CP 455. The contract provided for two different types of change orders modifying the contract: a "Bilateral Change Order," agreed to by both PCL and Sound Transit; and a "Unilateral Change Order," a change order issued by Sound Transit in circumstances where the contractor and owner cannot agree on the terms and conditions, the dollar amount, or any adjustment to contract time. CP 457-458 (Section 4.04.C. and D). In the event of issuance of a Unilateral Change Order where the dollar amount was inadequate, PCL/NWI were entitled to file a claim in accordance with Article 10 governing claims. *Id.* (Section 4.04.D).

As will be explained later, PCL/NWI did file an Article 10 claim challenging the dollar amount of Sound Transit's Change Order 12, ***and it is that claim which is the subject of this appeal.***

Article 10 governed contractor and subcontractor claims following either Sound Transit's denial of a Request for Change made by the contractor under Article 4, or Sound Transit's issuance of a Unilateral Change Order under Section 4.04.D where the dollar amount was disputed by the contractor. *See* Section 10.01.A(3). CP 465.

Finally, in the event an Article 10 claim was denied by Sound Transit, a dispute resolution process was imposed under Article 11, per Section 10.01.B(2)(c). CP 466-67. Per Section 11.06, dispute resolution was a condition precedent to PCL/NWI filing any litigation against Sound Transit arising from the Project or the Project Contract. CP 473-74.

B. Errors In The Sound Transit Site Earthwork Plans And Specifications Lead To Additional Earthwork By NWI And A Request For Change Under Article 4.

The Project plans and specifications were prepared by Sound Transit's engineers, KPFF. The site earthwork was governed by Sound Transit's Plan Drawing C3.04. That drawing specified specific volumes for "Cut" (amount of soils to be excavated) and "Fill" (amount of excavated soil to be backfilled). CP 476-77. NWI relied on the site earthwork volumes specification in Drawing C3.04 in preparing its competitive bid on this public works project. CP 6-7; 1204-05.

During the entire Project, Sound Transit had on-site resident engineers with the firm Harris and Associates to monitor the work. Scott Perry of Harris and Associates was the lead Resident Engineer. CP 155. In July 2004, NWI began the site earthwork required under its subcontract with PCL. By the fall of 2004, both NWI and PCL had determined that there was more earthwork being moved by NWI than what was specified in Drawing C3.04. CP 997-999; 1003-1015. However, neither NWI nor

PCL could determine *WHY* there was a greater amount of earthwork based on the site earthwork specifications found in Drawing C3.04. *Id.* PCL's project manager, Jim Pittman, was well aware of the additional earthwork being performed by NWI, and worked closely with NWI in monitoring the situation. *Id.* Sound Transit's on-site resident engineer, Scott Perry, was similarly kept abreast of the additional earthwork being performed by NWI. *Id.* NWI completed the site earthwork in the fall of 2004. As required by the Project Contract, before PCL and NWI could submit a change order request under Article 4 for the additional earthwork, ***the contractors needed to be in a position to specify to Sound Transit the reasons why there was entitlement to compensation for the additional work performed.*** Section 4.02.A of the Contract General Provisions provides:

After the Contractor becomes aware of the need for or desirability of a requested change, an RFC may be submitted to Sound Transit in writing (in a format acceptable to Sound Transit) and must specify the reasons for such change, including relevant circumstances and impacts on the schedule. (Emphasis added.)¹

¹ Similar requirements are found in Section 10 governing claims. ***The Notice of Intent to Claim must describe the reasons for which the Contractor believes it is entitled to additional compensation, and the Contractor's best estimate of the potential claim.*** Project Contract Section 10.01.A.(2). CP 465. Sound Transit will likely contend Article 10, not Article 4, governed the PCL/NWI June 2005 RFC discussed, *infra*. Even if Article 10 applied, the requirements were the same as Article 4. PCL and NWI could not submit notice to Sound Transit for an Article 10 claim until they could articulate the reasons supporting the right to additional earthwork compensation.

CP 455.

During its work, and for months after the site earthwork was completed, NWI made repeated inquiries to Sound Transit and its resident engineers with Harris and Associates to determine *WHY* NWI had been required to move more dirt. CP 997-999; 1003-1015. Sound Transit and Harris and Associates refused to provide any assistance to NWI, and also refused NWI's request for meetings with the Project engineers, KPFF, to determine a cause for the overwhelming increase in the earthwork volumes. *Id.*

Harold Johnson of NWI took it upon himself to make direct contact with KPFF and get some answers. Mr. Johnson spoke with a KPFF engineer assigned to the Project, Justin Matthews. In that telephone conversation, Mr. Matthews indicated that there was an error in the earthwork volume specification: Drawing C3.04 failed to account for excavating the garage footprint. After speaking to Harold Johnson, Mr. Matthews emailed Scott Perry, Sound Transit's resident engineer, and reported his telephone conversation with Harold Johnson. CP 479-480. In their June 10 and June 16, 2005 email exchange, Mr. Matthews assured Mr. Perry that he would refuse to have any further communication with Harold Johnson or NWI concerning inquiries about the Site Earthwork

Volumes in Drawing C3.04: “Harold won’t get the time of day from me if he ever calls again, sorry about that.” *Id.*

When Harold Johnson later spoke with Scott Perry about his conversation with Mr. Matthews and KPFF’s omission of the parking garage excavation in the C3.04 earthwork quantities, Mr. Perry made the following cryptic response: “You already have the gun, I am not going to give you the bullets.” CP 481, 998.

C. **Computer Modeling By NWI’s Consultant Discovers KPFF’s Errors In The Earthwork Quantity Specification In Drawing C3.04, Which Only Then Provided The Reasons For Making An Article 4 Change Order Request.**

NWI failed to obtain any cooperation or assistance from Sound Transit, Harris and Association, or KPFF in determining why the site earthwork exceeded KPFF’s specifications in Drawing C3.04. This prompted NWI to retain in June 2005 a consulting firm, Earthwork Services, Inc., for the specific purpose of reviewing the Project site drawings to ascertain cut and fill quantities using computerized modeling analysis. CP 998-999. Earthwork Services’ analysis of the site topography and elevations depicted on the Project drawings determined that the actual excavation (“Cut”) was 57,166 cubic yards, over twice the 24,000 cubic yards specified in Drawing C3.04. The actual backfill amount (“Fill”) was 23,808 cubic yards, not 16,000 cubic yards stated by

KPFF in the Project drawing. Instead of only 8,000 cubic yards of export per Drawing C3.04, the actual amount of soil that needed to be hauled off the Project site was 33,363 cubic yards, ***over four (4) times the amount stated in the drawing at bid time.*** CP 998-999, 954, 956, 962.

Based on the Earthwork Services report, NWI and PCL finally had the “***reasons***” for a change order request required by Section 4.02.A.²

D. NWI’s Request For Change Order For The Additional Earthwork Is Passed Through By PCL To Sound Transit.

Shortly after receiving Earthwork Services’ report, NWI provided a Request for Change package to PCL in accordance with the claim procedures in the parties’ subcontract. NWI sought compensation for the additional earthwork beyond that erroneously specified in Drawing C3.04. CP 998. PCL assisted NWI in preparing the additional earthwork claim, and submitted it to Sound Transit as a pass-through Request for Change under Article 4 by letter dated June 28, 2005 (“the June 2005 RFC”). CP 252; 954-965; 2380-2386.

At no time did PCL assert that the June 2005 RFC was untimely or otherwise failed to comply with any claim procedures imposed by either the Project Contract between Sound Transit and PCL, or the subcontract between PCL and NWI. To the contrary, ***PCL acknowledges that NWI’s***

² Or, as noted in footnote 1, the reasons supporting an Article 10 claim for additional earthwork.

additional earthwork claim submitted to Sound Transit in June 2005 was timely and fully complied with all applicable contract claim requirements. The following deposition testimony is from PCL's 30(b)(6) designee and Senior Manager of Finance and Administration, Garth Hornland:³

1: The Additional Earthwork Claim Was In Full Compliance With The Contract Claim Notice Requirements, Including Time Requirements.

Q. *So let's go to Exhibit 40,⁴ and I want to make sure I understand what PCL did before submitting the claim on a pass through basis to Sound Transit. Let me see if I understand your testimony correctly.*

You were aware several weeks before that June 28, 2005 letter was sent to Sound Transit that there would be a claim submitted on behalf of Northwest Infrastructure for additional earth work; is that correct?

A. *Yes.*

Q. *And in that two- to three-week period, part of what you did in conjunction with Mr. [Jim] Pittman [PCL's Project Manager] was to review the materials provided to PCL by Northwest Infrastructure to determine if the claim being passed through to the owner had merit?*

A. *Not exactly.*

Q. *What did you do?*

A. *I would discuss not necessarily the quantity calculations, I would talk about the process that they're doing, if the -- if Jim felt that there was any procedural issues that he had to address. So I was not there to review*

³ As PCL's 30(b)(6) designee as the person most knowledgeable of the facts supporting the cross-claims against NWI, Mr. Hornland's testimony is deemed to be the complete, knowledgeable, and binding answers of PCL on the subject matter designated in NWI's notice. *Flower v. TRA Industries*, 127 Wn. App. 13, 39, 111 P.3d 1192 (2005); *U.S. v. Taylor*, 166 FRD 356, 360-361 (MDNC 1996).

⁴ Exhibit 40 is the June 2005 RFC. CP 954-965.

whether the quantity calculations were accurate or correct, that was Jim's responsibility and the operation group's responsibility to analyze that.

Mine was to say, okay, procedurally, what's been presented now, are you willing to go there, from a timely perspective are you submitting them in a timely manner, and that would be what I would be doing with him, not a review of the merits of the claim, per se, or the request for change.

* * *

Q. All right.

And after going through that process, PCL determined that it was a valid claim that was being passed through to the owner as stated in Exhibit 40?

A. There was reasonable -- yes, there was reasonable information to say that there was additional work there.

CP 2382-2383.

2: PCL Submitted The Additional Earthwork Claim to Sound Transit Without Qualification.

Q. Let me ask the question differently, you would agree that whether it was the additional earth work claim in Exhibit 40 or any claim that PCL would submit on a pass through basis for a subcontractor that it would first verify whether the pass through claim had merit?

A. Yes, unless we qualified that pass through claim.

Q. Was the pass through claim found in Exhibit 40 qualified in any way?

A. No.

* * *

Q. In this case again you stated there was no qualification on the pass through claim found in Exhibit 40, correct?

A. Correct.

Q. And by submitting it to the owner you understood that you were as PCL certifying that claim as valid to the owner?

A. Yes.

CP 2383.

E. The Undisputed Record Affirms That Sound Transit Determined The June 2005 RFC Complied With All Contract Claim Requirements.

Sound Transit anticipated receiving PCL's June 28, 2005 RFC weeks in advance. Sound Transit's Weekly Meeting Minutes No. 047 dated June 15, 2005 (CP 493-499) reported:

6/15/05 - NWI is reviewing the earthwork quantity. There may be a conflict in the plans (Pg. 20).⁵ NWI is compiling information for possible additional costs.

CP 496.

The date on which Sound Transit received the RFC, June 28, 2005, is important. *Sound Transit, its Resident Engineer (Harris and Associates) and Project engineer (KPF), as well as PCL all knew the June 2005 RFC was being submitted months after NWI had completed the site earthwork in the Fall of 2004.* Given the number of months that had passed since NWI had completed the site earthwork, if any time limitations in the Project Contract applied, Sound Transit should have asserted or reserved the time requirements as a defense upon receipt of the June 2005 RFC. But Sound Transit did neither. The undisputed record affirms that Sound Transit determined the June 2005 RFC to be timely and

⁵ "Pg. 20" refers to Sheet 20 of the Project Plans, which is Drawing C3.04. CP 476 (lower right corner).

meritorious, both substantively and procedurally, under all applicable contract claim provisions.

F. Sound Transit Internal Documents Acknowledge NWI's Entitlement To Compensation For Additional Earthwork Under Article 4.

Sound Transit processed the June 2005 RFC under Article 4 of the Project Contract. As revealed in its own internal documents, Sound Transit repeatedly acknowledged the merit of the June 2005 RFC and NWI's entitlement to compensation for the additional earthwork. Never did Sound Transit contend the RFC was untimely or that it otherwise failed to comply with the contract claim procedures.

1. Sound Transit's Weekly Meeting Minutes Affirm The Merit Of NWI's RFC.

In all of its Weekly Meeting Minutes following receipt of the RFC in June 2005 through January 11, 2006 (Meeting Minutes No. 074, CP 501-507), Sound Transit tracked its internal processing of the additional earthwork RFC under Section 4.02.A, and its issuance of Change Order 12 on January 19, 2006. CP 504. Participants in these meetings included Sound Transit's Project Manager, Jerry Dahl; Resident Engineers from Harris and Associates (including Scott Perry); and representatives of the Project Engineer, KPFF. CP 501. At no time did Sound Transit assert any defense to the RFC based on NWI or PCL having failed to comply with procedural contract requirements, including any time limitations.

2. **NWI Entitlement To A Change Order Is Acknowledged In Sound Transit's Monthly Reports.**

In its Monthly Reports, Sound Transit addressed the additional earthwork RFC with no mention of any defense based on the contract claim provisions:

- August 2005 Monthly Report #13 (CP 509-514): “The contractor turned in a *change order request* for \$861,000 for additional earthwork which may have merit. Therefore, changes and potential changes to the contract equal approximately \$900,000....” CP 510 (emphasis added).
- November 2005 Monthly Report #16 (CP 516-522): “The contractor turned in a *change order request* for \$1.2 million for additional earthwork of which \$536,000 may have merit. Therefore, changes and potential changes to the contract equal approximately \$700,000.” CP 518 (emphasis added).

3. **Sound Transit's Change Order Request Issue Logs.**

Sound Transit also maintained a change order request tracking document during the Project, called the “Issue Log.” The Issue Log was updated monthly and listed issues arising on the Project that involved Requests for Change orders or the possibility of change orders being issued. The Issue Logs assigned a risk factor to each “issue” that could lead to a change order. CP 512-514. On the Issue Log updated effective September 7, 2005, the June 2005 RFC is identified as Issue 48; indicates

the status as “Pending Negotiations;”⁶ and assigns a chance of 7 out of 10 that a change order would be approved. CP 514. *Of the 66 issues appearing on the September 7, 2005 Issue Log, only one issue is highlighted by Sound Transit in bold: Issue 48, the June 2005 RFC. Id.*

4. **Sound Transit’s Change Order Review Board Approves The June 2005 RFC Without Reservation.**

Sound Transit submitted review of the June 2005 RFC to its “Capital Projects Change Control Board.” CP 524-526. The Board approved the RFC and NWI’s *entitlement* to compensation for additional earthwork without reservation. The only differences between the Board’s approval and NWI’s request: the dollar amount. Sound Transit was not willing to pay as much as requested and calculated by NWI and PCL. *Id.*

G. **In Correspondence With PCL, Sound Transit Affirms NWI’s Entitlement To Compensation For The Additional Earthwork.**

Sound Transit first responded to the June 2005 RFC by letter dated August 24, 2005. CP 528-530. In that letter, under the heading “**ENTITLEMENT**,” Sound Transit affirms the following:

PCL has requested compensation “for the additional earthwork above and beyond the quantities shown on Drawing C3.04.”

Sound Transit agrees that there is entitlement for the difference between the C3.04 earthwork quantities, and a

⁶ Sound Transit *never* entered into any negotiations concerning the June 2005 RFC, which ultimately resulted in Sound Transit issuing Change Order 12 unilaterally. The amount of the change order was a one-way determination made solely by Sound Transit.

reasonable theoretical earthwork quantities (TEQ), based on the Project documents, at the time of the bid.

CP 528. *Nowhere in Sound Transit's acknowledgement of entitlement letter does it assert any reservation or non-waiver of contract rights.*

H. In December 2005, Sound Transit Issues Proposed Change Order 12 In Accordance With Article 4.

In response to Sound Transit's August 24, 2005 letter, PCL/NWI submitted supplemental information by PCL letter dated October 19, 2005, which resulted in an increase in the cost calculation for the additional earthwork. CP 966-995.

NWI/PCL's supplemental RFC letter was reviewed by Sound Transit's Project Manager, Jerry Dahl; the resident engineer, Scott Perry; KPFF; and additionally, Sound Transit's legal counsel. CP 534-541; 875-882. In December 2005, Mr. Dahl and Mr. Perry co-authored a report to Sound Transit's in-house legal counsel with their recommendations to approve the requested change order. Mr. Dahl and Mr. Perry confirmed NWI's entitlement to compensation for the additional earthwork, explaining that the Drawing C3.04 earthwork specifications were in error and had misled bidders, including NWI and PCL:

...(the Drawing) included a note 'Site Earthwork Volumes' as 'Cut = 24,000 CY' and 'Fill = 16,000 CY'." It would seem reasonable for a bidder to rely on this quantity instead of performing an independent take-off. The construction project was bid as a lump sum project, which would mean

that all earthwork quantities would be the contractor's responsibility, however the note on the drawing (C3.04) mislead the bidders into assuming that the indicated quantities were the actual earthwork amounts.

CP 877. Sound Transit's counsel also reviewed and approved the content of the notification letter co-drafted by Mr. Dahl and Mr. Perry affirming approval of Change Order 12 for NWI's additional earthwork. CP 875-882.⁷

By letter dated December 16, 2005, under the word "ENTITLEMENT" in all bold and capital letters, Sound Transit acknowledged that NWI was entitled to payment for additional earthwork due to the errors in the Drawing C3.04 specification. Sound Transit stated it was prepared to pay by change order the sum of \$534,602.75, what it calculated as "full reimbursement" for all costs incurred by NWI for the additional earthwork. Accompanying Sound Transit's December 16, 2005 letter was proposed "Modification of Contract" (Change Order) No. 12. CP 534-541. *Noticeably absent from both the December 16, 2005 entitlement letter and proposed Change Order 12 is any reservation of rights, non-waiver, or other language preserving any contract-based*

⁷ During the lawsuit, Sound Transit withheld from NWI discovery of the Dahl/Perry report and related documents, claiming attorney-client privilege and work product. NWI was successful in obtaining a court order requiring Sound Transit to produce these documents. CP 873-874.

defense by Sound Transit - and this is after review of the documents by Sound Transit's legal counsel.

Although agreeing with Sound Transit's determination that NWI was *entitled* to recover its costs for the additional earthwork, NWI and PCL disagreed with Sound Transit's dollar amount to compensate for the additional earthwork. Sound Transit made no effort to negotiate the compensation amount of Change Order 12. By letter dated January 17, 2006, Sound Transit determined to process proposed Change Order 12 "unilaterally." CP 157-158; 548; 550-551. Change Order 12 was issued by Sound Transit on January 19, 2006. CP 550-551. Following issuance, Sound Transit paid PCL the sum of \$534,602.75, the full amount of Change Order 12. CP 253.

Change Order 12 was a formal modification to the Project Contract voluntarily and knowingly made by Sound Transit resulting in an increase to the Contract Price. As stated in Section 4.01.A of the Project Contract's General Conditions:

Sound Transit reserves the right to make by written order designated or indicated to be a Change Order, alterations to, deviations from, additions to, or deletions from the Contract Documents....Change Orders are required to make any changes to the Contract Price, Contract Documents, or Contract Time.

CP 454.

I. **PCL/NWI's Timely Submission Of A Notice Of Intent To Claim Under Article 10 For Underpayment Of The Additional Earthwork By Change Order 12.**

Section 4.04.C and .D of the General Conditions afforded PCL/NWI the right to submit a claim under Article 10 of the Project Contract in the event the contractors disagreed with the dollar amount of a Sound Transit unilateral change order. CP 457-458. NWI, through PCL, timely exercised this contract right. PCL/NWI provided Sound Transit with a "Notice of Intent to Claim" letter dated January 27, 2006 ("the January 2006 Article 10 Claim"). CP 553. The January 2006 Article 10 Claim made clear that it was submitted in compliance with Section 10.01.A.3 of the Project Contract General Conditions, and that the claim was for additional earthwork *compensation* beyond the amount stated in Change Order 12:

Please accept this letter as PCL's written "notice of to intent to claim" (sic) with respect to ***additional earthwork compensation***. Specifically, specification section 00200 10.01 A.3 requires the submission of this intent within 10 days of the issuance of a unilateral change order. Change Order #12 dated December 16th and received on January 27th is a unilateral change order that required the issuance of this Notice.

* * *

We shall be submitting the justification for this claim within 60 days per the requirement of the Contract Documents.

CP 553 (emphasis added).

Within 60 days after issuance of the January 2006 Article 10 Claim, PCL and NWI were required to submit a claim justification package to Sound Transit. CP 465-466 (Section 10.01.B.1.a). By letter dated March 27, 2006, within the contract-mandated 60 day period, PCL and NWI submitted this package. CP 1197-1501. The cover letter with the claim package states that the submission is made pursuant to Section 10.01.B.1.a of the Project Contract. CP 1197.

As to NWI's January 2006 Article 10 Claim, Sound Transit and PCL never asserted that NWI had not complied with either the subcontract or main contract requirements concerning the submission of claims, including the timing of claim submissions. Nor did Sound Transit or PCL assert non-waiver or any reservation of rights based on the contract claim provisions.

After receiving the claim package on March 27, 2006, Sound Transit did two things:

- Sound Transit made a claim against KPFF for negligence/professional malpractice for the defective earthwork specifications found in Drawing C3.04. CP 484-489.
- Sound Transit also sent PCL/NWI written demand for document review and an audit of the January 2006 Article 10 Claim. CP 571-575. The audit would be performed by Sound Transit's auditors, Navigant Consulting. CP 575.

During the audit process, Sound Transit's consultant Ron Maus of Navigant Consulting reached the same conclusion as had Mr. Dahl and Mr. Perry in their December 2005 report submitted to Sound Transit's counsel concerning the merits of the June 2005 RFC. CP 482. According to Mr. Maus, NWI was entitled to Change Order 12 due to the errors in Drawing C3.04 that adversely impacted all bidders on the Project, including NWI. *Id.* As will be explained below, *the Navigant audit revealed that NWI remained unpaid nearly an additional \$600,000 in costs for the additional earthwork, over and above the amount paid by Change Order 12, excluding project retainage.*

J. Sound Transit's Denial Of The January 2006 Article 10 Claim Was Not Based On Noncompliance With Contract Claim Notice Requirements.

Sound Transit denied the January 2006 Article 10 Claim in a letter dated December 7, 2006 from its legal counsel, Lane Powell. CP 597-602. *The letter plainly states the denial was solely because NWI's subcontract did not specifically refer to earthwork quantities.* CP 600. Sound Transit did not deny the claim on grounds it was untimely or that PCL or NWI failed to follow the claim notice requirements or other procedures found in Articles 4 or 10 of the Project Contract. CP 597-602.

K. NWI's Compliance With The Dispute Resolution And Mediation Procedures Imposed By Article 11.

1. The Parties Agree To A Mediator.

Following denial of the January 2006 Article 10 Claim, Article 11 of the Project Contract imposed a dispute resolution process as a condition precedent to formal litigation. Sound Transit did not establish a Dispute Resolution Board for the Project. Accordingly, the only dispute resolution procedure imposed under Article 11 was mediation in accordance with Section 11.04.B.2. CP 604-605. Through an exchange of correspondence, the parties agreed on Christopher Soelling to serve as mediator. CP 608-609.

2. NWI Seeks The Navigant Audit Report For Use At Mediation.

In its December 7, 2006 claim denial letter, Sound Transit asserted that NWI had been overpaid by Change Order 12 in the amount of \$186,933.23. CP 601. Sound Transit unequivocally represented that this determination had been made in Navigant's audit report. Although repeatedly citing to it, Sound Transit did not enclose the audit report with its December 2006 denial letter.

Before the Article 11 mediation, NWI sought access to the Navigant audit report by a public records request pursuant to RCW Ch. 42.56. CP 611-629. Sound Transit initially resisted production of the

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Navigant audit report on grounds of privilege and work product, but eventually relented and produced the document. CP 631-683. *In their April 24, 2007 letter producing the audit report (CP 653-683), Sound Transit's counsel admitted they had made an error in their December 7, 2006 claim denial letter when asserting NWI had been overpaid \$186,933.23 by Change Order 12. Sound Transit's counsel corrected themselves, now acknowledging the Navigant audit had actually determined NWI remained unpaid \$578,685 in costs actually incurred for the additional earthwork over and above the amount paid by Change Order 12.*⁸ CP 653. The \$578,685 in unpaid additional earthwork costs identified by Sound Transit's auditors did not include \$122,441 of contract retainage that still remains unpaid to NWI. *Id.*

L. The Post Article 11 Mediation Correspondence Exchanged Between Sound Transit And PCL Confirm The Absence of Any Contract Claim Defense.

The Article 11 mediation was held on August 1, 2007, and failed. Following the mediation, PCL and Sound Transit exchanged a series of letters. CP 692-693; 695-698. None of those letters describe any defense to the January 2006 Article 10 Claim based on failure to comply with contract notice procedures. Sound Transit blames and holds PCL responsible for a portion of NWI's additional earthwork claim. Sound

⁸ The amount paid in Change Order 12 is the sum of \$534,602.75. CP 550-551.

Transit points the finger at PCL for directing the stockpiling and movement of stockpiled materials from point to point to point on Project site. CP 692-693. PCL responds, attributing the stockpiling of excessive materials as being necessitated by the increased volumes of earthwork omitted from Sound Transit's Project plans: "Stockpiling and moving material would allegedly not have been necessary if earthwork volumes had been as represented in Sound Transit's plan and specifications. CP 696.

M. On Two Separate Occasions Following Issuance Of Change Order 12, Sound Transit Affirmatively And Expressly Waived Any Contract Claim Time Requirements.

Not once, but twice, did Sound Transit affirmatively waive in writing any contract time requirement defense to NWI's claim. The first express waiver was during the contract claim process for the January 2006 Article 10 Claim. By letter dated November 27, 2006, Sound Transit asserted it could reject that claim as "untimely" based on NWI's amendment to the dollar amount during the Navigant audit. CP 891-893. Notwithstanding its assertion that such a defense existed, Sound Transit affirmatively waived the timeliness defense in writing:

Sound Transit would be within its contractual rights if it rejected the Claim as untimely because the amount of the Claim fluctuated wildly for months.... However, Sound Transit has not done so, despite the fact that Navigant (Sound Transit's auditor) has been forced to expend

significant effort reviewing and analyzing cost and claim information that was superseded by NWI.

CP 892. Two weeks later, Sound Transit denied NWI's claim without relying upon any procedural contract defenses. CP 597-602.

Sound Transit's second express waiver came a short time later in the Article 11 ADR process. Article 10.01.B.2 required the contractors to notify Sound Transit of their request for mediation under Article 11 within ten days following Sound Transit's December 7, 2006 claim denial. PCL did not notify NWI until January 3, 2007 that Sound Transit had made its claim determination. CP 586; 588-589; 594-595. Knowing it had a time problem, PCL asked Sound Transit for relief from the contract time requirements for notice. CP 588-589.

Even though it had a defense that would have foreclosed Article 11 mediation (and a condition precedent to this lawsuit), Sound Transit affirmatively waived in writing any time requirements imposed by Article 10 or 11:

Although it is clear that Sound Transit's response to PCL's (January 2006 Article 10 Claim) was properly delivered on December 7, 2006, Sound Transit has no objection to permitting the period for any response to begin running as of January 3, 2007.

CP 591.

N. **NWI's Claims In This Lawsuit And The Trial Court's Summary Judgment Ruling.**

Based on its January 2006 Article 10 Claim for underpayment by Change Order 12, NWI filed its complaint in this action in March 2009. CP 1-14. Because of contract privity rules governing claims on public works projects, NWI asserted claims only against PCL seeking recovery for the unpaid costs of the additional earthwork.⁹ PCL "passed-through" NWI's claim to Sound Transit by third party complaint. CP 15-22.

1. **Sound Transit's "Two Front" Defense To NWI's Claim.**

Sound Transit responded to NWI's claim on two different fronts. On one front, Sound Transit sought to revoke Change Order 12 itself by contract rescission theories and recover what it previously paid on the change order. On the other front, Sound Transit opposed NWI's claim for additional earthwork compensation beyond Change Order 12's dollar amount, asserting it was untimely under procedural contract requirements. The problem with Sound Transit's two front defense is that each directly contradicts and forecloses the other.

⁹ The economic loss/contract privity rules are established under *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994); *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wash. App. 192, 49 P.3d 912 (2002); and *Lobak Partitions, Inc. v. Atlas Const. Co., Inc.*, 50 Wash. App. 493, 749 P.2d 716 (1988).

2. **On One Front, Sound Transit Seeks To Rescind Change Order 12 Without Reference To *Mike M. Johnson*.**

To set aside Change Order 12 itself, Sound Transit responded with counterclaims against PCL and cross-claims against NWI. Sound Transit argued that it was entitled to rescission of Change Order 12 nearly five years after it was issued on grounds of unilateral mistake and fraudulent misrepresentations relating to NWI's original earthwork bid to PCL for the Project. Sound Transit asserted contract-based counterclaims against PCL, and cross-claims against NWI sounding in tort.¹⁰ CP 23-24. Nowhere does Sound Transit assert *Mike M. Johnson* principles to rescind the issuance of Change Order 12 based on the underlying June 2005 RFC being "untimely." Sound Transit's pleadings recognized that after it had modified the Project Contract by issuing Change Order 12, the only way the change order could be "undone" was by rescission. CP 27-30. Sound Transit understood its issuance of the change order forever extinguished any procedural contract defense to the June 2005 RFC.

NWI successfully obtained dismissal of Sound Transit's fraud-based cross-claims by summary judgment order, effectively precluding respondent's rescission claims involving Change Order 12. CP 2731-

¹⁰ Sound Transit was limited to asserting tort claims against NWI because of contract privity rules. See footnote 9, *supra*.

2732; 2943-2950. That ruling is now being appealed by Sound Transit in the companion appeal under Court of Appeals No. 6-68706.

3. **On The Other Front, Sound Transit Defends The January 2006 Article 10 Claim By Arguing It Was “Untimely.”**

Sound Transit took an entirely different route in defending NWI’s additional earthwork compensation claim in its summary judgment motion. Sound Transit did not argue that NWI’s January 2006 Article 10 Claim (the basis for appellant’s additional compensation claim) in and of itself was untimely or otherwise failed to follow procedural contract requirements under *Mike M. Johnson*. Rather, Sound Transit asserted it had “discovered” after the fact that the June 2005 RFC had been untimely when made. Sound Transit argued it could, in essence, attach the alleged untimeliness of the RFC to the later January 2006 Article 10 Claim, thereby making the latter claim untimely.

Sound Transit based its argument on the following allegations: NWI had completed its earthwork in the Fall of 2004, months before submitting the June 2005 RFC. The RFC was too late because NWI was required to have submitted a written Notice of Intent to Claim under Article 10 within ten days of discovering months earlier that more than 24,000 cubic yards of soil had been excavated. CP 92-93. Sound Transit’s motion was based on two sources of information: (1) deposition

testimony of NWI's president, Hal Johnson, confirming that his company had learned it was excavating more than 24,000 cubic yards of soil months before the submission of the June, 2005 RFC; and (2) the declaration of Gerald Dahl, in which he states:

Prior to (PCL/NWI's) June 28, 2005 letter, Sound Transit had not received written notification of this claim. ***Not having knowledge of when NWI first discovered this error, Sound Transit responded to PCL's request for additional compensation and agreed to compensate NWI for the additional quantities, but calculated NWI's compensation differently.***

CP 157. Mr. Dahl's declaration fails to state that Sound Transit was well aware of the fact that NWI's site earthwork had been completed in the Fall of 2004, months before respondent received the June 2005 RFC.

Remarkably, PCL joined in Sound Transit's motion and sought dismissal of NWI's claims on the same *Mike M. Johnson* grounds asserted by Sound Transit. PCL likewise argued that NWI's claim based on the January 2006 Article 10 Claim was barred because NWI had failed to timely follow the procedural contract requirements in both the Project Contract and the PCL/NWI subcontract ***when it originally submitted the June 2005 RFC***. CP 235-250. PCL made this argument notwithstanding the deposition testimony of its 30(b)(6) designee, Mr. Hornland, affirming that NWI had followed all contract procedures applicable to the June 2005 RFC, including any time requirements. CP 417-443.

In response to the Sound Transit and PCL motions, NWI filed a cross-motion for summary judgment seeking determination that respondents' *Mike M. Johnson* defense did not apply to NWI's claims, and affirming that the January 2006 Article 10 Claim fully complied with any procedural contract requirements.

The trial court denied NWI's cross-motion, and granted the Sound Transit and PCL motions. CP 928-933. Citing *Mike M. Johnson* and related precedent, the trial court dismissed NWI's claim that Change Order 12 underpaid the cost of the additional earthwork for the following reasons:

The Court finds that NWI's failure to comply with the contract documents and mandated notice-claim procedures was not excused by the unequivocal conduct of Sound Transit; Sound Transit expressly asserted that it was not waiving or surrendering its established contractual rights or defenses.

CP 933. The trial court's order did not identify how, when, or where Sound Transit had expressly asserted non-waiver of any contract rights or defenses.

Following the summary judgment ruling, NWI filed a motion for reconsideration and motion to vacate the trial court's order. CP 934-945; 2416-2539. Both motions were denied. CP 2060-2062; 2728-2730. The trial court subsequently granted Sound Transit's motion for an award of

attorneys' fees against NWI for dismissal of petitioner's January 2006 Article 10 Claim. CP 2726-2727. The fee award was based on RCW 39.04.240. *Id.* This timely appeal ensued. CP 2960-2990.

V. ARGUMENT

A. The Trial Court's Summary Judgment Ruling Must Be Reversed; As A Matter Of Law, NWI Was Entitled To Summary Judgment On Its Cross-Motion.

1. Standard Of Review.

When reviewing a summary judgment order, the appellate court engages in the same inquiries as the trial court, determining whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Trimble v. Washington State University*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000) The appellate court reviews a summary judgment *de novo* and engages in the same inquiry as the trial court. *Keith v. Allstate Indemnity Co.*, 105 Wn. App. 251, 19 P.3d 1077 (2001). The appellate court considers all facts and reasonable inferences from them in the light most favorable to the non-moving party, and the motion should be granted only if from all the evidence, reasonable persons could reach but one conclusion. *Trimble*, 140 Wn.2d at 93; *Clements v. Travelers Indemnity Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

NWI filed two motions following the trial court's initial summary judgment ruling; a motion for reconsideration; and a subsequent motion to

vacate the summary judgment ruling. For purposes of the appellate court's *de novo* review, the record on appeal includes any materials considered by the trial court on the initial summary judgment motion, and any additional materials considered in subsequent motions for reconsideration. *Tanner Electric Cooperative v. Puget Sound Power and Light Company*, 128 Wn.2d 656, 675, n. 6, 911 P.2d 1301 (1996); *Rodriguez v. City of Moses Lake*, 158 Wn. App. 724, 728, 243 P.3d 552 (2010); *Jacob's Meadow Owner's Association v. Plateau, 44 II, LLC*, 139 Wn. App. 743, 754-756, 162 P.3d 1153 (2007). The materials considered by the trial court are identified in its initial summary judgment order, CP 928-933; the order on NWI's reconsideration motion, CP 2660-2662; and the order on NWI's motion to vacate, CP 2728-2730. NWI has referred to and relied upon this entire record in this brief, including the Statement of Facts.

2. **As A Matter Of Law, NWI's Cross-Motion For Summary Judgment Should Have Been Granted; The Trial Court Misapplied *Mike M. Johnson* In Granting Summary Judgment In Favor Of Respondents.**

Under Washington law, procedural contract requirements will be enforced absent either a waiver by the benefitting party or an agreement between the parties to modify the contract. *Mike M. Johnson*, 150 Wn.2d at 387. *See also, American Safety Casualty Ins. Co. v. City of Olympia*,

162 Wn.2d 762, 770, 174 P.3d 54 (2007). Waiver of procedural contract requirements can be express or implied by conduct. Waiver by conduct requires unequivocal acts of conduct evidencing an intent to waive. *Mike M. Johnson*, 150 Wn.2d at 386; *American Safety*, 162 Wn.2d at 770.

NWI's only affirmative claim before the trial court was based upon its January 2006 Article 10 Claim, i.e. that Change Order 12 underpaid NWI for the actual cost of the additional earthwork. Under Article 10 of the Project Contract, NWI's challenge to the dollar amount of Change Order 12 required: (1) Notice of Intent to Claim within 10 days after issuance of the unilateral change order (Section 10.01A.3), and (2) per Section 10.01B.1.a, submission of a claim package within 60 days after providing Notice of Intent to Claim. Neither Sound Transit nor PCL dispute that the January 2006 Article 10 Claim, standing alone, fully complied with all procedural contract requirements. Sound Transit did not assert noncompliance with the Article 10 procedures or any other contract requirements in its December 2006 claim denial.

Unable to argue a contract procedure defense to the January 2006 Article 10 Claim, both Sound Transit and PCL conjured up a circular, illogical syllogism to challenge NWI's underpayment claim, which was erroneously accepted by the trial court. Respondents implausibly argued that NWI's June 2005 RFC was "untimely," and because the RFC was

untimely, that untimeliness attached to the later and unrelated January 2006 Article 10 Claim and made it untimely as well. However, Sound Transit and PCL do not argue that the alleged “untimely” June 2005 RFC also invalidated Change Order 12 itself.

There are five reasons why respondents’ arguments did not support entry of summary judgment dismissing NWI’s claim for additional compensation based on its January 2006 Article 10 Claim, and which required the trial court to grant petitioner’s cross-motion. First, Sound Transit’s modification of the Project Contract by Change Order 12 precluded any later procedural contract defenses connected to issuance of the change order. Second, by previously expressly waiving in writing any timeliness defense to the January 2006 Article 10 Claim, Sound Transit was precluded from later asserting the same defense. Third, Sound Transit’s unequivocal conduct established waiver of any contract defenses relating to the June 2005 RFC and Change Order 12. Fourth, the undisputed facts establish NWI complied with all contract requirements regarding the June 2005 RFC even if that remained relevant after Change Order 12 issued. Finally, Sound Transit’s separate rescission claims involving Change Order 12 precluded any *Mike M. Johnson* defense.

a) **Modification Of The Project Contract By
Change Order 12 Made Irrelevant And Moot
Any Mike M. Johnson Defense.**

Upon issuing Change Order 12, Sound Transit formally modified the Project Contract per Section 4.01.A, making moot and irrelevant any contract procedural defenses to the earlier June 2005 RFC.¹¹ *Mike M. Johnson*, 150 Wn.2d at 386-87 (procedural contract procedures enforced absent modification of the parties' contract). Even if discovered "after the fact" by Sound Transit and PCL, any timeliness defense to the June 2005 RFC could not be revived and reanimated after issuance of Change Order 12, and then later attached to an unrelated, independent claim (i.e. the January 2006 Article 10 Claim) that otherwise complied with contract claim requirements. Respondents effectively argue that the January 2006 Article 10 Claim could be later "infected" by a previously dormant "untimeliness virus" carried by the unrelated June 2005 RFC. *Mike M. Johnson* cannot be interpreted to allow such a bizzare and patently absurd result.

¹¹ Likewise, upon issuing its Change Order No. 24 (CP 1306-1307) incorporating Sound Transit's Change Order 12 into the PCL/NWI subcontract, PCL likewise made moot any defense it may have had based on NWI's alleged non-compliance with subcontract procedural requirements.

b) **Sound Transit's Express Waiver Of Any Timeliness Defense Based On Procedural Contract Requirements.**

Sound Transit twice waived, in writing, any defense that NWI's claim was untimely under procedural contract requirements. CP 591; 891-893. Once made, waiver of a contract right is irrevocable and the right cannot be later revived:

No matter how the waiver occurs, if once made it cannot be revoked by the waiving party. The effect of a waiver, as applied in the law of contracts, is to remove entirely from the contract that requirement which has been waived. The result is the same as though such requirement was never called for at all.

Payne v. Ryan, 183 Wash. 590, 595, 49 P.2d 53 (1935). *See also, Tri-City Jewish Center v. Blass Riddick Chilcote*, 512 NE2d 363, 366 (Ill. App. 1987); *CJS Estoppel*, §93. Respondents impermissibly attempted to revoke Sound Transit's waiver of the procedural contract time requirements by reverting back to the June 2005 RFC. Once waived, all timeliness defenses under the contract were barred, regardless of the factual basis for the defense.

c) **Sound Transit's Unequivocal Conduct Waived Any Procedural Contract Defenses.**

Any defense that NWI's June 2005 RFC did not comply with contract procedures had been waived by Sound Transit's unequivocal conduct surrounding the RFC and Change Order 12. Sound Transit's

conduct could not have been more unequivocal in establishing waiver.

Sound Transit:

- (1) acknowledged in writing NWI's entitlement to Change Order 12 not once, but twice;
- (2) issued Change Order 12 after review by
 - (a) the Capital Project Change Control Board;
 - (b) Sound Transit's in-house counsel;
 - (c) Harris and Associates, the owner's resident engineer; and
 - (d) the owner's project engineer, KPFF;
- (3) voluntarily paying Change Order 12; and
- (4) never asserting any oral or written reservation of rights or non-waiver of contract defenses at any time, either before or after issuance of Change Order 12.

Sound Transit's unequivocal waiver is further established by the declaration of Sound Transit's Project Manager Jerry Dahl. He testifies that respondent *agreed* to compensate NWI for additional earthwork and *agreed* to issue a change order for the extra work. CP 157 (Dahl Decl. at ¶¶15, 18).

d) The Undisputed Facts Demonstrated NWI's Compliance With The Applicable Procedural Contract Requirements.

The record establishes that the June 2005 RFC did timely comply with applicable procedural contract requirements. Sections 4.02.A, 10.01.A.2(a), and 10.01.A.3 of the Contract General Provisions provided that a contractor claim was not to be submitted to Sound Transit until the

reasons could be specified in the claim notice, including discovery of any acts or omissions of Sound Transit supporting a claim. The specific reasons and the acts and omissions of Sound Transit giving rise to the additional earthwork claim were defects in Drawing C3.04. The defects and errors were first discovered in June 2005, only after NWI obtained the results of digital analysis of the Project plans by Earthwork Services. *See, Weber Const., Inc. v. Spokane County*, 124 Wn. App. 29, 34, 98 P.3d 60 (2004) (contractor deemed to comply with claim requirements when it was precluded from submitting its claim until information supporting the claim was available).

It is disingenuous for Sound Transit to claim through the Dahl Declaration that it was not until the deposition of Hal Johnson in February 2010 that respondent “first learned” when NWI had discovered the additional earthwork. Mr. Johnson’s deposition testimony was neither an epiphany nor a revelation to Sound Transit, or anyone else observing the Project site, including Sound Transit’s on-site resident engineers from Harris and Associates. Sound Transit knew that NWI had completed the site earthwork in the fall of 2004, well before receiving the June 2005 RFC. If there was a timeliness defense available to Sound Transit, it would have been asserted long before issuance of Change Order 12.

e) **Sound Transit's Rescission Claims Involving Change Order 12 Precludes *Mike M. Johnson* Argument.**

The sole underpinning of NWI's January 2006 Article 10 Claim is the underpayment of the additional earthwork costs in Change Order 12. The Article 10 claim rises and falls with Change Order 12, not the June 2005 RFC. Any Sound Transit defense to the RFC became moot once Sound Transit issued the change order.

In this action, Sound Transit has limited its legal challenge to Change Order 12 *to rescission claims only*. Sound Transit's Change Order 12 rescission claim is acknowledgment that it has no *Mike M. Johnson* defense to the change order. Otherwise, Sound Transit would have argued (albeit unsuccessfully) that Change Order 12 was also made ineffective because the June 2005 RFC was "untimely." Absent a *Mike M. Johnson* defense to Change Order 12, there can be no similar defense to NWI's underpayment claim based on the change order.

B. **The Trial Court Improperly Awarded Attorneys' Fees Under RCW 39.04.240 In Favor Of Sound Transit Against NWI.**

1. **Standard of Review.**

NWI challenges the trial court's application of RCW 39.04.240 in awarding attorneys' fees and costs in favor of Sound Transit. Whether a statute applies to a factual situation is a question of law subject to *de novo* review. *Mackey v. America Fashion Institute Corp.*, 60 Wn. App. 426,

429, 804 P.2d 642 (1991) (whether RCW 4.84.250 (incorporated in RCW 39.04.240) afforded defendants a right to attorneys' fees subject to *de novo* review). *See also, Villas at Harbour Pointe Owners Assn. v. Mutual of Enumclaw*, 137 Wn. App. 751, 758, 154 P.3d 950 (2007); *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wn. App. 881, 887, 658 P.2d 1267 (1983).

2. RCW 39.04.240 Did Not Apply Because NWI Did Not Assert Any Affirmative Claims Against Sound Transit.

RCW 39.04.240 applies only to direct claims of an adverse party that arise from a public works contract. Sound Transit and NWI did not have any direct contract claims against the other based on the Project Contract. Accordingly, the statute does not apply and cannot serve as basis for a fee award against NWI. This lawsuit was commenced as a breach of contract action between NWI and PCL arising from the party's construction subcontract for the Federal Way Transit Center Project. The only damages asserted and recoverable by NWI from PCL are for underpayment of additional earthwork performed by NWI under the terms of its subcontract. The only party that can be liable to NWI for the cost of that extra work is PCL based on the economic loss/contract privity rules established under *Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994); *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192, 49 P.3d 912 (2002); and *Lobak*

Partitions, Inc. v. Atlas Const. Co., Inc., 50 Wn. App. 493, 749 P.2d 716 (1988).

Under *Berschauer*, *Donald B. Murphy*, and *Lobak*, NWI could not sue Sound Transit for any claims arising under the Project Contract, nor could Sound Transit sue NWI for claims based on the public works contract. Privity of contract was required, which was absent as between Sound Transit and NWI.

3. **Even If RCW 39.04.240 Applied, Sound Transit Failed To Follow Statutory Notice Requirements That Were Conditions Precedent To An Award Of Fees.**

By the express terms of RCW 39.04.240, the provisions of RCW 4.84.250 through 4.84.280 (and related jurisprudence) apply to any request for attorneys' fees made under the statute.¹² Accordingly, the requirements under RCW 4.84.250 et. seq. for providing actual notice are incorporated into RCW 39.04.240. It is well established that the party from whom fees are sought must receive actual notice from the opposing party that it may be subject to fees under the statute. That notice must be provided *before* the dispositive ruling or judgment that is the basis for the opposing party's request for a fee award. *Beckmann v. Spokane Transit*

¹² Under RCW 39.04.240, the only exception to the application of RCW 4.84.250-280 are (a) the maximum dollar limitation in RCW 4.84.250 does not apply, and (b) in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be a period not less than 30 days and not more than 120 days after completion of the service and filing of the summons and complaint. RCW 39.04.240(1).

Authority, 107 Wn.2d 785, 788-89, 733 P.2d 960 (1987); *Lay v. Hass*, 112 Wn. App. 818, 824-25, 51 P.3d 130 (2002); *Public Utility District No. 1 of Grays Harbor County v. Crea*, 88 Wn. App. 390, 393-94, 945 P.2d 722 (1997).

Sound Transit failed to give any notice to either PCL or NWI that it intended to seek fees under RCW 39.04.240. No notice was provided in Sound Transit's responsive pleadings. Nor was any other written notice provided at any time during the pendency of this action, including an actual offer of settlement made under RCW 39.04.240. CP 2072-2108.

a) **Sound Transit Did Not Provide Notice Of Intent To Seek Fees Under RCW 39.04.240 In Its Responsive Pleading.**

Sound Transit's responsive pleadings do not provide notice of intent to seek fees under RCW 39.04.240 against either PCL or NWI. The statute is not cited nor pled in Sound Transit's responsive pleading to PCL's third party complaint, including counterclaims against PCL; the cross-claims against NWI; or in Sound Transit's request for relief. CP 23-24. The only fee statute noticed in Sound Transit's pleading is RCW 19.86.090 under the Washington Consumer Protection Act. CP 32.

Sound Transit also filed a responsive pleading and amended responsive pleading to NWI's tort and statutory based cross-claims unrelated to the public works contract. CP 48-56; 919-927. Absent in

both its original and amended pleadings is any affirmative claim or request for relief by which Sound Transit requests *any award of fees*. Devoid from either pleading is any notice of intent to seek a fee award under RCW 39.04.240. *Id.*

b) **Independent Of Its Responsive Pleadings, Sound Transit Did Not Provide Actual Notice Of Intent To Seek Fees And Costs Under RCW 39.04.240.**

A party is not required to affirmatively plead the fee statute in its responsive pleading. However, if not pled a party must provide other actual notice of intent to rely on the statute before trial or summary judgment ruling, thereby putting the opposing party on notice of the risk of attorney fee assessment. *Lay*, 112 Wn. App. at 824-825 (actual notice must be provided before trial court files ruling on summary judgment motion); *PUD No. 1*, 88 Wn. App. at 394 (actual notice must be provided before trial). Outside of a party's pleadings, actual notice can be in the form of an offer of settlement or other prior written notice of intent to seek attorneys' fees under the statute. *PUD No. 1*, 88 Wn. App. at 395.

Here, Sound Transit provided no actual notice whatsoever that it would seek fees under RCW 39.04.240, written or even verbal. CP 2073. The first and only notice of intent to seek fees under the statute is Sound Transit's fee motion filed on July 23, 2010. *Id.* The "notice" was provided *after* the Court's summary judgment ruling, which is the sole

basis for Sound Transit's claim for fees under RCW 39.04.240. The fee motion does not qualify as actual notice required under the statute.

4. **PCL Did Not Put NWI On Notice Of Any Claim To Fees Under RCW 39.04.240.**

Likewise, PCL at no time put NWI on notice that it would seek recoupment of fees and costs under RCW 39.04.240, on a pass-through basis or otherwise. There is no notice of the statute in PCL's responsive pleadings. CP15-22; 57-62. PCL at no time provided any "pass-through" notice to NWI that Sound Transit intended to seek fees from PCL under RCW 39.04.240. CP 2073. PCL's failure to provide NWI with actual notice of a possible fee award under the statute further precludes NWI's liability for any Sound Transit attorneys' fees based on the statute.

5. **Sound Transit Failed To Comply With The Ten Day Filing Requirement Of Civil Rule 54(d), Thereby Barring Its Motion For Attorneys' Fees And Costs.**

Civil Rule 54(d)(2) provides:

(2) Attorneys' Fees and Expenses. Claims for attorneys' fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. ***Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.*** (Emphasis added.)

Sound Transit based its request for attorneys' fees and costs on the Court's summary judgment ruling issued on May 20, 2010. CP 2063-2071. Civil

Rule 54(d)(2) required Sound Transit to file its attorney fee motion no later than Tuesday, June 1, 2010.¹³ Sound Transit's motion was untimely under the court rule, and therefore barred.

C. **NWI Is Entitled To An Award Of Attorneys' Fees And Costs On Appeal.**

NWI requests an award of attorneys' fees and costs on appeal against PCL and the contractor's bond issued by Fidelity and Deposit Company of Maryland. NWI's entitlement to a fee award is based on RCW 39.08.030, and Section 12.8.4 of the PCL/NWI subcontract. CP 101-123 (at 119).

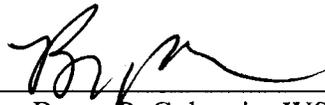
VI. **CONCLUSION**

The trial court erroneously granted summary judgment in favor of Sound Transit and PCL dismissing NWI's claim for additional earthwork compensation, and wrongly denied NWI's cross-motion. The Court should reverse the trial court's summary judgment ruling, direct entry of summary judgment in favor of NWI on its cross-motion, and reinstate petitioner's additional compensation claim on remand. The Court should further reverse the trial court's award of attorneys' fees and costs in favor of Sound Transit against NWI under RCW 39.04.240. Finally, NWI is entitled to a fee award on appeal as requested.

¹³ Although June 1, 2010 is 12 days following the date of the Court's summary judgment ruling, Monday, May 31, 2010 was a Court holiday. CP 828-833.

RESPECTFULLY SUBMITTED on May 23, 2011.

CABLE LANGENBACH KINERK &
BAUER, LLP

By  _____
Bryan P. Coluccio, WSBA 12609
Attorneys for Plaintiff/Respondent
Northwest Infrastructure, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2011, I caused the foregoing document to be served on the following counsel of record, via first class U.S. mail, postage prepaid:

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APPENDIX 1

RCW 4.84.250 - Attorneys' fees as costs in damage actions of ten thousand dollars or less — Allowed to prevailing party.

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

RCW 4.84.260 - Attorneys' fees as costs in damage actions of ten thousand dollars or less — When plaintiff deemed prevailing party.

The plaintiff, or party seeking relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250 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, as set forth in RCW 4.84.280.

RCW 4.84.270 - Attorneys' fees as costs in damage actions of ten thousand dollars or less — When defendant deemed prevailing party.

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280.

RCW 4.84.280 - Attorneys' fees as costs in damage actions of ten thousand dollars or less — Offers of settlement in determining.

Offers of settlement shall be served on the adverse party in the manner prescribed by applicable court rules at least ten days prior to trial. Offers of settlement shall not be served until thirty days after the completion of the service and filing of the summons and complaint. Offers of settlement shall not be filed or communicated to the trier of the fact until after

judgment, at which time a copy of said offer of settlement shall be filed for the purposes of determining attorneys' fees as set forth in RCW 4.84.250.

RCW 39.04.240 - Public works contracts — Awarding of attorneys' fees.

(1) The provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party, except that: (a) The maximum dollar limitation in RCW 4.84.250 shall not apply; and (b) in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.

(2) The rights provided for under this section may not be waived by the parties to a public works contract that is entered into on or after June 11, 1992, and a provision in such a contract that provides for waiver of these rights is void as against public policy. However, this subsection shall not be construed as prohibiting the parties from mutually agreeing to a clause in a public works contract that requires submission of a dispute arising under the contract to arbitration.

APPENDIX 2



Invitation for Bid
CONSTRUCTION OF THE FEDERAL WAY
TRANSIT CENTER

IFB NO. RTA/RE 17-04

Volume 1 of 4

Instructions
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Forms

MARCH 2004

ARTICLE 4 CHANGES AND CHANGE ORDER PROCESS

4.01 CHANGES

- A. General. Sound Transit reserves the right to make by written order designated or indicated to be a Change Order, alterations to, deviations from, additions to, or deletions from the Contract Documents. Such Change Orders may be made without notice to any surety(ies) or guarantors. Within the Performance and Payment Bonds and any financial guarantees, the surety(ies) and guarantors must waive notice of any Change Orders and agree to be bound in all ways to Sound Transit for any such Change Orders as if it (they) had received notice of the same. Change Orders are required to make any changes to the Contract Price, Contract Documents, or Contract Time. All additions, deductions, or changes to the Work as directed by Change Orders shall be executed under the conditions of the original Contract.
- B. Changes in the Work, within the general scope of the Contract, may be the results of, but not limited to, changes in any of the following:
1. Specifications, drawings, and designs.
 2. Method, manner, or timing of the performance of Work.
 3. Sound Transit furnished facilities, goods, services, or worksite.
 4. Contract Milestones.
 5. Value Engineering.
- C. The Contractor shall continue to work during the change process in a diligent and timely manner as directed by Sound Transit, and shall be governed by all applicable provisions of the Contract.
- D. Adjustments in the Contract Price. The value of any work covered by a Change Order shall be negotiated by Sound Transit and the Contractor to determine an equitable adjustment of the Contract Price. An increase or decrease in the Contract Price will be determined in one of the following ways:
1. Where the Work involved is covered by unit prices contained in the Contract Documents, by application of unit prices to the quantities involved in the changed Work;
 2. Where provisional sums are provided for work items, the provisional sums shall be applied to changes for those work items;
 3. By establishment of new unit prices and related quantities for the changed work;
 4. By reference to catalog prices or other published prices offered to the public in the open marketplace;
 5. By mutual acceptance of a lump sum;
 6. On a time and materials basis in accordance with Section 9.09, Payment on a Time and Material Basis.

- E. All Change Orders (CO) and Change Notices (CN) shall be issued through the Resident Engineer. No other order, statement, act of omission or conduct of any representative of Sound Transit or third party will be treated as a change hereunder. Nothing in this Article shall be construed to bind Sound Transit for acts of its employees or agents exceeding their authority.
- F. Nothing in this Article shall be deemed to require a change in Contract Price when additional, extra, or changed work is the result of actual conditions or performance differing from that assumed by the Contractor (except for differing site conditions) or as a result of the Contractor's error in judgment or mistake in designing, estimating, contracting, constructing or otherwise performing the Work. The Contractor shall not be entitled to a change in the Contract Price for delays caused by the Contractor or its Subcontractors, employees, or agents or for any non-compliance with any Contract provisions, applicable law, regulations, or permit requirements affecting the Work.
- G. The Contractor's records pertaining to Changes pursuant to this Article are subject to audit as set forth in Section 3.04, Audit Access to Records.

4.02 REQUEST FOR CHANGE (RFC)

- A. After the Contractor becomes aware of the need for or desirability of a requested change, an RFC may be submitted to Sound Transit in writing (in a format acceptable to Sound Transit) and must specify the reasons for such change, including relevant circumstances and impacts on the schedule.
- B. The Contractor may request additional compensation and/or time through an RFC, but not for instances that occurred more than twenty (20) days prior to the request.
- C. Any RFC that is approved by Sound Transit will be incorporated into a Change Notice or a Change Order. If the request is denied, but the Contractor believes that it does have merit, the Contractor may submit a Notice of Intent to Claim in accordance with Paragraph 10.01A, Notice of Intent to Claim.

4.03 CHANGE NOTICE

- A. Change Notice - Request for Proposal (CN-RFP).
 - 1. Sound Transit may issue a CN-RFP, in writing, to the Contractor, describing a proposed change to the Contract and requesting the Contractor to submit a Contractor's Cost and Schedule Proposal (in a format acceptable to Sound Transit). A CN-RFP does not authorize a Contractor to commence performance of the changed Work. After receipt of the Contractor's Cost and Schedule Proposal, Sound Transit may:
 - a. Proceed no further with the proposed change.
 - b. Issue a Change Notice - Work Directive incorporating part or all of the proposed change.
 - c. Issue a Change Order incorporating part or all of the proposed change.

B. Change Notice - Work Directive (CN-WD).

1. A Change Notice-Work Directive is issued unilaterally by Sound Transit ordering the Contractor to proceed with a change in the Work. A CN-WD may be issued under one of the following four circumstances:
 - a. to execute changes in the Work that do not cause changes in the Total Contract Price and/or Contract Time;
 - b. to execute changes in the Work covered by the unit prices or a lump sum price contained in the Contract;
 - c. to execute changes in the Work on a Time and Material basis, in accordance with Section 9.09, Payments on Time and Material Basis; or
 - d. to direct the Contractor to execute change(s) in the Work pending resolution of an equitable adjustment to the Total Contract Price and/or Contract Time. If Sound Transit and Contractor cannot reach agreement on changes to the Total Contract Price and/or Contract Time prior to starting on the changed Work, the Contractor shall maintain cost records in accordance with Section 9.09, Payments on Time and Material Basis.
2. The Contractor shall not commence performance of the Work described in the CN-WD, until the CN-WD is issued by Sound Transit. The CN-WD shall expressly specify the:
 - a. intention to treat such items as changes in the Work;
 - b. scope of the changes in the Work; and
 - c. basis under which changes to the Total Contract Price and/or Contract Time will be determined.
3. When the Contractor receives a CN-WD, the Contractor shall promptly proceed with the Work as indicated in the CN-WD. The Contractor shall carry on the Work and adhere to the schedule. No work shall be delayed or postponed pending resolution of any dispute or disagreement except as Sound Transit and the Contractor may otherwise agree in writing.
4. Until such time as resolution of an equitable adjustment is reached, the Contractor shall maintain its records in accordance with Article 9.09, Payment on Time and Material Basis. The CN-WD shall become the basis for a CO when the amount of the adjustment to the Total Contract Price and/or Contract Time can be determined. The issuance of a CN-WD is sufficient authority for a CO, within the limits of the estimated value of the CN-WD.
5. The CN-WD shall contain a Not to Exceed (NTE) amount. The Contractor shall not invoice Sound Transit for any amount in excess of the NTE amount. The Contractor is required to notify Sound Transit at the point at which eighty percent (80%) of the NTE amount has been expended, and provide an estimate of the cost to complete the changed

Work. If Sound Transit agrees that costs in excess of the NTE amount are justified, Sound Transit may issue a revised CN-WD increasing the NTE amount or negotiate a lump sum amount for the changed Work.

- C. Contractor's Cost and Schedule Proposal - If directed by Sound Transit in the Change Notice, the Contractor shall submit a Contractor's Cost and Schedule Proposal to Sound Transit within fifteen (15) days after receipt of the Change Notice. The Cost and Schedule Proposal shall detail price and scheduling information, showing all of the impacts on the Contract Price, Construction Schedule and/or Small Business Participation of the changes identified in the Change Notice. If any prices or other aspects are conditional, such as orders being made by a certain date or the occurrence of a particular event at a specified time, the Contractor shall identify these conditions in its Cost and Schedule Proposal. The cost breakdown shall have separate estimates of the costs of added Work and any deleted Work and shall be prepared in the manner set forth in Article 9.09, Payment on Time and Material Basis, and shall be presented in a manner such that all phases of work can be easily identified. The Contractor shall submit detailed cost breakdowns as described above for any Subcontractor proposed to perform Work under the change. The Proposal shall include a Certificate of Current Cost or Pricing Data if required by Sound Transit. The Contractor shall also provide detail and scheduling analysis about the effect of the changed work on the Contract Time for completion.

4.04 CHANGE ORDER

- A. The Change Order shall expressly state that it is Sound Transit's intention to treat the items described therein as changes in the Work; identify scheduling requirements, time extensions, prices, and all costs of any nature arising out of the change and shall be accompanied by a Certificate of Current Cost or Pricing Data, if required by Sound Transit; and shall contain a statement that the adjustment to the Total Contract Price, if any, includes all amounts to which the Contractor is entitled as a result of the events giving rise to the Change Order. The execution of a Change Order by both parties shall be deemed to be an agreement to all costs and time of performance related to the change. There will be no reservation of rights by either party on a bilateral Change Order.
- B. For all Change Orders greater than or equal to two hundred thousand dollars (\$200,000), a certificate of Conflict of Interest must be submitted by the Contractor.
- C. Bilateral Change Order: Sound Transit will issue a Change Order as soon as practical following agreement with Contractor's Cost and Schedule Proposal, if Sound Transit decides to proceed with the changed work. If Contractor agrees with the terms and conditions of a Change Order, Contractor shall sign the Change Order and return it to the Resident Engineer for execution by Sound Transit.
- D. Unilateral Change Order: In the event that the Contractor and Sound Transit are unable to agree on the terms and conditions, the amount of any change or adjustment to be made to the Total Contract Price or Contract Time, Sound Transit may execute a unilateral Change Order, in which case the Contractor may file a claim in accordance with the requirements of Article 10, Delays and

Claims. If the Contractor fails to follow the claim procedures in Article 10, the Contractor shall not be entitled to any claim for additional compensation or schedule extension arising out of or relating to the Change Order than that specified in the Change Order.

- E. When a Change Order has been executed by Sound Transit, the Contractor shall promptly proceed with the Work as indicated in the Change Order. The Contractor shall carry on the Work and adhere to the schedule during all disputes or disagreements with Sound Transit. No work shall be delayed or postponed pending resolution of any dispute or disagreement, except as Sound Transit and Contractor may otherwise agree in writing.
- F. Special Rules When Pricing Change Orders
 - 1. In accordance with the requirements of the Labor Compliance Manual, the Contractor and its Subcontractors are required to contribute five cents (\$0.05) per hour for each hour of contract labor (those subject to prevailing wages requirements) of the Contractor to a Pre-apprentice Training Program Fund. Accordingly, the Contractor shall incorporate into each Change Order an amount equal to five cents (\$0.05) per hour for each hour of contract labor.
 - 2. Premium Increase(s)/decrease(s) for Performance and Payment Bonds:
 - a. Premium Increase(s) / decrease(s) for Performance and Payment Bonds will not be paid as a part of Change Order payments, but will be paid / deducted as a lump sum in the final payment. Verification of increased / decreased payment, from the surety, must be provided.
 - b. If the surety should require an immediate payment for the increased Bond(s) value as a result of a large Change Order, the Contractor must supply evidence of the payment made and a copy of the surety's request for early payment.

4.05 REVIEW OF ESCROWED BID DOCUMENTS

In the event that a change is unresolved by mutual negotiation, Sound Transit and the Contractor may mutually agree to review the escrowed bid documentation to verify the fairness and reasonableness of any proposed adjustment in the Contract Price or Contract Time. The review of escrowed bid documentation shall be by mutual agreement or by direction of a mediator or Dispute Review Board, if used.

4.06 SCHEDULE EXTENSIONS

If the Contractor is delayed in completion of the Work by reason of changes made under this Article, or by Sound Transit-controlled delays as specified in Article 10, Delays and Claims, and if Sound Transit agrees with the Contractor that a schedule extension is warranted, a Change Order will be furnished to the Contractor within a reasonable period of time specifying the number of days of time allowed. The Contractor shall have the responsibility of demonstrating the scheduling impact of changes and delays in order to justify any schedule extensions.

4.07 CONSTRUCTIVE CHANGE ORDER

Except as herein expressly stated, no order, statement, or conduct of Sound Transit unless provided in writing shall be treated as a change under the Contract or entitle the Contractor to an adjustment under the Contract. If the Contractor considers that an action or a direction by the Resident Engineer or Sound Transit deviates from the Contract requirements or may entitle the Contractor to extra compensation or a time extension, the Contractor shall submit a Request for Change as provided above. The Contractor shall not proceed with the Work until appropriate directions are received from Sound Transit.

4.08 EXCLUSIVE REMEDIES

The procedures specified herein and in Article 10, Delays and Claims, of these General Provisions are the Contractor's exclusive remedy for actual or constructive changes or delays by Sound Transit. No course of conduct or dealings between the parties, no express or implied acceptance of change or alterations to the Work, and no claim that Sound Transit has been unjustly enriched by an alteration or Change to the work, shall be the basis of any other claim for an increase in Contract Price or extension in the Contract Time for completion of the Work.

4.09 CHANGES IN QUANTITIES

- A. This Section applies to unit price items on the Contract Price Schedule with an estimated quantity of four (4) or more and the measured quantities required to complete the Work.
- B. Increases in Quantities of More than 25 percent.
 - 1. Should the actual total quantity of a Contract Item of work shown on the Bidding Schedule exceed the estimated quantity shown on the Bidding Schedule by more than 25 percent, the Work in excess of 125 percent of such estimated quantity and not covered by an executed Change Order specifying the compensation to be paid, will be paid for by adjusting the Contract unit price as hereinafter provided or at the option of the Resident Engineer, payment for the Work involved in such excess will be made on a time and material basis as provided in Section 9.09, Payment on Time and Material Basis.
 - a. The adjustment of the Contract unit price for such excess quantities will be the difference between the Contract unit price and the actual unit cost to perform the work, as determined in this Section. If the costs applicable to such item of Work include fixed costs, such fixed costs will be deemed to have been recovered by the Contractor by the payments made for 125 percent of the estimated quantity shown on the Bidding Schedule for such item, and in computing the actual unit cost; such fixed costs will be excluded. Subject to the above provisions, such actual unit cost will be determined by the Resident Engineer in the same manner as if the Work were to be paid for on time-and-materials basis as provided in Section 9.09, Payment on Time and Material Basis, or such adjustment as agreed to by the Contractor and the Resident Engineer.

- b. When the total compensation payable for the number of units of an Item of Work performed in excess of 125 percent of the estimated Quantities is less than \$5,000 at the applicable Contract unit price, the Resident Engineer reserves the right to make no adjustment in said unit price.
- C. Decreases of More Than 25 percent.
 - 1. Should the total pay quantity of any Item of Work required under the Contract be less than 75 percent of the estimated quantity thereof, an adjustment in compensation pursuant to this Section will not be made unless the Contractor so requests in writing. If the Contractor so requests, the quantity of said Item performed, unless covered by an executed Change Order specifying the compensation payable therefore, will be paid for by adjusting the contract unit price, or at the option of the Resident Engineer, payment for the quantity of the Work of such Item performed will be made on time and materials basis as provided in Section 9.09, Payment on Time and Material Basis.
 - 2. Adjustment of the Contract unit price for such decreased quantities will be the difference between the Contract unit price and the actual unit cost, which will be determined as hereinafter provided, of the total pay quantity of the item, including fixed costs. Such actual unit cost will be determined by the Resident Engineer in the same manner as if the Work were to be paid for as provided in Section 9.09, Payment on Time and Material Basis, or such adjustment will be as agreed to by the Contractor and the Resident Engineer.
 - 3. No compensation shall be made in any case for loss of anticipatory profits.
- D. If the Contractor disagrees with an equitable adjustment determination by the Resident Engineer, the Contractor shall strictly follow all procedures in accordance with Article 10, Delays and Claims. Failure to do so shall constitute the Contractor's acceptance of determinations by the Resident Engineer. When ordered by the Resident Engineer, the Contractor shall proceed with the Work pending determination of the adjustment in costs or time, as applicable.
- E. When Sound Transit has entered an amount for any bid item, whether unit or otherwise, solely for the purpose of providing a common bid for all bidders, this Section 4.09, Changes in Quantities, shall not apply. Any impact due to an increase or decrease in the amount provided for the purpose of obtaining a common bid shall be the sole risk of the Contractor.

4.10 ELIMINATED WORK

- A. Sound Transit may, by written order to the Contractor, omit work, equipment and/or material to be provided under this Contract, and the value of the omitted work, equipment and/or material will be deducted from the Contract Price. The deducted value will be based upon the applicable unit price or lump sum, or if there is no such price, the deducted value will be a lump sum agreed upon in writing by the Contractor and Sound Transit based on the Schedule of Values and other cost information submitted by the Contractor or obtained otherwise by

Sound Transit. In the event that no agreement can be reached on a lump sum basis, Sound Transit shall be entitled to a deduction based on the value as if the work were to be paid for on a Time and Material basis as provided in Section 9.09, Payment on Time and Material Basis.

- B. Should any Contract Item of the Work be eliminated in its entirety, in the absence of an executed Change Order covering such elimination, payment will be made to the Contractor for actual costs incurred in connection with such eliminated Contract Item if incurred prior to the date of notification in writing by the Resident Engineer of such elimination.
- C. If acceptable material is ordered by the Contractor for the eliminated work prior to the date of notification of such elimination by the Resident Engineer, and if orders for such material cannot be canceled, it will be paid for by Sound Transit at the actual cost to the Contractor. In such case, the material paid for shall become the property of Sound Transit and the actual cost of any further handling will be paid for by Sound Transit. If the material is returnable to the vendor and if the Resident Engineer so directs, the material shall be returned and the Contractor will be paid for the actual cost of charges made by the vendor for returning the material. The actual cost of handling returned material will be paid for by Sound Transit.

4.11 DIFFERING SITE CONDITIONS

- A. The Contractor shall immediately upon discovery, and before the conditions are further disturbed, notify the Resident Engineer, in writing of:
 - 1. Subsurface or latent physical conditions at the Site which differ materially from the conditions indicated in the Contract Documents;
 - 2. Unknown physical conditions at the site, of an unusual nature, which differ materially from the conditions ordinarily encountered and generally recognized as inherent in the Work of the character provided for in the Contract.
- B. The Resident Engineer will promptly investigate the conditions.
- C. Unless otherwise agreed upon in writing by Sound Transit, within fourteen days of the Contractor's initial written notification of the Differing Site Condition to Sound Transit, the Contractor shall provide:
 - 1. A detailed description of the Differing Site Condition;
 - 2. A reasonable estimate of the price and time impacts such Differing Site Condition shall cause to the Contract; and
 - 3. Substantive, contractual, and technical basis supporting the existence of the Differing Site Condition and its impacts.
- D. Within 14 days from receipt of the Contractor's detailed description of impacts, Sound Transit shall either:
 - 1. Issue a Change Notice (CN) or a Change Order (CO);

2. Make a written determination that the event or condition does not justify any changes to the Contract;
 3. Request additional information, or
 4. Respond to the Contractor and indicate when a determination will be made, if it cannot be made within the above stated 14 days.
- E. If Sound Transit finds that conditions are materially different and cause a material increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the Work under this Contract, the Resident Engineer will make an equitable adjustment in the cost or the time required for the performance of the Work, as provided in Paragraph G below.
- F. No request by the Contractor for an equitable adjustment to the Contract for a Differing Site Condition shall be allowed unless the Contractor has given the required written notice.
- G. Cost and time adjustments for a differing site condition accepted as a change by the Resident Engineer shall be resolved in accordance with this Article and Article 10, except to the extent that an equitable adjustment for any condition otherwise within the scope of this Section has been addressed by unit price or Provisional Item, which shall control if provided. All other provisions and requirements of this Section shall apply to such conditions, including without limitation, notification obligations and investigation requirements with respect to any such conditions.
- H. After providing Notice to Sound Transit and upon receiving direction from the Resident Engineer, the Contractor shall be required to continue with performance of all work pending resolution of the Differing Site Condition and maintain its progress with the Work.
- I. If the Contractor does not agree with Sound Transit's determination that the event or condition does not justify any change to the Contract, the Contractor must file a Claim in accordance with Article 10, Delays and Claims, or such right to any adjustment in Contract Price and/or Contract Time shall be waived.

4.12 VALUE ENGINEERING CHANGE PROPOSALS (VECPs)

- A. Sound Transit encourages the Contractor to submit Value Engineering Change Proposals (VECPs) in order to avail Sound Transit of potential cost or time savings or increased safety during construction. The Contractor and Sound Transit will share any savings in accordance with this Section. VECPs may be submitted at any time after Notice to Proceed.
- B. The Contractor shall submit VECPs directly to the Resident Engineer. As a minimum, the following information shall be submitted by the Contractor with each VECP:
1. Description of the existing Contract requirements that are involved in the proposed change;
 2. Description of the proposed change;

3. Discussion of differences between existing requirements and the proposed change, together with advantages and disadvantages;
 4. Itemization of the Contract requirements that shall be changed if the VECP is accepted (e.g., drawing numbers and specification);
 5. Justification for changes in function or characteristics of each affected item, and effect of the change on performance of the end item;
 6. Effect of proposed change on life-cycle costs, including operation, maintenance, replacement costs, and life expectancy;
 7. Date or time by which a Change Order adopting the VECP shall be issued in order to obtain the maximum cost reduction, noting any effect on contract completion time or delivery schedule; and
 8. Cost estimate for existing Contract requirements correlated to the Contractor's unit price or lump sum breakdown and the proposed changes in those requirements.
 9. Costs of development and implementation by the Contractor shall be provided.
 10. Additional costs to Sound Transit (e.g., costs of testing, redesign, and effect on other contracts) shall also be estimated.
- C. Sound Transit retains the right to reject a VECP without review, without recourse by the Contractor if a similar change is already under review; or if in Sound Transit's sole opinion, the potential savings are unlikely to justify the cost of the review; or if the proposed change is otherwise unacceptable to Sound Transit.
- D. Sound Transit shall expeditiously process VECPs accepted for review but shall not be liable for any delay in acting upon any VECP submitted pursuant to this Section. Sound Transit may accept, in whole or in part, by Change Order, any VECP submitted pursuant to this Section. Until an order to proceed is issued on a VECP, the Contractor shall remain obligated to perform in accordance with this Contract. Change Orders made pursuant to this Section will so state. Sound Transit's decisions as to acceptance or rejection of any VECP shall be at Sound Transit's sole discretion and shall be final and not subject to review by a dispute resolution process or otherwise.
- E. If a VECP submitted by the Contractor pursuant to this Section is accepted, the Contract Amount shall be reduced by an amount equal to fifty percent of the Estimated Net Savings (ENS) to the Contractor plus fifty percent of Sound Transit's Review Costs (STRC) (or the reduction = $0.5ENS + 0.5STRC$). The Estimated Net Savings shall be calculated by subtracting the Contractor's Costs from the Contractor's Estimated Gross Savings. For the purposes of this Section, the Contractor's Costs are defined as the reasonable costs incurred by the Contractor in preparing the VECP and making the change, such as cancellation or restocking charges; and the Contractor's Estimated Gross Savings are defined as the difference between the cost of performing the Work according to the existing requirement and the cost to perform the Work according to the proposed change. The Contractor's profit shall not be considered part of the cost and shall not be reduced by application of the VECP.

- F. The Contractor shall include appropriate value engineering incentive provisions in all subcontracts of \$100,000.00 or greater, and may include those provisions in any subcontract. In determining Estimated Net Savings for cost reduction proposals that involve a Subcontractor, only actual costs to the Contractor and Subcontractor, as defined in Paragraph E. above, will be allowed as Contractor Costs. Incentive payments made to the Subcontractor by the Contractor in connection with the cost reduction proposal will not be allowed in determining Net Savings.
- G. Sound Transit is subject to public disclosure of records in accordance with Washington State Law. Material and information, which may be submitted as part of any VECP, will be subject to such public disclosure pursuant to State law.
- H. The compensation provisions of this Section shall constitute the Contractor's exclusive and complete compensation for Sound Transit's use of the VECP, and the Contractor shall have no right to additional compensation for future or additional uses of the VECP. Sound Transit shall have an absolute and unrestricted right to use the concepts, ideas, methods, materials, and any other salient feature of a VECP, for any purpose other than on the Contract or contracts for which it was submitted.
- I. Sound Transit's determination of the value of the Estimated Net Savings is final.

ARTICLE 5 MATERIALS AND EQUIPMENT

5.01 GENERAL

- A. The Contractor shall furnish all materials, including without limitations, equipment and completely or partially assembled items, required to complete the Work, except materials that are designated in the Contract Documents to be furnished by Sound Transit.
- B. Material and equipment furnished and installed for this Work shall be new and of a quality equal to or better than that specified.
- C. Sound Transit's acceptance of materials on the basis of compliance documentation, inspection or testing shall not relieve the Contractor of its obligation for conformance with the Contract.
- D. Manufacturers' warranties, instruction sheets, and parts lists, which are to be furnished with certain materials, shall be delivered to the Resident Engineer before Acceptance.
- E. The materials and equipment provided and work performed by the Contractor shall strictly conform to the requirements contained in the Contract Documents. The burden of proof that the completed Work conforms to the Contract Documents shall be on the Contractor.

5.02 MATERIALS CERTIFICATIONS

- A. All materials except materials specified by brand name or mark or manufacturer, furnished for use or incorporation in the Work, shall be covered by quality certifications, test results or other documentation as required by the Contract to establish compliance of the products with Contract requirements. Unless specific

Transit, on request, with copies of all such books, records, and other material determined to be pertinent to the claim.

- b. Failure to submit sufficient detail to permit Sound Transit to conduct a review of the claim will result in rejection of the claim.
- c. Each claim the Contractor submits for an adjustment that is related to a delay for any cause shall be accompanied by:
 - (1) a revised construction schedule reflecting the effects of the delay; and
 - (2) proposals to minimize these effects.
- d. If the Contractor fails to submit any claim in writing in the time and manner specified herein, it shall waive any relief that might otherwise be due with respect to such claim. Depending upon the grounds for the relief and the nature of the relief sought, additional information and/or conditions of submittal may be specified elsewhere in this Contract.
- e. The Contractor shall continue to work during the Dispute Resolution process in a diligent and timely manner as directed by Sound Transit, and shall be governed by all applicable provisions of the Contract.
- f. At all times during the course of the conflict or dispute resolution, the Contractor agrees to continue to perform the Work with due diligence, unless a Stop Work Order has been issued by Sound Transit. In the event the disputed matter impedes continuing performance, the Contractor shall inform Sound Transit in writing of the impediment and seek direction as to how to proceed. If the Contractor fails to provide such notice to Sound Transit, it shall be assumed that the Contractor is proceeding with performance of the Contract.
- g. The Contractor shall maintain cost records of all Work that is the basis of any claim in the same manner as is required for time-and-materials work in Article 9.09, Payment on Time and Material Basis.
- h. Both parties have a duty to take all reasonable steps necessary to mitigate losses resulting from the dispute whether those losses are their own or another party's losses, unless such mitigation would require the party to relinquish their position in the dispute.

2. Submittal and Processing of Claims

- a. The Contractor shall submit its claim in writing to the Resident Engineer. Sound Transit shall respond within sixty (60) days after receipt of the claim. Sound Transit may request in writing, within thirty (30) days of receipt of the claim, that the Contractor provide any additional documentation that may be required to support the Contractor's claim or documentation that may relate to defenses

or claims Sound Transit may have against the Contractor. Sound Transit shall respond in writing to the Contractor's claim including any additional documentation as requested by Sound Transit, within either thirty (30) days of receipt of said additional documentation, if the Contractor responds during the initial sixty (60) day period, or within a period no longer than that taken by the Contractor in producing the additional documentation, whichever is greater. In no event shall the extension of the response time resulting from Sound Transit's request for additional documentation and the Contractor's response time be deemed to waive any statutory limits or rights to Sound Transit.

- b. If the claim is found to have merit, the settlement will be negotiated in compliance with Article 4, Changes and Change Order Process.

~~If Sound Transit finds the claim not to have merit the Contractor may, within any (10) day period, file a claim for the finding, submit the claim for dispute resolution in accordance with Article 4.1, Dispute Resolution. The Dispute Resolution process may include a Disputes Review Board (DRB), mediation or other means as may be agreed upon between the parties for settling a dispute.~~

- d. If the Dispute Resolution process finds the claim to have merit and if both accept the finding, Sound Transit and the Contractor will negotiate the terms and value of a Change Order in accordance with Article 4, Changes and Change Order Process.

- 3. In no event shall any claims be made after Final Payment is made, except for those claims that are expressly reserved in writing as provided in Article 9.08B. Failure by the Contractor to submit claims in a timely manner shall result in a waiver by the Contractor as to such claims.

- 4. ~~Failure to comply with the notice and other procedures set forth in the contract documents shall bar the Contractor from asserting any claim for delay, compensation, damages, schedule extension, or any other claim.~~

10.02 DELAYS

A. Liquidated Damages

- 1. For each and every day that any portion of the Work remains incomplete after a designated Contract Milestone, including intermediate or final completion dates, as specified in the Special Provisions, damage will be sustained by Sound Transit. These damages may include, but are not necessarily limited to the following:
 - a. Delays in completion and operation of the transit system;
 - b. Increased costs of Contract administration, engineering, inspection, and other Sound Transit functions related to the design and construction of the Project;

- c. Costs resulting from delays to Interfacing Contractors; and
 - d. Costs relating from Impacts to businesses along the alignment.
2. Because of the difficulty in computing the actual material loss and damages to Sound Transit, it is determined in advance and agreed by the parties hereto that the Contractor will pay Sound Transit the amount(s) set forth in the Special Provisions for each day of delay as representing a reasonable forecast of the actual damages that Sound Transit will suffer by the failure of the Contractor to complete such Work, or portion thereof, within said time(s). The execution of this Contract shall constitute acknowledgement by the Contractor that it has ascertained and agreed that Sound Transit will actually suffer damages in the amount herein fixed for each and every day during which the completion of the Work or portions thereof is avoidably delayed beyond the specified time(s).
 3. Sound Transit may deduct assessed liquidated damages from any monies due or that may become due the Contractor under the Contract. If such deducted monies are insufficient to recover the liquidated damages owing, the Contractor or the Contractor's surety or sureties shall pay to Sound Transit any deficiency within 30 days after completion of the Work.
 4. Where liquidated damages for contractor-caused delays are applicable, Sound Transit shall not seek actual damages for delay; however, to the extent liquidated damages are not applicable, Sound Transit reserves all other rights and remedies provided by law or under this Contract.

B. Extension of Time for Certain Delays

1. Notice of Delay or Potential Delay. Immediately, but in any event no more than five (5) days, after the Contractor foresees or should foresee a delay or a potential delay in the prosecution of the Work or upon the occurrence of a delay or potential delay that the Contractor regards as unavoidable, the Contractor shall notify Sound Transit of such delay or potential delay. Within five (5) days of such notice the Contractor shall provide in writing the probability or the occurrence of such delay, the extent of the delay, the specific impacts and effects of the delay on critical path activities and the Construction Schedule, and its possible cause. At a minimum the written notice shall include:
 - a. The facts underlying the potential delay;
 - b. The nature of the any additional costs which may be caused by the potential delay;
 - c. The nature of any additional time which may be needed;
 - d. Contractor's plan for mitigating such costs and delay; and
 - e. An estimate of the cost impacts due to the delay or the potential delay and an estimate of the time extension required for mitigation, along with all substantiating facts and supporting data.

2. The Contractor shall take immediate steps to prevent, if possible, the occurrence or continuance of the delay. If this cannot be done, the Contractor and Sound Transit will determine how long the delay will continue and to what extent the prosecution and completion of the Work are being or will be delayed thereby. Sound Transit will also determine whether the delay is to be considered avoidable or unavoidable and notify the Contractor of Sound Transit's determination.
3. The Contractor agrees that no claim shall be made for delays for which timely written notice, as specified above, is not made to Sound Transit.

C. Avoidable Delays

1. Avoidable delays in the prosecution of the Work shall include delays that could have been avoided by the exercise of due care, prudence, coordination, foresight and diligence on the part of the Contractor, its Subcontractors, or its Suppliers at any tier. Examples of avoidable delays include, but are not limited to:
 - a. Delays that may in themselves be unavoidable but do not necessarily prevent or delay the prosecution of parts of the Work or the completion of the Work within the Contract Time (e.g., fit within the Float time shown on the Construction Schedule(s).)
 - b. Time associated with the reasonable activities of Sound Transit, third party stakeholders or other contractors employed by Sound Transit that do not necessarily prevent the completion of the Contract within the Contract Time.
 - c. Delays that may in themselves be unavoidable, but which do not affect any Critical Path activity on the accepted Construction Schedule(s).
 - d. Strikes, normal weather conditions, mechanical breakdown, equipment failure, and acts of negligence by the Contractor's forces, including Subcontractors and Suppliers.
 - e. Delays in the prosecution of the Work due to:
 - (1) The Contractor's failure to provide sufficient resources, including, but not limited to: personnel, equipment, material, or plant;
 - (2) The Contractor's failure to submit required work products in a timely manner;
 - (3) The Contractor's failure to procure and/or deliver materials and/or equipment in a timely manner.
2. If requested by the Contractor, Sound Transit may grant an extension of time for the avoidable delay, if Sound Transit determines that an extension is in Sound Transit's best interest. Time extensions shall be issued through a Change Order.

D. Unavoidable Delay

1. An unavoidable delay means a delay in the prosecution of the Work that cannot be regarded as avoidable under Paragraph 10.02C. Unavoidable delays shall include delays that result from causes beyond the control of the Contractor and that could not have been avoided by the exercise of care, prudence, coordination, foresight, and diligence on the part of the Contractor, its Subcontractors or its Suppliers at any tier, and for which no provision is specifically provided in the Contract Documents for managing or mitigating such delay.
2. Examples of Unavoidable Delays include, but are not limited to:
 - a. Acts of God.
 - b. Fire.
 - c. War.
 - d. Riot.
 - e. Unusually Severe Weather. Unusually severe weather conditions shall not be deemed unusually severe if they fall within two standard deviations from the mean of data recorded by the U.S. Weather bureau for the Seattle and Tacoma metropolitan area over the past twenty (20) years. Impacts of on-going weather conditions shall be updated weekly by the Contractor and provided to Sound Transit. To preclude the difficulties of actual measurement the parties hereto agree that weather data at the Site shall be expressly deemed to be the same as that measured at the Seattle-Tacoma International Airport by the Environmental Data and Information Service of the National Oceanic and Atmospheric Administration ("NOAA") of the U.S. Department of Commerce.
 - f. Epidemic.
3. Extension of Time: For delays that the Contractor has given notice pursuant to this Section, and considers to be unavoidable, the Contractor shall submit to Sound Transit complete written information demonstrating the effect of the delay on the critical path on the accepted Construction Schedule. The submission shall be made within ten (10) days after the end of the occurrence that is claimed to be responsible for the unavoidable delay. Sound Transit will review the Contractor's submission and determine the number of days of unavoidable delay and the effect of such unavoidable delay on such critical path. Sound Transit may grant an extension of time to the extent that unavoidable delays necessarily affect the critical path in the Construction Schedule(s). During such extension of time, liquidated damages will not be charged to the Contractor. It is understood and agreed by the Contractor and Sound Transit that time extensions due to unavoidable delays necessarily involve critical path operations that would prevent completion of the Work,

or portion thereof, within the Contract Time. Time extensions shall be issued via a Change Order.

E. Concurrent Delay

If Sound Transit determines that there are delays to the project as a result of concurrent delays for which both the Contractor and Sound Transit are contributors, Sound Transit may grant a time extension. However, no compensation will be due to the Contractor for this time extension due to the concurrent nature of delays.

F. Shortage of Materials

No extension of time will be granted for a delay caused by a shortage of materials (except Sound Transit-furnished materials), unless the Contractor furnishes to the Resident Engineer documentary proof that the Contractor has diligently made every effort to obtain such materials from all known sources within reasonable reach of the Work and further proof in the form of critical-path-analysis data as required in Section 10.01, Claims, that the inability to obtain such materials when originally planned did in fact cause a delay in final completion of the entire Work which could not be compensated for by revising the sequence of the Contractor's operations. Only the physical shortage of material will be considered under these provisions as a cause for extension of time; and no consideration will be given to any claim that material could not be obtained at a reasonable, practical, or economical cost or price, unless it is shown to the satisfaction of the Resident Engineer that such material could have been obtained only at exorbitant prices entirely out of line with current rates, taking into account quantities involved and the usual practices in obtaining such quantities.

G. Compensation for Certain Delays

To the extent that the Contractor proves (a) that the Contractor has been delayed in completion of the Work by reason of changes made by Sound Transit under these General Provisions, or a Stop Work Order, or by any other action or omission of Sound Transit; (b) that the Contractor was not concurrently responsible for the delay; (c) that the Contractor has suffered actual losses as a result of the delay; (d) that but for Sound Transit's actions, the Contractor could not have suffered such actual losses; (e) that the Contractor could not have mitigated such actual losses despite taking all precautionary and remedial actions; and (f) that the delay was not within the contemplation of the Contract; then Sound Transit shall pay to the Contractor as full compensation for any such delay, and for any actual and real disruption which may have been associated with any such delay which the Contractor can clearly quantify and calculate, the amount of the actual loss as computed in accordance with the Contract Documents, provided that the Contractor shall strictly comply with the notice and other claims procedures set forth in Section 10.01, Claims. Unless the Contractor satisfies the provisions of this Section, the Contractor's sole remedy for Sound Transit-caused delay shall be an extension of time under Paragraph 10.02B, Extension of Time for Certain Delays.

ARTICLE 11 DISPUTE RESOLUTION

11.01 PURPOSE OF DISPUTE RESOLUTION

The purpose of this Dispute Resolution Section is to provide a structured approach for the parties to resolve disputes fairly at the lowest level possible without incurring significant administrative costs. It is agreed by the parties that the parties shall enter into the dispute resolution process in good faith and that use of the dispute resolution processes for purposes other than resolving a legitimate dispute (e.g. as a delay tactic) shall be evidence of bad faith in the performance of this Contract.

11.02 CONTINUATION OF WORK WHILE DISPUTE RESOLVED

At all times during the course of the conflict or dispute resolution, the Contractor agrees to continue to perform the Work with due diligence, unless a Stop Work Order has been issued by Sound Transit. In the event the disputed matter impedes continuing performance, the Contractor shall inform Sound Transit in writing of the impediment and seek direction as to how to proceed. If the Contractor fails to provide such notice to Sound Transit, it shall be assumed that the Contractor is proceeding with performance of the Contract.

11.03 DUTY TO MITIGATE

Both parties have a duty to take all reasonable steps necessary to mitigate losses resulting from the dispute whether those losses are their own or another party's losses, unless such mitigation would require the party to relinquish their position in the dispute.

11.04 PARTNERING

A. Preventing Conflict

1. The parties agree to use the principles of Project Partnering: collaboration and cooperation to identify and engage in measures to prevent and resolve potential sources of conflict before they escalate into disputes, claims, or legal actions. Such measures should extend to all levels of the Work, including lower-tiered Subcontractors, and may include the following:
 - a. Conducting a one-day workshop to "kick-off" the performance of the Work by introducing the concepts of Project Partnering and holding follow-up workshops at least annually.
 - b. Developing and implementing a Partnering Action Plan devoted to developing and maintaining a collaborative atmosphere on the project at all levels.
 - c. Developing and implementing a Dispute Escalation Process.
 - d. Conducting facilitated, Executive Partnering Sessions among the senior managers of each party to discuss issues related to potential conflicts and to engage in collaborative problem solving.
 - e. Conducting training for all parties in teambuilding, collaborative problem solving and conflict resolution skills.

f. Conducting evaluations of the Project's partnering efforts, including language from this Section in contracts for Subcontractors who become involved in the performance of the Work.

2. Sound Transit will provide the Partnering Facilitator and Facilitates. All other costs associated with the Contractor's participation in the partnering program shall be included in the Contract Price.

B. Resolving Conflicts

1. Sound Transit and the Contractor agree to use their best efforts to resolve disputes arising out of or related to this Contract using good faith negotiations and the principles of Project Partnering by developing and implementing a Dispute Escalation Process that provides for the timely resolution of disputes as close to the their point of origin as possible. It is agreed that the foregoing will not negate any of the Contract requirements for providing timely notice and the timely submission of documents that are required elsewhere in the Contract Documents.

2. ~~In the event the parties are unable to resolve a dispute using the Dispute Escalation Process, and there is no Dispute Review Board established in the contract, the Dispute Review Board shall be established in accordance with the provisions of the contract. For mediation, a mediator shall be chosen that is agreeable to all parties involved in the dispute and such agreement shall not be unreasonably withheld. All statements made by parties involved in the dispute to the mediator shall remain confidential and shall not be disclosed by the mediator in any litigation or other claim proceedings. All parties hereby agree to such terms and signature of the Contract provides written confirmation of these terms.~~

11.05 DISPUTES REVIEW BOARD

A. Disputes Review Board (DRB) may be established to assist in resolving claims on the Project. Disputed claims may be heard by the DRB only after the claims process detailed in Section 10.01, Claims, has been completely followed.

B. The provisions for establishing a DRB, if a DRB is to be utilized in this Contract, will be provided in the Special Provisions in the Section entitled Disputes Review Board Procedures. The Three Party Agreement to be used in establishing a DRB is also located in that section.

C. Where no approved DRB is currently established or currently operating, the parties will utilize their best efforts to negotiate resolution of claims in good faith utilizing an Disputes Resolution process such as mediation, or other recognized Disputes Resolution process for settling a dispute, acceptable to the parties to the Contract.

~~11.06 EXHAUSTION OF ADMINISTRATIVE REMEDIES~~

It is the intention of this Article that differences between the parties arising under and by virtue of the Contract shall be brought to the attention of Sound Transit at the earliest possible time in order that such matters may be settled without a claim being filed, if

possible, or other appropriate action promptly taken. The Contractor agrees to defer, in the absence of special written notice given by Sound Transit, the commencement of any legal action against Sound Transit on a matter required to be covered by written Notice of Intent to Claim pursuant to Paragraph 10.01A, Notice of Intent to Claim, until all of the administrative and dispute resolution processes have been exhausted.

ARTICLE 12 SUSPENSION AND TERMINATION

12.01 STOP WORK ORDER

- A. Sound Transit may at any time and for any reason within its sole discretion issue a written order to the Contractor thereby suspending, delaying, or interrupting all or any part of the Work for a specified period of time.
- B. In the event that it become necessary for Sound Transit to suspend all, or a part, of the Work, Sound Transit will deliver a written Stop Work Order to the Contractor, which shall describe the following:
 - 1. Identification of the work to be suspended;
 - 2. The date and time upon which the Stop Work Order shall be effective;
 - 3. The period of time during which Work will be suspended, if known;
 - 4. Directions to be taken regarding subcontracts; and
 - 5. Other instructions required to safeguard the Work and to prevent property damage and personal injury.
- C. The Contractor shall comply immediately with any written order it receives from Sound Transit suspending the Work and take all reasonable steps to minimize costs allocable to the Work covered by the suspension during the period of Work stoppage. The Contractor shall resume performance of the suspended Work upon expiration of the notice of suspension, or upon direction of Sound Transit.
- D. Within the period specified by the Stop Work Order, or within any extension of that period, Sound Transit may:
 - 1. Terminate the work covered by the Stop Work Order;
 - 2. Cancel the Stop Work Order; or
 - 3. Allow the period of the Stop Work Order to expire.
- E. Costs Associated with a Stop Work Order
 - 1. If a Stop Work Order is canceled or the period of the Stop Work Order expires, the Contractor shall resume work.
 - 2. The Contractor may be allowed an increase in the Total Contract Price or an extension of time, or both directly attributable to any suspension, provided that:
 - a. The Contractor submits a Request for Change in accordance with the requirements of the Contract Documents;



APPENDIX 3

PCL CONSTRUCTION SERVICES, INC.
SUBCONTRACT

Project No.: 5701053
Subcontract No.: 572844 OS
Cost Code: 022-200
Req. By: JP CCL ASM

This agreement is made this 24th day of June 2004 by and between PCL Construction Services, Inc. ("Contractor") 15405 SE 37th Street, Suite 200, Bellevue, Washington 98006, Phone (425) 454-8820 and Facsimile (425) 454-5924 and, Northwest Infrastructure, Inc. ("Subcontractor"), 31217 Pacific Highway South, #223, Federal Way, Washington 98003 Witnesseth:

THE PROJECT

WHEREAS Contractor has entered into or will enter into a general construction contract ("The Prime Contract") dated _____ with the Central Puget Sound Regional Transit Authority ("Owner"), to furnish certain materials, labor, and services necessary for the construction of: Federal Way Transit Center ("The Project") located at: 23rd Avenue South/South 316th Street, Federal Way, Washington in accordance with various contract documents hereinafter described, including certain drawings, specifications and addenda prepared by KPFF Consulting Engineers ("Architect/Engineer").

WHEREAS Contractor desires to retain Subcontractor to furnish certain portions of the material, labor, and/or services for the Project.

NOW, THEREFORE, Contractor and Subcontractor agree as follows:

SECTION I
SUBCONTRACT WORK

1.1 Subcontractor shall, as an independent contractor, provide and furnish all labor, materials, tools, supplies, equipment, services, facilities, supervision and administration necessary for the proper and complete performance and acceptance of the following portions of the work (hereinafter the "Subcontract Work" as more specifically defined in the Uniform Special Conditions to Subcontract) for the Project, together with such other portions of the drawings, specifications and addenda as related thereto: Subcontract Work as specifically outlined in Exhibit "A"

1.2 Subcontractor [X] is [] is not required to adopt and implement a mandatory drug and alcohol testing program in accordance with Paragraph 6.7 of the Uniform Special Conditions to Subcontract.

SECTION II
SUBCONTRACT PRICE

In consideration of Subcontractor's performance of this Subcontract and the Subcontract Work, and at the times and subject to the terms and conditions hereinafter set forth, Contractor shall pay to Subcontractor the total sum of One Million, Ninety-Three Thousand, Three Hundred Thirty Two and 00/100, (\$ 1,093,332.00), hereinafter the "Subcontract Price."

SECTION III
SPECIAL CONDITIONS

The Uniform Special Conditions to Subcontract (Revised 01/99), containing Articles I through XXII, are incorporated in the Subcontract as though fully set forth herein. Subcontractor hereby acknowledges receipt of the Uniform Special Conditions to Subcontract.

This Subcontract is acknowledged and executed as of the date set forth above.

Northwest Infrastructure, Inc.
By: [Signature] 7-8-04
Is: [Signature]

PCL Construction Services, Inc.
By: [Signature]
Is: Garth H. Hornland
Administration Manager

PLEASE RETURN:

Two copies of the Subcontract and Exhibit "A" (if any) duly executed for execution and return by Contractor.
Executed Certification of Equal Employment Opportunity, if applicable.
Certificate(s) of Insurance Compliance.
Executed Performance and Payment Bonds, as required.

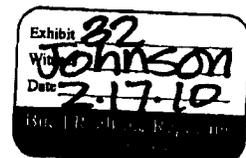
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Subcontractor File Accounting Jobsite Project Manager

EXHIBIT A

XXXI



APPENDIX 3

made in any proceeding authorized by the Prime Contract. Subcontractor's compensation on claims described in Paragraph 12.4 shall be limited to the compensation actually paid to Contractor in connection with those claims, and receipt of such payment by Contractor is a condition precedent to Contractor's obligations hereunder.

12.6 Joinder of Subcontractor: Contractor may, in its sole discretion, join Subcontractor in any dispute resolution proceeding to which Contractor is or becomes a party and which, in Contractor's sole judgment, relates to or affects Subcontractor's performance of the Subcontract Work, including: (a) any dispute resolution procedure provided in the Prime Contract for disputes arising between Contractor, Owner and/or others, including arbitration and submission to Architect or Engineer; (b) litigation; (c) administrative proceedings; and (d) any other dispute resolution proceeding applicable under the prevailing law. If so joined, Subcontractor shall participate at its own expense in said proceeding, shall be bound by its outcome, and shall dismiss or abate any mediation, arbitration or litigation proceedings instituted against Contractor under Paragraph 12.7.

12.7 Claims between Contractor and Subcontractor:

- 12.7.1 If either party has claims against the other which are not covered under Paragraphs 12.3 through 12.6, the claimant shall provide written notice of such claims to the other party within sixty (60) days after the claimant knew or should have known of the facts giving rise to the claim, except as otherwise provided in Paragraph 12.2. Prior to the commencement of arbitration or litigation, each party agrees, upon the written request of the other party, to submit the claims to a mediator and to negotiate in good faith in an attempt to reach a settlement of the claims. Mediation shall be governed by the Construction Industry Mediation Rules of the American Arbitration Association. Neither party shall proceed with arbitration or litigation while mediation is ongoing, except as otherwise provided in Paragraph 12.6.
- 12.7.2 With respect to the claims identified in Subparagraph 12.7.1, if neither party requests mediation, or if mediation does not resolve the dispute, Contractor may elect at any time to arbitrate or to litigate the dispute, and Subcontractor hereby agrees to arbitrate if so elected by Contractor. Subcontractor agrees to dismiss or abate any proceeding pending in a forum other than that selected by Contractor. Any arbitration proceeding shall be governed by the Construction Industry Arbitration Rules of the American Arbitration Association, as supplemented by Subparagraphs 12.7.3 and 12.7.4 and by Paragraph 12.8 hereof. No arbitration or litigation shall include by consolidation, joinder or in any other manner, parties other than Owner, Architect, Engineer, Contractor, Subcontractor and any other persons substantially involved in a common question of fact or law, whose presence is required if complete relief is to be accorded. If arbitration is selected by Contractor, the award rendered by the arbitrator(s) shall be final, and judgment herein may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.
- 12.7.3 Subcontractor agrees to require its sureties and insurers to be bound by any arbitration award against it. Notwithstanding any provisions of law or rule of arbitration to the contrary, any party to an arbitration agreed to herein may avail itself of the discovery procedures provided for in the Federal Rules of Civil Procedure.
- 12.7.4 Neither Subcontractor nor Contractor shall commence or proceed with mediation, arbitration or litigation against the other, nor assert a defense in any such proceeding, without having first determined that, to the best of its knowledge, information and belief, formed after reasonable inquiry, said claim or defense is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of mediation, arbitration or litigation. If either party violates this provision, the presiding court or arbitration panel, upon motion, shall impose upon the violating party an appropriate sanction, which shall include an order to pay to the other party the reasonable expenses incurred because of such violation, including the award of reasonable attorneys' fees.

12.8 General Provisions:

- 12.8.1 Subcontractor shall proceed with the Subcontract Work and maintain its progress in all respects during the pendency of any claim, dispute, mediation, arbitration or litigation.
- 12.8.2 If the elections afforded Contractor in Subparagraphs 12.7.1 or 12.7.2 hereof are not enforceable, then both parties shall be bound to arbitrate the dispute in accordance with the requirements of Subparagraph 12.7.2.
- 12.8.3 If Contractor has provided any bonds pursuant to 40 U.S.C. Section 270(a), et seq. (the "Miller Act") or pursuant to any state or local statutory or regulatory requirement, Subcontractor agrees to stay any action or claim against Contractor and/or its sureties arising out of or relating to the Subcontract or the Subcontract Work pending the complete and final resolution, including appropriate appeals, of all claims involving the Subcontract or the Subcontract Work submitted pursuant to any of the dispute resolution procedures set forth in the Prime Contract or in Paragraphs 12.3 through 12.7 hereof. This provision in no way excuses or stays Subcontractor's obligations to file any and all notices or claims as required by statute, code, rule, regulation or bond.
- 12.8.4 Should either party file a claim or demand arbitration to enforce any of the provisions hereof, to protect its interests in any manner arising under the Subcontract, or to recover on a surety bond furnished by a party to the Subcontract, the prevailing party shall be entitled to recover from the other party and its sureties all reasonable attorneys' fees, costs, charges, expert witness fees, and expenses incurred in said proceeding.
- 12.8.5 Subcontractor waives its right to trial by jury in any litigation to which it is or becomes a party under the provisions of the Subcontract. Subcontractor agrees to include this condition in every subcontract and agreement for materials, supplies, labor or equipment entered into by Subcontractor in regard to the Subcontract Work.
- 12.8.6 The validity, interpretation, and performance of the Subcontract shall be governed by the laws of the State in which the Project is located, and Subcontractor hereby submits to the jurisdiction of that State. Any mediation, arbitration or legal proceeding permitted hereunder shall be commenced and proceed in the county in which the Project is located, unless the parties agree in writing to a different location.
- 12.8.7 Subcontractor agrees that Contractor's sureties are intended third-party beneficiaries of this Article XII.