70432-0

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No. 70432-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

KING COUNTY,

Plaintiff/Respondent/Cross-Appellant,

v.

VINCI CONSTRUCTION GRANDS PROJETS/PARSONS RCI/FRONTIER-KEMPER, JV, a Washington joint venture, *et al.*,

Defendants/Appellants/Cross-Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Laura Gene Middaugh)

BRIEF OF RESPONDENT/CROSS-APPELLANT KING COUNTY IN RESPONSE TO BRIEF OF APPELLANT VINCI CONSTRUCTION GRANDS PROJETS/PARSONS RCI/FRONTIER-KEMPER, JV

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GLOSSARY

Bond	Performance and Payment Bond issued by Sureties, Trial Exhibit 6
Brightwater Project	The King County regional wastewater treatment system at issue in this appeal
BT-1	Brightwater tunnel segment 1
BT-2	Brightwater tunnel segment 2
BT-3	Brightwater tunnel segment 3
BT-4	Brightwater tunnel segment 4
Central Contract	Contract documents governing VPFK's work on BT-2 and BT-3, Trial Exhibit 6
Central Tunnel	BT-2 and BT-3
Contract	Central Contract
Corrective Action Plan	Trial Exhibit 145
CP	Clerk's Papers
East Contract	Contract documents governing work on BT-1
East Tunnel	BT-1
EPB TBM	Earth pressure balance tunnel boring machine
GBR	Geotechnical Baseline Report, Trial Exhibit 7
GDR	Geotechnical Data Report, Trial Exhibit 8
JDC	Tunneling contractor working on the West Contract (BT-4)
RP	Report of Proceedings for trial
STBM	Slurry tunnel boring machine

Sureties	Travelers Casualty and Surety Company of America, Liberty Mutual Insurance Company, Federal Insurance Company, Fidelity and Deposit Company of Maryland, and Zurich American Insurance Company
Surety Br.	Opening brief submitted by the Sureties
Vinci	Vinci Construction Grands Projets
VPFK	Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV
VPFK Br.	Opening brief submitted by VPFK
West Contract	Contract documents governing work on BT-4
West Tunnel	BT-4

I. INTRODUCTION

King County contracted with appellant Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV ("VPFK") for construction of a portion of the regional wastewater treatment system called the "Brightwater Project."[1] After studying the contract documents for the project, VPFK offered to complete the tunneling work for the project governed by the "Central Contract" for a fixed price and in a specified amount of time. As required by the Public Works statute, King County awarded the Contract to VPFK as the lowest bidder and promptly issued a Notice to Proceed.

VPFK fell behind schedule due to serious mismanagement and equipment failures. When asked to prepare a "Corrective Action Plan," VPFK projected that it would finish its work almost *three years late* and at *significant additional cost* to King County and its ratepayers. Worse still, VPFK said it might not be able to finish the tunneling at all. Nonetheless, King County granted the change orders VPFK was entitled to and paid VPFK $225,635,658 for the work it did complete. King County then hired another contractor to complete a significant portion of VPFK's work and sued VPFK for the additional amounts that the County was required to pay

[1] For the Court's convenience, a glossary of abbreviations can be found immediately following the Table of Authorities.

to complete VPFK's work and consequential damages resulting from VPFK's breach. After a three-month trial and two weeks of deliberations, the jury awarded King County a net verdict totaling $129,578,522.

VPFK promised to complete its work for a fixed price and in a specified amount of time and – consistent with Washington law regarding fixed price contracts – was properly found liable for additional costs and consequential damages when it breached that contractual promise. VPFK nevertheless asks this Court to set aside the jury's award on multiple grounds, but each of its arguments fails. As will be discussed in Sections V.A-B below, the trial court correctly dismissed on summary judgment two of VPFK's claims – its differing site condition claim based on soil transitions and its defective specifications claim – because VPFK had *no evidence* to support key elements of those claims. As discussed in Sections V.C-E below, the trial court also did not err, let alone abuse its discretion, by refusing to give VPFK's erroneous implied warranty instruction, denying VPFK's motion for partial summary judgment on liquidated damages for delay, and excluding evidence of alleged concurrent delay.

The trial court correctly decided all of the above issues, and its rulings regarding those issues should be affirmed. But it erred in denying King County's motion for judgment as a matter of law with regard to

VPFK's claims for "extended repair of rim bar." As will be discussed in Section VI below (addressing King County's cross-appeal), there was no substantial evidence or reasonable inference to sustain the jury's verdict for VPFK on these claims. This Court, therefore, should reverse the trial court's post-trial ruling and set aside the jury's award of damages on those claims, thereby increasing the net award to King County by $8,297,551. In all other respects, the trial court's rulings should be affirmed.

II. KING COUNTY'S ASSIGNMENTS OF ERROR

1. The trial court erred when it denied King County's CR 50(b) Renewed Motion For Judgment As A Matter Of Law. CP 4499-500.

2. The trial court erred when it entered judgment in accordance with its denial of the above-referenced motion. CP 4536-39.

III. ISSUES PRESENTED

A. VPFK's Appeal

1. Whether the trial court erred in granting King County's motion for summary judgment regarding VPFK's differing site condition claim based on soil transitions because VPFK failed to show that the contract documents provided a baseline for transitions or that it relied on any such baseline.

2. Whether the trial court erred in granting King County's motion for summary judgment regarding VPFK's defective specifications claim because, as the court concluded, "there is no evidence the specifications were defective."

3. Whether the trial court abused its discretion (or otherwise erred) in refusing to give VPFK's implied warranty instruction because VPFK – not King County – is the only party that warranted that it would timely complete the project.

4. Whether the trial court erred in denying VPFK's motion for partial summary judgment on liquidated damages for delay because the liquidated damages provision in the parties' agreement does not apply where, as here, the contractor does not complete the work and is declared in default.

5. Whether the trial court abused its discretion (or otherwise erred) in excluding evidence of alleged concurrent delay because the proffered evidence was not timely disclosed and was in any event irrelevant.

B. King County's Cross-Appeal

Whether the trial court erred in denying King County's motion for judgment as a matter of law with regard to VPFK's claims for "extended

repair of rim bar" because there was no substantial evidence or reasonable inference to sustain the jury's verdict for VPFK on these claims.

IV. STATEMENT OF THE CASE

A. The Brightwater Project

The Brightwater Project has two major components: (1) the treatment plant, which is designed to treat and disinfect wastewater; and (2) the conveyance facilities, comprising pipelines and pumps that carry water to and from the treatment plant. RP 570-72. A map showing these components is included in the Appendix to this brief at App. 1.

The conveyance facilities include a 13-mile system of tunnels, which was divided into three parts for contracting purposes: the West Contract, the Central Contract, and the East Contract. *Id.* The Central Contract (also referred to herein as "the Contract") included Brightwater tunnel segments 2 and 3 – denoted BT-2 and BT-3. RP 571; App. 1. The East Tunnel or BT-1 ran to the east of BT-2 toward Woodinville, and the West Tunnel or BT-4 ran to the west of BT-3 toward Puget Sound. *Id.* These tunnels are also shown on the attached map.

King County advertised the Central Contract for construction bids in January 2006. RP 2649. The bid documents were voluminous and included considerable information about the soils through which the tunnels were to be built. First, there was a "Geotechnical Baseline

Report" ("GBR"), which provided geotechnical data and interpretations for the contractors' use in preparing their bids and planning the work. Ex. 7. Second, there was a "Geotechnical Data Report" ("GDR"), containing data from the County's physical investigation of the tunnel alignments and construction sites. Ex. 8.

The bid documents also included terms and conditions for performance of the Central Contract. Ex. 6. The Contract established a deadline for substantial completion of all the Central Contract work 1,540 days after King County issued its Notice to Proceed. RP 679; Ex. 6 at 442. This "Contract Time" could be changed during performance of the work, but *only* if the circumstances entitled the contractor to more time pursuant to the Contract provisions and the contractor submitted a timely and properly substantiated change order request. Ex. 6 at 479-86. The substantial completion deadline was vitally important to the County because the Central Contract was part of the larger Brightwater Project and the system would not be operational as promised to King and Snohomish County residents until all of the tunnels and pipelines were completed. RP 678-79.

The Central Contract required that the contractor use a slurry tunnel boring machine ("STBM"). Ex. 6 at 1022. An STBM uses bentonite (a kind of clay) mixed with water and other additives to support

unstable soils around the machine and to remove excavated materials to the surface. RP 1106, 1219. On the surface, a slurry treatment plant separates the excavated materials and returns clean slurry to the STBM. RP 1236-37. King County designated an STBM based on its expectation of high underground water pressure in certain areas. RP 2040, 2215.

B. VPFK And Its Bid

VPFK is a joint venture of three companies: (1) Vinci Construction Grands Projets ("Vinci"), (2) Parsons RCI, and (3) Frontier-Kemper. CP 3 ¶ 10. Vinci is a global construction company headquartered in Paris, France, and is a subsidiary of Vinci Construction, one of the largest construction and engineering conglomerates in the world. RP 430, 476. Vinci owned a 60% interest in the joint venture and led the decision-making. RP 1793. Parsons RCI and Frontier-Kemper are large American construction companies that – like Vinci – have substantial experience in large tunneling projects. RP 1477, 4512-13, 4846.

After the bid documents were published, VPFK and other bidders had several months in which to evaluate the risks involved in the work, decide whether or not to submit a bid, and price the bid. RP 2649. Before VPFK submitted its bid, Vinci hired a geotechnical consulting firm to

review the GBR. Ex. 16. The consultant gave the following assessment of the information in the GBR:

> The GBR is an honest attempt to present realistic descriptions of soil and groundwater conditions and the behavior of these soils during tunnel construction. As is correctly stated in the GBR, the soil conditions are very complex and at times erratic. Prediction of the soils in the face at any single location with an accuracy of say 50- to 100-ft along the alignment will at best be approximate.

Ex. 16 at 1. VPFK clearly knew, well before it submitted its bid, that the contract documents indicated that the soil conditions were both complex and erratic and could not be predicted with certainty.

With that understanding of the soil conditions, VPFK agreed that, if given a choice, it would have chosen to perform the work with an STBM. VPFK's conclusion was supported by Herrenknecht, the STBM supplier and a manufacturer of all types of tunnel boring machines. Before VPFK submitted its bid, the chief engineer for Herrenknecht sent an e-mail to VPFK stating that the "*preferred solution is a slurry TBM*" for tunneling in the conditions described in the contract documents. Ex. 10 (emphasis added). He explained that an STBM was preferable "because of better potential to operate under highest face pressure and lower risk for the need of chamber access." *Id.*

After studying the bid package, VPFK, in competition with four other bidders, submitted a bid in which it offered to perform the work for

approximately $212 million. Ex. 27 at 618943. King County accepted VPFK's bid and awarded the Contract to VPFK on June 28, 2006 and issued its Notice to Proceed on August 28, 2006. RP 679, 2649. VPFK was then required by its contractual promise to substantially complete its work on BT-2 and BT-3 within 1,540 days, or by November 15, 2010. RP 679; Ex. 6 at 442.

C. VPFK's Mismanagement Of The Project, Failure To Achieve Its Planned Rate Of Progress, And STBM Failure

Before tunneling work could begin, VPFK needed to construct a shaft at the intersection of the BT-2 and BT-3 tunnels where it could launch the STBMs and support the tunneling work. RP 4161-63. VPFK also needed to build a slurry treatment plant. RP 1238. Due to delivery delays by VPFK's suppliers, the STBMs for BT-2 and BT-3 each started mining later than planned, with BT-3 starting three months late. CP 38; RP 4162-63.

VPFK's performance quickly went from bad to worse. VPFK had planned for its STBMs to accomplish a certain amount of mining per day to complete the project on time. As a tunnel is constructed, concrete segments – known as "rings" – are installed to create the tunnel walls as the STBM moves forward. RP 704-05. Each ring is five feet long. RP 705. VPFK's schedule assumed it could complete an average of 10-12

rings per day on each tunnel. *Id.* VPFK never achieved that rate on a consistent basis. RP 705-06, 1260. Thus, not only did VPFK not make up its delay in starting the tunneling later than planned, it fell even further behind schedule.

The record at trial shows that VPFK was unable to achieve its planned rate of progress for several reasons, the first of which was its own mismanagement. Early in the project, Frontier Kemper shared a report with its joint venture partners regarding its observations of the slurry treatment plant, which documented "disturbing results." RP 1487-88; Ex. 32 at 622710. It found that morale was poor and that the majority of personnel were not getting support from senior management. *Id.* Dave Rogstad, a member of the joint venture board and president of Frontier Kemper, raised these issues with senior management and at joint venture board meetings. RP 1488-90. As he testified, numerous employees expressed concerns to Mr. Rogstad and some threatened to quit. RP 1492.

On January 30, 2008, just before the second STBM was launched, Mr. Rogstad reiterated these concerns in an e-mail to fellow board member Thierry Portafaix. He wrote there that he was "fast losing all confidence" in VPFK's project manager, Lionel Suquet. Ex. 29. Mr. Rogstad also reported that the project superintendent, Francois Delille, had problems communicating with English-speaking workers and

recommended that Mr. Delille be sent "back to Europe once the BT-3 machine is installed." Ex. 28.

On October 10, 2008, Mr. Rogstad again voiced his frustration. Ex. 62. He said that Messrs. Suquet and Delille had "systematically destroyed" the morale of the VPFK staff and had "steadfastly refused" to accept offers for help from Vinci's partner companies, despite being incapable of solving the technical problems with the slurry treatment plant and mining process. *Id.* By this time, Mr. Rogstad had reached the conclusion that Messrs. Suquet and Delille had to be replaced. RP 1508-09. Even Eric Chambraud, a senior Vinci official, complained about the lack of progress and added that the revised goals set by project management "are very very disappointing and give the unfortunate impression that the management team is giving up on any significant improvement and return to 'normal.'" Ex. 60 at 4-5. Despite these concerns, Vinci declined (until much later) to replace Mr. Suquet or Mr. Delille.

A second reason that VPFK was unable to achieve its planned rate of progress was that VPFK's field management modified the slurry treatment plant without consulting the plant designer or equipment supplier. RP 1243-51. These unauthorized modifications caused coarse material to be sent through the equipment, leading to flooding, premature

wear on VPFK's equipment, and breakdowns, which delayed tunneling progress on both STBMs. CP 706-07, 1243-51, 7723-24, 7729. A representative of the treatment plant equipment provider, Ben Clark, testified that there were "glaring concerns" with worn equipment. CP 7722. The equipment supplier made written recommendations to VPFK to correct the problems, but the recommendations were "ignored," leading the supplier to write again hoping to "get through to them." CP 7761. Mr. Rogstad also testified that flooding and overflows at the plant were "a serious issue." RP 1493. The jury saw photographs of that flooding as well as rocks and sand in the slurry tanks. Exs. 37, 72, 91, 93, 94, 98, 101. Equipment was badly damaged. Exs. 63, 84. At times, equipment was buried in muck. Exs. 82, 85, 88. The area known as the tank farm was often overflowing with muck. A few such photographs are included in the Appendix at App. 2-13.

VPFK's own equipment manager, Bernard Chatelet, testified that the slurry treatment plant was a mess and that pumps and electrical motors were damaged. CP 7082-83. The tanks were overflowing onto electrical panels, causing the entire tunneling operation to shut down. RP 1385; CP 7082-83. Slurry was overflowing on the ground. Ex. 61; CP 7084. Hydrocyclone pumps were badly damaged by sand. Ex. 63; CP 7086.

Storage tanks were flooding the entire slurry treatment plant yard. Ex. 67; RP 1383-407; CP 7087-88.

Mr. Rogstad personally suggested "numerous changes for the slurry treatment plant" and "operational systems of the mining process," but the Vinci project management team was "refusing to listen." RP 1510-11. Despite these documented concerns and failure to implement Mr. Rogstad's proposed solutions, Mr. Rogstad confirmed at trial that he had seen e-mails from Mr. Portafaix in the May-June 2009 timeframe indicating that "VPFK's strategy will be to say we have done everything right in this slurry treatment plant." RP 1506-07.

Finally, the record also shows that additional mining delays were caused by the need to repair damage to the STBMs. RP 1260-61. In December 2008, VPFK discovered significant damage to the BT-2 STBM cutterhead, which required repairs that took three months. RP 1267. Then, in May/June 2009, after metal pieces were found in the slurry treatment plant, VPFK investigated the condition of each STBM and discovered that both were badly damaged and needed extensive repairs. RP 1269, 1409-10. As a result, the BT-2 machine was inoperable for about 10 months in 2009-10 and the BT-3 machine was inoperable for about seven months in 2009-10 and did not do any further tunneling after February 2010. RP 1266-69, 2031-32, 3201-02.

Vinci's executives finally agreed that Messrs. Suquet and Delille were incapable of turning the job around. In mid-March 2009, VPFK appointed Mr. Portafaix as project manager and Shane Yanagisawa as his deputy project manager. RP 1268; Ex. 105. During a visit to the slurry treatment plant in March 2009, Mr. Yanagisawa wrote a report detailing problems with the plant and the need for changes. Ex. 104. This report found many of the same problems that Derrick Equipment (the treatment plant equipment provider) had identified in 2008 and made many of the same recommendations that VPFK had up to then failed to implement. *Id.*; RP 4868-69.

D. VPFK's "Dead Weight Strategy"

When the severe STBM damage was discovered in May/June 2009, Vinci (the majority owner of the VPFK joint venture) formulated a secret approach that it came to call its "dead weight strategy." Ex. 122. The first hint of this strategy was in an e-mail between two top Vinci officers:

> I'm asking myself if, as a matter of strategy, we couldn't just tell the Client that this exceptional accident doesn't give us the opportunity to find an acceptable technical solution at present, and we cannot get it except under a different Contract.
>
> Must we absolutely rush to come up with a solution at our expense?

Ex. 117. This strategy was communicated to Mr. Portafaix in the field as follows: "PB and JFR whom I saw yesterday, want us to examine scenarios where instead of rushing to try to solve problems, we do the opposite." Ex. 118.

This strategy was not communicated to Vinci's American partners, who understandably voiced frustration with Vinci's lack of progress. Steve Redmond of Frontier Kemper sent an e-mail insisting that VPFK "DO SOMETHING" to address the operational problems. Ex. 122. Mr. Portafaix forwarded Mr. Redmond's e-mail to his superiors at Vinci with the following comments:

> His questions are valid but *he obviously did not understand our "dead weight" strategy in the face of these exceptional problems* . . . .
>
> Some people onsite have trouble understanding and accepting this strategy because:
>
> 1/ it is opposed to American pragmatism: they try again and again always looking forwards
>
> 2/ and also the natural urge for any organization to look for quick solutions
>
> 3/ and finally because *it contains the seeds of a threat to at least partially shut down the site for several months.*

Id. (emphases added). As the italicized text shows, rather than work proactively to assist King County, VPFK's approach from this point

forward was to adopt a "dead weight strategy" and threaten to "at least partially shut down the site for several months." *Id.*

Despite its partners' concerns, Vinci pursued the dead weight strategy of slowing down the work and looking to King County for direction, money, and time before finding solutions. Before attending a meeting with the County, Mr. Chambraud of Vinci sent the following reminder:

> The whole discussion should be within the framework of the work stoppage strategy decided 10 days ago . . . .

Ex. 123. The next day, Mr. Chambraud's superior, Jean Francois Ravix, added his advice:

> Given the legislation in the United States, I prefer not to send this email to Thierry [Portafaix]; I'd rather leave it to Eric [Chambraud] to convey the message verbally because it could be used against us . . . .
>
> Have the Client agree to set up an Expert Panel (with its participation) to consider and propose a new mining solution taking into account the current situation.
>
> Do not propose a technical solution (ours or [Herrenknecht's]) to the Client. It must come from the experts thus involving the Client.

Ex. 124. As Mr. Ravix stated, Vinci apparently believed that this e-mail would not be disclosed in discovery. That assumption was of course incorrect; King County obtained the document in discovery, which confirmed that Vinci was looking for ways to shift blame and

responsibility to the County – consistent with its dead weight strategy – when it should have been looking for solutions.

King County also learned through discovery that Vinci had decided to look for ways to shift responsibility for VPFK's lack of progress. With regard to the slurry treatment plant, for example, an internal e-mail indicates "we need to re-write the history of the [slurry treatment plant], i.e. ... that it's the nature of the soils that has forced us to make these modifications." Ex. 60 at 3. Vinci likewise decided to argue that its equipment, methods, and management were "perfect" and "compliant" even though, as Mr. Rogstad testified at trial, that statement was not truthful. RP 1522 ("No, we had problems."). Yet another Vinci e-mail advised: "[V]ery quickly set up a case file to show that we are blameless." Ex. 122 at 1.

E. King County's Notice Of Default And VPFK's Deficient "Corrective Action Plan"

King County, of course, was unaware of this dead weight strategy during the project. Instead, all King County knew was that by October 2009 VPFK was one year behind schedule and had not even started to repair either STBM. RP 1198-99, 2031-32. That delay was not acceptable to King County, so on October 28, 2009 the County issued a notice of default, pointing out that VPFK's failure to make progress

toward timely completion was a breach of contract and asking VPFK (as the Central Contract indicated) to provide a "corrective action plan." Ex. 142.

VPFK submitted what it called a corrective action plan on November 13, 2009, but it did not propose any cure for the projected delay in completion. Ex. 145. Instead, consistent with its dead weight strategy, it said it would adopt new and more time-consuming tunneling methods, which would delay substantial completion to December 22, 2011. Ex. 145 at 23. Then, on January 29, 2010, VPFK submitted a revised schedule that pushed the substantial completion date back even further, to February 29, 2012. Ex. 151. A few weeks later, in mid-February 2010, VPFK predicted completion of tunneling on December 15, 2012 (Ex. 152), pushing substantial completion back to February 2014.

Thus, within a span of two months, VPFK's estimates of substantial completion slipped by more than two years. Equally troubling, on February 19, 2010, VPFK wrote a letter to King County stating that it was not sure whether it could even complete the mining at all. Ex. 153 at 3. And if it could finish the work, VPFK indicated that it would cost the County an additional $98 million plus or minus 15%. Ex. 153 at 1.

F. The Need For An Interim Agreement To Complete BT-2 And BT-3

King County was in a difficult position. It could capitulate to VPFK's demands, agree to pay an additional $98 million (and perhaps more later), and wait (for an unknown period of time) for VPFK to finish constructing the tunnels. Or it could terminate VPFK's Contract and spend months finding a replacement contractor to complete VPFK's work. Fortunately a third option presented itself. JDC, the tunneling contractor working on the West Contract, was close to completing its work, and its tunnel boring machine was almost at the western end of the BT-3 alignment and at the same depth as VPFK's inoperable STBM. CP 5407-08; RP 810. JDC expressed interest in completing the BT-3 tunneling work. CP 5406, 5408; RP 2243.

Although JDC's machine was an earth pressure balance tunnel boring machine ("EPB TBM"), rather than an STBM, it was King County's only potentially viable alternative. CP 5409; RP 2296-97. The EPB TBM could be modified and upgraded so that it could operate in the high pressures of the BT-3 work. CP 5408-09; RP 2297-303. Although JDC would need several months and several million dollars to modify and upgrade the EPB TBM, King County estimated that JDC could complete VPFK's BT-3 mining work in considerably less time than VPFK had

projected and likely at a lower cost. CP 5408, 5410; RP 2253. King County suggested that VPFK retain JDC to complete the BT-3 tunnel, but VPFK declined. CP 5406; RP 2275-76.

King County later learned, through documents disclosed by VPFK in discovery, that VPFK in fact *wanted* King County to hire JDC to complete the BT-3 tunnel so that VPFK would not incur the cost overrun for the work (since VPFK had not performed as efficiently as planned, it had significantly overspent its budget for the Contract). Immediately prior to a February 2010 mediation, Mr. Ravix informed Mr. Chambraud:

> My strategy will be to ensure that the Client and the Mediators ask that Jay Dee's EPB finish the BT3 tunnel (mining and pipes) and that we finish BT2 with our slurry machine. In this case in addition to the PAT [*i.e.,* cost overrun on the project] being $87.2M instead of 115, we will have a much stronger case to get Change Orders on all pending issues.

Ex. 148. Consistent with its dead weight strategy, VPFK was continuing to look for ways to shift financial responsibility for its work to King County – even in mediation.[2]

Consistent with VPFK's strategy, as stated in Mr. Ravix's e-mail, King County and VPFK entered into an agreement, called the "Interim Agreement," that would allow the County to delete the remaining BT-3

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[2] Although the trial court initially redacted the above-quoted portion of Exhibit 148 as a privileged mediation communication, it reconsidered that ruling and allowed King County to offer the unredacted version after Mr. Chambraud testified – *directly contrary to VPFK's stated position as set forth in Exhibit 148* – that having King County hire JDC was "not the preferred option." RP 4504.

tunneling work from VPFK's Contract and hire JDC to finish that tunnel. Ex. 152. King County reserved the right to claim that VPFK was in default, and VPFK reserved its defenses to the County's claim. *Id.* The County also subsequently agreed with VPFK on a new schedule to complete BT-2, with up to $5 million in incentives to be paid to VPFK if it finished the tunnel by the new deadline. Ex. 155. VPFK then completed BT-2 by the new deadline, and King County paid VPFK for the work it completed, including the full incentive payment. CP 5407; RP 1978-79, 2294, 2329, 4369. JDC completed BT-3, as expected, in considerably less time than VPFK had been projecting and for less money than VPFK had been demanding. CP 5410; RP 2253.

G. The Sureties' Denial Of King County's Claim Against The Bond

As mandated by Washington law (RCW 39.08.010), the Central Contract required VPFK to obtain a performance and payment bond (the "Bond"). Ex. 6 at 112. Five companies provided the Bond: Travelers Casualty and Surety Company of America, Liberty Mutual Insurance Company, Federal Insurance Company, Fidelity and Deposit Company of Maryland, and Zurich American Insurance Company (the "Sureties"). The Sureties were notified of King County's notice of default to VPFK one day after the County issued it. CP 6988-94. After months of meetings

and correspondence, as described in King County's answering brief in response to the Sureties' opening brief (filed concurrently herewith), the Sureties consented to King County's decision to hire JDC to complete VPFK's work but denied liability on the County's claim against the Bond by adopting the defenses VPFK had asserted. Ex. 161 at 2; Ex. 162 at 20-21.

H. King County's Damages, Its Claims Against VPFK For Default, And The Jury's Verdict

King County commenced this lawsuit against VPFK and one of its Sureties, Travelers, in April 2010. CP 1-14. The remaining Sureties intervened as defendants. CP 1433 ¶ 2. The case was tried for almost three months, from September 12 to December 6, 2012. RP 1-7106. King County presented a single claim for default and asserted damages totaling $155,831,471. CP 1-14, 1317. The largest component of those damages is the amount that King County paid to JDC to complete BT-3. CP 1316-17. VPFK, for its part, submitted over a dozen different claims, with various amounts of alleged damages. CP 1317-29.

The jury deliberated for two weeks, after which it found in favor of King County and awarded the County $155,831,471 (100% of its claimed damages) for default. CP 1317. The jury also awarded VPFK damages totaling $26,252,949 for some of its claims. CP 1318-29. The net verdict

in favor of King County was therefore $129,578,522. The jury also found that VPFK was not entitled to any additional time to complete its work as a result of its claims. *Id.* Following post-trial motion practice, the trial court awarded prevailing party attorney fees and costs totaling $14,720,387.19 in favor of King County and against the Sureties. CP 4490.

This timely appeal and cross-appeal followed. VPFK and the Sureties filed separate opening briefs. This answering brief responds to VPFK's arguments (which the Sureties adopt in their opening brief) and also addresses King County's cross-appeal. King County responds to the Sureties' appeal on the attorney fee award in another answering brief filed contemporaneously herewith.

V. LEGAL ARGUMENT REGARDING VPFK'S APPEAL

A. The Trial Court Correctly Granted King County's Motion For Summary Judgment Regarding VPFK's Differing Site Condition Claim Based On "Transitions."

1. The Trial Court Correctly Dismissed VPFK's Transitions Claim Because VPFK Failed To Show That The Central Contract Provided A Baseline For Transitions, That It Relied On Any Such Baseline, Or That Actual Conditions Could Not Have Been Reasonably Anticipated.

VPFK's lead argument on appeal is that the trial court erred in granting King County's motion for summary judgment regarding VPFK's "claim arising from frequent soil transitions." VPFK Br. 33-42. VPFK

bases this claim on the (alleged) fact that the soils contained "more frequent changes between plastic (sticky) and nonplastic soils than the Contract indicated." VPFK Br. 35. The trial court dismissed this claim on summary judgment because it concluded that "there had been no representation, understanding or reliance as to the frequency or number of transitions except that there would be frequent transitions and that the soil conditions were variable." CP 1083 ¶ 1.

Under Washington law, a differing site condition claim (also referred to as a changed condition claim) has four elements in addition to causation and damages. As set forth below, the contractor must establish (1) that the contract documents represented certain conditions, (2) that the contractor reasonably relied on that representation in making its bid, (3) that actual conditions differed, and (4) that the complained of condition was not foreseeable. Also as set forth below, VPFK failed to create fact issues as to *any* of these elements.

The Washington Supreme Court addressed the first three elements of a claim for differing site conditions in *Maryland Casualty Co. v. City of Seattle*, 9 Wn.2d 666, 16 P.2d 280 (1941). The contractor there was hired to build a concrete sewer in a tunnel on a designated route. 9 Wn.2d at 668. Partway through the work, the ground became so wet and soft that the contractor had to work under compressed air, which "greatly

increased" its costs. *Id.* at 669. The contractor claimed it was entitled to recover this unexpected expense. *Id.*

The Washington Supreme Court began its analysis by stating the "general rule" as follows:

> The general rule may be deduced from the decisions that where plans or specifications lead a public contractor reasonably to believe that conditions indicated therein exist, and may be relied upon in making his bid, he will be entitled to compensation for extra work or expense made necessary by conditions being other than as so represented.

Id. at 670 (internal quotation marks and citation omitted). Having set forth these elements of a differing site condition claim, the Washington Supreme Court reviewed the contract documents and rejected the contractor's claim because "the contract did not contain any representation or implied warranty as to underground conditions" and "the specifications were not misleading or defective." *Id.* at 675-76.

Applying *Maryland Casualty*, the Washington Court of Appeals addressed the fourth element of a differing site condition claim (that the complained of condition was not foreseeable) in *Basin Paving Co. v. Mike M. Johnson, Inc.*, 107 Wn. App. 61, 27 P.3d 609 (2001). The contractor there was awarded a contract to construct the Town of Lind's wastewater and water system project. 107 Wn. App. at 62. After completing the work, the contractor asserted a changed condition claim because it

allegedly "encountered more subsurface rock than it expected based on boring tests conducted on behalf of Lind." *Id.* at 63. The trial court "summarily dismissed" the claim, and the contractor appealed. *Id.*

The Court of Appeals affirmed. After repeating the "general rule" of *Maryland Casualty* as stated above, the court held that there was no changed condition for several reasons, including (a) the contract made "no contractual representation of the material to be excavated," and (b) the contractor's president "admitted in his deposition that he knew there could have been more subsurface rock than what was indicated in the boring tests." *Id.* at 66-67. The court then concluded: "In sum, a contractor cannot recover additional compensation for a 'changed condition' if the complained of condition was foreseeable." *Id.* at 67-68.[3]

In response to King County's summary judgment motion, VPFK failed to show fact issues regarding any of these necessary elements. First, there was no representation that there would be limited transitions. VPFK's contrary argument ignores the limited nature of the GDR and GBR, which are the only documents that provided detailed information regarding soil conditions along the tunnel alignment. The GDR, for its

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[3] Other Washington courts have similarly held. *See, e.g., Dravo Corp. v. Municipality of Metro. Seattle*, 79 Wn.2d 214, 484 P.2d 399 (1971); *Clevco, Inc. v. Municipality of Metro. Seattle*, 598 Wn. App. 536, 799 P.2d 1183 (1990); *Nelson Constr. Co. of Ferndale, Inc. v. Port of Bremerton*, 20 Wn. App. 321, 582 P.2d 511 (1978).

part, provided data regarding soil samples from *designated bore holes*. CP 350-51. The GBR then interpreted the available data. CP 383-468. Neither document indicated soil types *between* bore holes or provided a baseline for the number or nature of changes between different types of soils.

The record before the trial court on King County's summary judgment motion also showed that VPFK *recognized* the absence of any location-specific baselines for soil types between bore holes. For example, VPFK's April 21, 2009 claim letter stated:

> *[T]he GRB [sic, for GBR] produced for this project stopped short of providing location specific soil conditions* . . . . When the County decided to not include location specific soil information in the GBR, *it also did not provide an express expectation regard[ing] the variability of the ground.*

CP 471 (emphases added). VPFK's expert witness regarding differing site conditions, Dr. Ronald Heuer, later confirmed that point in a report dated September 8, 2008:

> [T]he GBR contains *no baseline for expected number of changes* in face composition.

CP 475 (emphasis added). At his deposition, Dr. Heuer likewise agreed "that *the GBR, the contract documents and specifications did not provide any baseline for the number of expected transitions* from plastic to non-plastic soils." CP 483 (emphasis added; answering "Correct").

VPFK admits this point in its appellate brief. On page 22 of the brief, for example, VPFK concedes that "the County's GBR provided *no information* about soil conditions at locations other than bore holes or about the *frequency of transitions* between dominant soil types." (Emphases added.) Referring again to the GBR and whether it provided a baseline for frequency of transitions, VPFK similarly states on page 40 of its brief that "*there were no such baselines.*" (Emphasis added.) Without any such baseline, VPFK could not show that King County made a contractual representation as required to establish its claim.

Indeed, to the extent that the Central Contract addressed the number and frequency of transitions, the contract documents indicated that soil conditions were highly variable and, as a result, there would be frequent transitions. The GBR contained a profile showing the location of the bore holes and depicting the "tunnel soil groups" present at different depths within the bore holes. CP 404-06. This profile showed considerable variability of soil types both vertically (several different colors found within a single bore hole) and horizontally (different colors at the tunnel elevation from one bore hole to the next). CP 430-32. The GBR also explained that continental glaciers had traversed the project site at least six times, eroding the preexisting ground surface and then depositing new sediment over the land, and expressly stated, consistent

with that glacial and tectonic history, that the "soil stratigraphy for the Central Contract is complicated." CP 400-04.

Here too, the record shows that VPFK *recognized* this complexity. Before it submitted its bid, VPFK hired GZA GeoEnvironmental, Inc., to analyze expected soil conditions. Based on the contract documents, including the GDR and the GBR, GZA advised VPFK:

> As is correctly stated in the GBR, the soil conditions are very complex and at times erratic. Prediction of the soils in the face at any single location with an accuracy of say 50- to 100-ft along the alignment will at best be approximate.

CP 500. The author of the GZA report, Joseph Guertin, subsequently confirmed at his deposition that, based on the contract documents, "one would expect high variability ... in the types of soil to be encountered," that "soil types would change . . . frequently," and that conditions "can change very quickly." CP 489-90. Thus, as the trial court *correctly* concluded, VPFK's transitions claim failed "because there had been no representation ... as to the frequency or number of transitions except that there would be frequent transitions and that the soil conditions were variable." CP 1083 ¶ 1. On this basis alone, this Court can affirm.

Second, even if there were fact issues regarding the representation prong (which there were not), VPFK also did not establish fact issues regarding reliance at the time it prepared its bid. When asked whether

VPFK had directed him to evaluate the frequency of soil type changes, Mr. Guertin could not recall any such request and further testified that he did not believe it would be possible, based on the information presented in his report, to determine the number of "transitions" along the alignment. CP 493-94. VPFK hired another geotechnical expert, Jean Launay, to prepare a report about expected tunnel conditions. Mr. Launay did not provide such an assessment of transitions either. CP 524. To the contrary, he testified that such information "wasn't needed for a bid estimate" and that it would be "foolish to try to" map the locations of particular soil conditions. *Id.*

VPFK's lead estimator, Jean-Pierre Debaire, also did not consider the frequency or nature of transitions in preparing VPFK's bid. Mr. Debaire testified that no one thought it was important to count the number of transitions that would occur along the tunnel alignment and that "[i]t was not possible" to do so. CP 535. Thus, as Mr. Debaire stated, Vinci's bid estimate was not based on counting the number of transitions between different types of soils. CP 533-34. Even if a certain number of transitions along the tunnel alignment was a reasonable guess, VPFK failed to provide any evidence indicating that it relied upon any such representation at bid time. As the trial court correctly concluded (CP 1083

¶ 1), VPFK's differing site condition claim failed for that reason as well. This, too, is a separate and independent basis to affirm.

Finally, even if there were fact issues regarding the representation and reliance prongs (which, again, there were not), VPFK also failed to establish fact issues regarding the remaining elements of a differing site condition claim: that actual conditions differed and that the complained of condition was not foreseeable. As discussed in detail above, the Central Contract made clear that VPFK would encounter different types of soils along the tunnel alignment, and VPFK's consultants (Mr. Guertin at GZA and Mr. Launay) and its lead estimator (Mr. Debaire) knew that soil conditions would change frequently over the course of the alignment. CP 489-90, 493-94, 524, 533-35. In his expert report, VPFK's geotechnical expert (Dr. Heuer) similarly opined that glacial geology in the Seattle region "is generally recognized as being complex." CP 541. This glacial and tectonic history was known when VPFK submitted its bid and was expressly referenced in the GBR. CP 400-02. As such, the record shows – without dispute – that actual conditions *did not* differ and that VPFK could have anticipated (and did anticipate) those conditions. For this reason too, the trial court correctly granted King County's motion for summary judgment regarding VPFK's transitions claim.

2. In Attempting To Show Fact Issues Regarding The Required Elements Of A Differing Site Condition Claim, VPFK Misstates The Central Contract, Controlling Legal Principles, And Record Evidence.

a. VPFK's Representation Arguments Are Legally And Factually Flawed.

Because VPFK admits (as it must) that "the County's GBR provided *no information* about soil conditions at locations other than bore holes or about the *frequency of transitions* between dominant soil types" and that "*there were no such baselines*" (VPFK Br. 22, 40 (emphases added)), it argues that it can satisfy the "representation" requirement to assert a differing site condition claim based on "interpolations" or "assumptions" regarding expected transitions (VPFK Br. 33-35, 39-40). As set forth below, VPFK's arguments are both legally and factually flawed: legally, VPFK's own authorities confirm that it cannot establish fact issues based on assumptions; factually, there is no record support for those assumptions.

As an initial matter, VPFK's interpolation argument is not supported by the plain language of the Central Contract. VPFK's argument is premised on the following provision:

> The Contractor may make its own interpretations, evaluations, and conclusions as to the nature of the geotechnical materials, the difficulties of making and maintaining the required excavations, and the difficulties of doing other work affected by geotechnical conditions, and shall accept full responsibility for making assumptions that differ from the baselines set forth in the GBR.

CP 845 (cited at VPFK Br. 35). As can be seen, the provision does not establish that *King County* is liable if a contractor guesses wrong. To the contrary, "*[t]he contractor*" expressly accepts "*full responsibility* for making assumptions that differ from the baselines set forth in the GBR." *Id.* (emphases added). That necessarily includes VPFK's assumptions and interpolations because, as VPFK concedes, it made assumptions about conditions that the GBR *did not* address.[4]

Seeking to rewrite the agreement, VPFK claims that "the Contract invited contractors to draw their own conclusions about soil conditions so long as they did not *contradict* the County's baseline figures in the GBR." VPFK Br. 13 (emphasis added). That is incorrect, as the Contract uses the term "differ" (CP 845), not "contradict." Moreover, if VPFK's interpretation were accepted, a contractor could simply make an *incorrect* assumption and then recover damages from the owner when that assumption proves inaccurate even if – as here – the contract did not make *any representation* regarding that issue. Such a result not only would eliminate the "representation" requirement for a differing site condition

[4] The Contract also stated that VPFK was "solely responsible for the proper performance of the Work in accordance with the Contract, including the construction means [and] methods" to construct the tunnels (Ex. 6 at 9 of 58 (§ 3.1.A)), which may require making assumptions about soil conditions.

claim, it would turn owners into guarantors. The Court should reject VPFK's incorrect and absurd revision of the contract language.[5]

VPFK's argument is also contrary to controlling case law. The Washington Supreme Court addressed analogous contract language – and rejected an argument similar to VPFK's – in *Dravo Corp. v. Municipality of Metropolitan Seattle*, 79 Wn.2d 214, 484 P.2d 399 (1971). The contract there provided as follows:

> The bidder shall make his own deductions and conclusions as to the nature of the materials to be excavated, the difficulties of making and maintaining the required excavations, the difficulties which may arise from subsurface conditions, and of doing any other work affected by the subsurface conditions, and shall accept full responsibility therefor.

79 Wn.2d at 215-16. The court described this provision as an "express disclaimer of any representation concerning the subsurface." *Id.* at 219. Thus, contrary to VPFK's argument, a provision permitting a contractor to formulate its own conclusions, as here, has been authoritatively held *not* to shift the risk of those conclusions to the owner.

Federal law also holds that contractors bear the risk of their own assumptions. In *Weeks Dredging & Contracting, Inc. v. United States*, 13

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[5] *See Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 137, 26 P.3d 910 (2001) ("[I]t is elementary law, universally accepted, that the courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves." (internal quotation marks and citation omitted)); *Forest Mktg. Enters., Inc. v. State, Dep't of Natural Res.*, 125 Wn. App. 126, 132, 104 P.3d 40 (2005) ("We avoid interpreting statutes and contracts in ways that lead to absurd results.").

Cl. Ct. 193 (1987), a dredging contractor asserted a differing site condition claim alleging that the quantities of certain materials encountered during dredging were "*in excess* of what was reasonably discernible from the contract boring logs" provided with the invitation to bid. *Id.* at 196 (emphasis in original). Because the contract materials provided to prospective bidders did not identify the *quantity* of different types of material in the overall area to be dredged and the boring logs did not cover the entire dredging area (*id.* at 198), the contractor – like VPFK here – extrapolated an estimate of the quantity of certain materials based on the data in the boring logs (*id.* at 201) and argued that the boring logs and related information were an indication of the quantities of the dredge materials (*id.* at 221).

The court rejected the contractor's differing site condition claim because the contract materials, including the boring logs, did not state any quantities of expected dredge materials. *Id.* The court also rejected the contractor's attempt to rely on the boring logs as indicators about soil conditions between areas that had been tested because the contractor's expectations concerning those areas were based "entirely and solely on *its* extrapolations from the contract boring logs." *Id.* (emphasis in original). Those expectations, the court held, were "no more than hospitable assumptions, which, while necessary for the bid to proceed, are

nonetheless *entirely of the contractor's own making*." *Id.* (emphasis in original).

The same reasoning and result apply equally here. As noted above, VPFK's differing site condition claim is premised entirely and solely on its *own* assumptions and interpolations and not on any specific representation in the contract documents. VPFK Br. 33-35, 39-40. In *Weeks*, the court concluded that the contractor's analogous assumptions "were neither indicated, nor otherwise contained within the contract documents and thus cannot, as a matter of law, be thrusted upon the government to form the basis of a differing site condition claim." 13 Cl. Ct. at 223. This case is no different.

The cases cited by VPFK do not support a different rule. To the contrary, those cases confirm, as the court in *Weeks* expressly held, that whether a contract indicates a particular site condition is a matter of contract interpretation for the court to decide as a matter of law. *See Renda Marine, Inc. v. United States*, 66 Fed. Cl. 639, 652 (2005) ("What is 'indicated' by contract documents 'is a matter of contract interpretation and thus presents a question of law' to be decided by the court." (quoting *P.J. Maffei Bldg. Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984))); *Foster Constr. C.A. & Williams Bros. Co. v. United States*, 193 Ct. Cl. 587, 602 (1970) ("The issue of the indications in the

contract is one of law for decision by the tribunal, not an issue of fact . . . ."). Thus, when the trial court here concluded that "there had been no representation . . . as to the frequency or number of transitions" in the contract documents (CP 1083), it was not resolving a disputed issue of fact as VPFK claims but appropriately interpreting contract terms.

Equally important, VPFK's cited authorities also confirm that a "differing site condition *cannot exist* where the plans and specifications do not show or indicate anything about the alleged unforeseen condition, i.e., if they say nothing one way or the other about the [the subsurface condition] . . . ." *Renda Marine*, 66 Fed. Cl. at 651 (emphasis added; internal quotations marks and citations omitted; brackets in original); *see also Foster*, 193 Ct. Cl. at 603 ([A] contract silent on subsurface conditions cannot support a changed conditions claim . . . ."). In that sense, federal law is consistent with Washington law as discussed in Section V.A.1 above.

VPFK claims that *Renda Marine* supports a different rule, but it quotes out of context the court's recognition that "contract indications need not be explicit or specific so long as they provide sufficient grounds by which the contractor can justify his expectation of latent conditions materially different from those encountered." 66 Fed. Cl. at 652 (internal quotation marks, citation, and brackets omitted); *see* VPFK Br. 33-34. In

a portion of the opinion ignored by VPFK, the court was careful to recognize that "[w]here the contract contains no affirmative (positive or negative) representations of the subsurface conditions . . . the government has no liability." 66 Fed. Cl. at 651-52 (internal quotation marks and citation omitted; ellipsis in original). In support of that holding, the court in *Renda Marine* quoted *Weeks*, which as discussed above is fatal to VPFK's interpolation argument.

VPFK's reliance on *Foster* (VPFK Br. 34, 39) is similarly misplaced. In *Foster*, the drill hole logs indicated that subsurface conditions would be sufficiently stable to permit excavation in the dry. 193 Ct. Cl. at 595. That indication, combined with specifications regarding classes of concrete and the omission of any provision for a concrete seal, necessarily indicated certain conditions. *Id.* at 618. Here, as discussed above, there was no representation as to the frequency of transitions *other than* that soil conditions were highly variable. The court's opinion in *Foster* is therefore inapposite.

Moreover, to the extent that VPFK relies on the contract documents (rather than its own assumptions and interpolations) to establish an alleged representation, the record does not support its arguments. VPFK asserts that the GBR "represented that there are 'slight but discrete changes that can occur' between ground conditions found at

the bore holes." VPFK Br. 38 (quoting CP 410). VPFK never argued this theory to the trial court, and the argument in any event misstates the GBR. The statement relied upon by VPFK was made in the context of advising bidders about where conditions might be best for an inspection or maintenance stop in a particular reach, and it reads in full:

> *In addition to the general variability of the subsurface profile along the alignment of both tunnel sections* there are slight but discrete changes that can occur.

CP 410 (emphasis added). In other words, in addition to large-scale soil changes reflected in the bore holes, smaller-scale variations can occur. Contrary to VPFK's argument, this is consistent with other statements that the soils would be highly variable.

Lastly, VPFK claims that "because the County *required* VPFK to use an STBM ... VPFK concluded before submitting its bid that the ground would be sufficiently predictable to efficiently operate the STBM." VPFK Br. 39 (citations and internal quotation marks omitted; emphasis in original). This argument fails, at the outset, because the jury specifically found that VPFK had not established a differing site condition based on unpredictable ground. CP 1322 (Question 12a), 1324 (Question 13a). In any event, this is just another assumption dressed up as a representation. The contract documents include no such representation (in fact, they disclose the unpredictable nature of the ground), and VPFK's own

documents confirm its understanding that the decision to specify an STBM was driven by concerns about soil and ground water pressures and not because of any assumption regarding the frequency of transitions between soil conditions. *See* Section IV.B above and Section V.B.1 below. The absence of any representation is fatal to VPFK's argument and, *on this basis alone*, the Court can properly affirm the trial court's summary judgment ruling.

b. VPFK's Contention That It Relied On An Estimate Of Transitions At Bid Time Is Likewise Unsupported.

VPFK's other challenge to the trial court's ruling on its differing site condition claim – that it presented evidence of reliance on estimates about transitions at bid time (VPFK Br. 35-39, 40-41) – fails factually. At oral argument on the County's motion, the trial court repeatedly asked VPFK's counsel to identify evidence in the record establishing that VPFK relied on any particular estimate of the frequency of soil transitions, and VPFK's counsel could not do so. RP 7/13/12 MSJ Hrg at 83-98. Now, on appeal, VPFK asserts that it commissioned studies regarding transitions and relied on this information in making its bid. As explained below, VPFK's contentions in support of this argument are based on materials or arguments not presented on summary judgment, irrelevant information, or

distortions of the record. Each of VPFK's contentions is addressed in turn.

Starting with VPFK's claim that it retained Messrs. Launay and Guertin to analyze "expected frequency of transitions between plastic and nonplastic soils" (VPFK Br. 36), this assertion is unsupported. Its cited authority (CP 882) merely establishes that Mr. Debaire referenced the work of Messrs. Launay and Guertin, not that he understood their work to be a study of the frequency of transitions. Mr. Launay and Mr. Guertin both testified that they did *not* study or attempt to predict the number or frequency of transitions between different soils. CP 493, 522, 524-25. VPFK ignores this testimony.

Next, VPFK argues that Mr. Debaire reviewed the work of Messrs. Launay and Guertin and concluded that the changes between dominant soil types would be "gradual, not chaotic" and "manageable." VPFK Br. 37. In support of this assertion, VPFK cites to the *trial testimony* of Mr. Launay (RP 2924-25). The Court should ignore this testimony and related argument because the testimony obviously was not before the trial court on summary judgment and therefore cannot be used to show that VPFK established fact issues that precluded summary judgment or that the trial court erred.

As to Mr. Debaire's work in preparing the bid estimate, his deposition testimony – which *was* part of the summary judgment record – reveals that it was "impossible" to determine soil conditions "foot-by-foot between boreholes" and that no one told him that it was "important to count the number of times the soils would change along the tunnels." CP 534-35. His estimate, he confirmed, did *not* include an attempt to "count the number of changes of soils." CP 536. Rather he simply made "assumptions" about soil conditions between bore holes. CP 534. Even drawing inferences in VPFK's favor, Mr. Debaire's testimony establishes that he did not make an estimate of the frequency or number of soil transitions on which VPFK could have relied.

Lastly, VPFK cites to two reports prepared *after* it submitted its bid in 2006: VPFK's October 8, 2007 preconstruction expectations report and an evaluation of that report by the County's consultant. VPFK Br. 37. This evidence is legally irrelevant because it does not – and cannot – establish VPFK's "expectations *at the time it submitted its bid.*" *Erickson-Shaver Contracting Corp. v. United States*, 9 Cl. Ct. 302, 306 (1985) (emphasis added); *see also Maryland Casualty*, 9 Wn.2d at 670 (focusing on representations "relied upon in making his bid"). In addition, both reports were written by individuals who were *not* involved in VPFK's bid.

CP 3808-09. Both logically and legally, the Court should ignore these materials and VPFK's related argument.

If the Court nonetheless considers these materials, the result is the same. The record shows, without dispute, that an estimate of the frequency or number of transitions was not possible, that no one was charged with making such an estimate, and that no one for VPFK relied on any such estimate in making its bid. CP 493, 522, 524-25, 535-36. The fact that VPFK thought about counting transitions after it bid is immaterial. Thus, not only was there a failure of proof regarding the representation prong of a differing site condition claim, there also was a failure of proof regarding reliance. For this reason too, the trial court correctly dismissed VPFK's differing site condition claim on summary judgment.

c. VPFK Also Fails To Show, As It Must, That There Were Fact Issues Regarding Whether Actual Soil Conditions Differed And Whether Those Conditions Were Not Reasonably Anticipated.

Finally, VPFK does not even attempt to establish fact issues regarding the remaining elements of a differing site condition claim: that actual conditions differed and that the complained of condition was not foreseeable. Among other evidence (discussed at length above), VPFK's geotechnical consultant advised VPFK *before* it submitted its bid: "As is

correctly stated in the GBR, the soil conditions are very complex and at times erratic." CP 500. VPFK's *after-the-fact* protestations do not, and cannot, change the record at the time it submitted its bid, which establishes without dispute that actual conditions *did not* differ and that VPFK could have anticipated (and did anticipate) those conditions. VPFK's failure of proof on these elements is another legally sufficient ground to affirm the trial court's ruling dismissing VPFK's differing site condition claim on summary judgment.

B. The Trial Court Correctly Granted King County's Motion For Summary Judgment Regarding VPFK's Defective Specifications Claim.

1. The Trial Court Correctly Concluded That "There Is No Evidence The Specifications Were Defective."

In addition to asserting a differing site condition claim based on soil transitions, VPFK asserted, as an "alternative theory" (VPFK Br. 58), a defective specifications claim. VPFK's counterclaim reads as follows:

> King County warranted that the STBM method it chose for this project could successfully complete the work in the ground conditions encountered in the time frame allowed. If the actual ground conditions encountered are what should have been anticipated based on the Contract Documents (which VPFK refutes), then King County's specification of a STBM and allotment of contract time was defective.

CP 75 ¶ 50. King County filed a summary judgment motion to dismiss that claim for failure of proof. CP 181-99. The trial court granted the

motion, concluding that "[t]here is no evidence the specifications were defective." CP 1083 ¶ 2.

To begin with, the trial court correctly stated the applicable legal standard as set forth in *Donald B. Murphy Contractors, Inc. v. State*, 40 Wn. App. 98, 696 P.2d 1270 (1985). Like VPFK here, the contractor in *Donald B. Murphy Contractors* argued that the owner breached the implied warranty of design (discussed more fully below) when culverts that the owner had designed and the contractor had constructed failed. 40 Wn. App. at 102. The court expressly rejected the contractor's argument "that the implied warranty of design is the equivalent of strict or absolute liability." *Id.* Instead, "a design must be 'defective' for there to be a breach of the implied warranty." *Id.* The court then concluded that "because the design for the culverts was reasonable ... the State did not breach its implied warranty of design." *Id.* at 103.

Although VPFK claims that the STBM requirement was defective, the record before the trial court on summary judgment showed very clearly that VPFK *preferred* an STBM over the alternative – an EPB TBM – because the industry experience at that time indicated the STBM was better suited to perform in the Central Contract conditions. As noted previously, Mr. Portafaix wrote at the time of bid: "The choice to use a

slurry TBM was imposed by the client, but it satisfies our own selection criteria." CP 221. Mr. Portafaix explained that assertion as follows:

- The ground conditions are adapted to slurry.
- Interventions at the head will be facilitated by having pressurized [slurry] impregnating the face.
- Slurry pressure is well adapted to a job that involves tunnels that are narrow and deep.
- There will be less wear to the cutter head from the use of slurry, and it matters because these tunnels have no intermediate shafts where one can perform heavy-duty maintenance of the cutter head.

Id. Werner Burger, the chief engineer of VPFK's STBM supplier, Herrenknecht, agreed with that assessment. Consistent with Mr. Portafaix's conclusion, Mr. Burger sent an e-mail to VPFK in February 2006 (again, before the bid) stating that the "*preferred solution is a slurry TBM* because of better potential to operate under highest face pressure and lower risk for the need of chamber access." CP 6187 (emphasis added). In a January 1, 2006 memorandum, another Herrenknecht engineer, V. Breuning, likewise stated:

> Recommended machine type: Mixshield with slurry supported tunnel face.... (The use of an EPB-Shield is not recommended due to tunneling through loose soil conditions with high water pressures.)

CP 6174. As can be seen, VPFK and its consultants *understood and agreed with* King County's decision to require the successful contractor to complete the work using an STBM.

Nor did this opinion change after VPFK asserted its defective specifications claim in litigation. Consistent with the above evidence, Mr. Burger testified at his deposition in this matter that he "preferred" an STBM over an EPB TBM for three reasons:

- "[b]ecause of the anticipated face pressure";
- "[b]ecause of the size of the machines and the ability to install air locks and chamber access systems"; and
- "because of the potential of boulders, and, let's say, cause of ground conditions on sections along the job."

CP 238. Then, completely eliminating any doubt regarding the viability of VPFK's defective specifications claim, Mr. Burger testified:

> Q. Okay. And – but I want to be sure I'm clear in my question. The county's specification in the contract documents for a slurry TBM, ***did you feel that there was anything defective or wrong with that specification by the county***?
>
> A. ***No***.

CP 239 (emphases added). On this record, VPFK cannot credibly argue that the STBM requirement was unreasonable or otherwise defective and that it should be absolved of liability simply because King County required the successful bidder to complete the work using an STBM.

Much the same is true with regard to the allotted contract time. Contrary to VPFK's argument, King County's requirement that the work be done within a certain number of days is *not* a warranty that VPFK

would timely complete the work. Rather, it was *VPFK* that represented to the County that the allotted contract time was adequate:

> The Contractor makes the following representations to the County.... [T]he Contract Time is adequate for the performance of the Work as represented by the Contract....

CP 5435.[6] VPFK's internal documents tell a similar story. When VPFK signed the Central Contract in 2006, and for a considerable time thereafter, VPFK believed that the allotted contract time was sufficient to perform the work. This was reflected on VPFK's baseline construction schedule, which showed all of the work being completed on the substantial completion deadline. CP 205-15.

On similar facts – where a contractor expressly warranted that it would complete its work by a contractual deadline – courts have routinely held that the owner *did not* impliedly warrant timely performance. In *American Ship Building Co. v. United States*, 228 Ct. Cl. 220 (1981), for example, the appellate court ruled as follows:

> By entering into the contract, the *contractor warrants it can perform by the due date*. . . . By finding that the 900 days was a warranty, the trial judge transposed the situation and made the government a warrantor. . . . [W]e find it beyond "the realm of expectation" that the government either expressly or impliedly warranted the contract could be performed within 900 days. Rather [the government] invited those who thought they could

[6] VPFK further agreed that "[t]imely performance and completion of the Work is essential to the County and the time limits stated in the Contract are of the essence." Ex. 6 at 515.

> deliver in 900 days to submit bids. We hold therefore, the 900 day requirement was not a warranty or affirmation but a mere due date.

Id. at 224-25 (emphasis added; citations omitted). A contractual deadline, therefore, does not guarantee the contractor will meet the deadline; it merely establishes when performance is due.

In *Associated Engineers & Contractors, Inc. v. State*, 58 Haw. 187, 567 P.2d 397 (1977), the Hawaii Supreme Court similarly rejected a contractor's argument that the state had impliedly warranted that the contractor would be able to complete its work by a date certain. The contractor complained that by failing to require special procedures to deal with cold weather, the owner had impliedly warranted that cold weather would not prevent timely completion of the work. 58 Haw. at 193. The court rejected the contractor's argument that the state had warranted timely completion, saying that there was "no authority holding that a requirement that work be performed only under certain weather conditions is, without more, a warranty that such weather conditions will exist." *Id.* at 201-02.

These cases, along with the plain language of the parties' agreement, are controlling here. Like the defendants in *American Ship Building* and *Associated Engineers*, King County did not impliedly warrant that VPFK would timely complete its work using an STBM.

Instead, VPFK expressly warranted the completion date in the Contract. For this reason – in addition to the absence of any evidence that the STBM requirement was defective (as discussed above) – the trial court correctly dismissed VPFK's defective specifications claim on summary judgment.

2. VPFK's Arguments Regarding Its Defective Specifications Claim Are Both Legally And Factually Flawed.

a. VPFK Misstates The *Spearin* Doctrine And Case Law Applying This Doctrine.

VPFK's argument regarding its defective specifications claim relies entirely on what it calls the "*Huetter/Spearin* implied warranty doctrine." VPFK Br. 43. VPFK claims that "several principles follow from" that doctrine (*id.*), but it misstates those principles – largely because it misapplies or simply ignores controlling case law.

Starting with *Huetter v. Warehouse & Realty Co.*, 81 Wash. 331, 332, 142 P. 675 (1914), the contractor in that case agreed to construct a large fill and viaduct in accordance with plans and specifications provided by the City of Spokane. The contractor did so until a large portion of the fill collapsed. *Id.* The contractor recovered damages, and the Washington Supreme Court affirmed as follows:

> If a contractor cannot perform by reason of defective plans which he is required to follow, which render the contract impossible of performance, which were not prepared or provided by him, but were prepared and provided by the owner, or by his architect or engineer, there would seem to be no just reason why the contractor

> may not recover for work done in strict compliance with such plans and specifications, under the supervision and to the satisfaction of the owner, architect, or engineer, in an attempt to perform the contract.

Id. at 337. Significant here, the court also recognized that this legal principle *does not* apply if the contractor "has warranted that the plans and specifications are correct." *Id.* at 335 (internal quotation marks and citation omitted). But it found this exception inapplicable because there was "nothing to indicate that the plaintiffs warranted the plans and specifications prepared by the city engineer." *Id.* at 336.

The United States Supreme Court's holding in *United States v. Spearin*, 248 U.S. 132 (1918), is no different. The contractor there was to build a dry-dock in a Navy yard. *Id.* at 133. The contractor performed the work in accordance with the government's plans and specifications, but was unable to complete the work after water backed up and broke a relocated sewer. *Id.* at 133-34. The contractor then sued for the cost of the work it had performed. *Id.* at 133.

The Court of Claims ruled for the contractor, and the Supreme Court affirmed. The Supreme Court first recognized the financial and practical implications of a fixed-price contract:

> The general rules of law applicable to these facts are well settled. Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered.

Id. at 135-36 (citations omitted). This general rule is subject to an exception:

> But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.

Id. at 136. The Court then held that the contractor in *Spearin* – like the contractor in *Huetter* – was not legally responsible for the flooding and sewer damage that occurred as a result of strictly following the government's plans and specifications. *Id.* at 137.

Washington courts continue to follow the principles set forth in *Huetter* and *Spearin*. For example, in *Shopping Center Management Co. v. Rupp*, 54 Wn.2d 624, 631, 343 P.2d 877 (1959) ("*SCMC*"), the Washington Supreme Court expressly distinguished *Huetter* because "[t]he express wording of the guaranty provision [in the parties' agreement] is that *the contractor* shall guarantee the satisfactory operation of all materials and equipment installed under this contract." *Id.* at 632 (emphasis added and omitted). Given that express warranty, the court held that it was "*immaterial* ... whether the pumps failed to operate satisfactorily because of the plans and specifications." *Id.* at 633 (emphasis added). Instead, "the appellant must be held, under the language of his guaranty, to have assumed the risk of the events which

subsequently transpired." *Id.* In *Dravo*, 79 Wn.2d at 218, the Washington Supreme Court again quoted the "fixed sum" language in *Spearin*.

> Several legal principles flow directly from the above cases:
>
> 1. If a contractor performs in strict accordance with the owner's plans and specifications, the owner cannot recover damages from the contractor if the result is unsatisfactory.
> 2. If a contract is impossible to perform in strict accordance with the owner's plans and specifications, the contractor may recover from the owner for the value of work done in its attempt to perform.
> 3. Notwithstanding point 2 above, if the contractor expressly warrants its work or that it will timely complete its work, the contractor – not the owner – is responsible for its own deficient and/or untimely performance.

Contrary to VPFK's argument (VPFK Br. 43), these are the principles that "follow from the *Huetter/Spearin* implied warranty doctrine."

If these principles are *correctly* applied here, something VPFK also does not do, it is clear that VPFK's arguments fail. First, there is no evidence that it was *impossible* to complete BT-2 and BT-3 using an STBM. Indeed, VPFK completed BT-2 using an STBM. CP 5407; RP 870. Second, like the contractor in *SCMC*, VPFK expressly warranted that it would timely complete the work using an STBM. CP 5435. Accordingly, as in *SCMC*, *Dravo*, *American Ship Building*, and *Associated Engineers*, VPFK – not King County – is responsible for its own deficient and untimely performance.

City of Seattle v. Dyad Construction, Inc., 17 Wn. App. 501, 565 P.2d 423 (1977), cited by VPFK (VPFK Br. 44), is not to the contrary. VPFK misunderstands what warranties an owner provides to a contractor by seizing on the following statement:

> Further, when an owner furnishes plans and specifications for a construction project prescribing a time for completion of the work, there exists an implied warranty that the contractor will be able to complete the project timely, as designed. *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 442 P.2d 621 (1968); *Armstrong Constr. Co. v. Thomson*, 64 Wn.2d 191, 390 P.2d 976 (1964).

17 Wn. App. at 517. As the introductory word "further" suggests, this statement needs to be understood in context.

At issue in *Dyad* was the enforceability of a contract clause limiting a contractor's remedy for owner-caused delay to a time extension. The City first had interfered with and changed the scope of the contractor's work, and later the City's plans had proved unworkable and unsafe and had to be changed. *Id.* at 503. On these facts, the court, in the above-quoted statement, noted the long-standing rule that by delivering plans and specifications the owner impliedly accepts responsibility for defects in those documents. Confirmation can be found by reviewing the *Prier* and *Armstrong Construction* cases cited in *Dyad*. *Id.* at 517. Those cases also involved faulty design and did not mention any warranty of

timely completion. *Prier*, 74 Wn.2d at 29-30; *Armstrong*, 64 Wn.2d at 192.

In suggesting that an owner necessarily warrants timely completion, VPFK seriously misreads *Dyad*. No such rule was necessary to decide *Dyad*. Indeed, the Washington Supreme Court subsequently explained that the holding in *Dyad* was based on "[a]ctive owner interference." *Christiansen Bros., Inc. v. State*, 90 Wn.2d 872, 877, 586 P.2d 840 (1978), *superseded by statute as stated in Scoccolo Constr., Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wn.2d 506, 515, 145 P.3d 371 (2006). *Dyad*, therefore, does not stand for the proposition that an owner warrants the contractor's timely completion in the absence of faulty design or owner interference, particularly if, as here, the contractor expressly warrants that it will timely complete the work.

VPFK's other cited cases also do not establish a legal standard for an owner warranty as VPFK claims. Two of those cases merely confirm the legal principles set out on page 53 above. Confirming the first legal principle, the court in *Weston v. New Bethel Missionary Baptist Church*, 23 Wn. App. 747, 753-54, 598 P.2d 411 (1978) (VPFK Br. 43), held that a contractor's adherence to an owner's plans and specifications on a project was a defense to the owner's claim for indemnification. Confirming the second legal principle, the court in *Haley v. Brady*, 17 Wn.2d 775, 789,

137 P.2d 505 (1943) (VPFK Br. 54-55), held that "[a]dditional compensation may be recovered for extra work which becomes necessary because the building cannot be constructed according to the plans and specifications furnished." Contrary to VPFK's suggestion, neither case supports its defective specifications claim.

The same is true of the two other Washington cases cited by VPFK. In *Tyee Construction Co. v. Pacific Northwest Bell Telephone Co.*, 3 Wn. App. 37, 472 P.2d 411 (1970), and *Teufel v. Wienir*, 68 Wn.2d 31, 411 P.2d 151 (1966) (VPFK Br. 44), the owner was not entitled to withhold payment from a contractor that performed in strict accordance with (defective) plans and specifications. These cases do nothing to show that King County's specifications were defective.

Dissatisfied with Washington law, VPFK turns to federal Board of Contract Appeals cases. VPFK Br. 45. The Court need not consider those cases because there is controlling Washington case law. Regardless, VPFK's cited cases merely confirm that a contractor can recover damages for work that proves to be impossible (the second legal principle on page 53 above).[7] Here, in contrast, there is no evidence that it was

[7] *See Appeal of Maitland Bros. Co.*, 83-1 BCA ¶ 16,434, 1983 WL 7514 (ASBCA 1983) (contractor entitled to recover cost of using another excavator because the specified machine proved "*incapable* of performing the excavation" (emphasis added)); *Appeal of Evergreen Eng'g, Inc.*, 78-2 BCA ¶ 13,226, 1978 WL 1800 (IBCA 1978) (contractor permitted to recover cost of extra work because contract provided that

impossible to complete BT-2 and BT-3 using STBMs. As such, the federal Board of Contract Appeals cases cited by VPFK are inapposite.

b. VPFK Did Not Introduce Evidence Creating Genuine Issues Of Material Fact As To Whether The STBM Specification Was Defective.

In addition to arguing that the County warranted that VPFK would timely complete the work (an argument that is contrary to the contract documents and controlling legal authority), VPFK claims that it "submitted considerable evidence" showing that the STBM requirement was defective. VPFK Br. 48. VPFK groups this evidence into five categories: (1) JDC's use of an EPB TBM to complete BT-3; (2) increased frequency of transitions between soil types; (3) lack of provision in the Contract for additional exploratory bore holes; (4) the expert panel's recommendations concerning interventions and bore holes; and (5) tunnel face instability. As set forth below, VPFK's "evidence" regarding these issues does not preclude summary judgment.

Starting with VPFK's first argument (VPFK Br. 48), the County's decision to allow JDC to use its EPB TBM to complete BT-3 does not support a conclusion that the STBM requirement in the Central Contract was defective. The record shows – without dispute – that the County hired

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ground at the job site would support concrete mixer but it "was impossible to fully correct or eliminate" the effects of the mixer sinking into ground without performing additional work).

JDC and allowed it to use its EPB TBM because JDC's machine was the *only* reasonably available alternative to VPFK's STBM. CP 5407-09. The record also shows that the EPB TBM had to be substantially modified and upgraded, over several months and costing several million dollars, so that it could operate in the high pressures of the BT-3 alignment. CP 5408. Lastly, the record also shows – without dispute – that VPFK completed BT-2 using its STBM. CP 5407; RP 870.

These facts are critical because they distinguish this case from VPFK's authority on this point, *Big Chief Drilling Co. v. United States*, 26 Cl. Ct. 1276 (1992). In both *Big Chief* and the cases cited in *Big Chief*, the specifications at issue were found to be defective because after the contractors were allowed to deviate from those specifications their performance problems ceased altogether. *Id.* at 1295-96. Further, as the court pointed out, it was undisputed that the deviation was a "necessity." *Id.* at 1295. Here, in contrast, VPFK did not need to deviate from the initial specifications: to the contrary, it completed BT-2 using its STBM. CP 5407. And the only reason that BT-3 was completed using an EPB TBM is that no other tunnel boring machine was reasonably available. CP 5407-09. *Big Chief* is therefore inapposite.[8]

[8] In its Statement of the Case, VPFK suggests that the EPB TBM versus STBM issue was extensively debated in 2005 and that "the County's construction management team" prepared a "draft report" that recommended an EPB TBM. VPFK Br. 11 (citing

VPFK's additional evidence – items (2) through (5) above – is legally irrelevant because it is beyond the scope of its defective specifications claim. Addressing that issue, VPFK asserts that "[i]n opposition to the County's motion, VPFK reminded the court that VPFK's defective specification counterclaim was not limited to the County's selection of an STBM." VPFK Br. 47. VPFK's counterclaim is quoted on page 44 above. As can be seen, the counterclaim focuses *exclusively* on whether VPFK could timely complete the work *using an STBM.* This Court, too, should focus on that issue, not on alleged evidence of transitions, face conditions, interventions, and bore holes.

If the Court nevertheless considers VPFK's remaining arguments, the result is the same. As to VPFK's second argument – addressing the frequency of transitions between soil types (VPFK Br. 48-49) – VPFK conflates its differing site condition claim and its defective specifications claim. VPFK is essentially arguing that the STBM requirement was defective because there were more transitions between soil types than it allegedly anticipated. In that circumstance, "where the alleged defect in

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Ex. 1245 and related trial testimony). VPFK does not repeat this discussion in its argument regarding its defective specifications claim, presumably because *none* of this evidence was before the trial court on summary judgment. But what VPFK overlooks in its Statement of the Case is that the trial court *struck* the portion of Exhibit 1245 that VPFK relies upon along with the related testimony because the report was "never finalized" by King County's consultant and "never communicated" by that consultant to King County and therefore it "cannot be relevant." RP 4391. VPFK's reliance on that exhibit and testimony is improper.

the specification is the failure to disclose the alleged differing site condition," the differing site condition claim and the defective specifications claim "collapse into a single claim" and are "governed by the specific differing site conditions clause and the cases under that clause." *Comtrol, Inc. v. United States*, 294 F.3d 1357, 1362 (Fed. Cir. 2002).[9] VPFK's differing cite condition claim has already been addressed in Section V.A above.

VPFK's third argument – that the STBM specification was defective because the Contract did not provide for additional exploratory bore holes to determine ground conditions and that actual pressures were higher than expected (VPFK Br. 49-50) – does not pertain to the specification of *an STBM* but rather concerns *other* Contract specifications. This is really another claim for differing site conditions. VPFK was entitled to make a claim if it believed ground pressures were unexpectedly high – and it did so. One claim (for pressures greater than 75 PSI) was resolved and paid before trial. RP 1815-16. Another pressure-related claim was given to the jury, which awarded damages to VPFK. CP 1321. There is no basis for an appeal on this point.

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[9] Numerous courts have similarly held. *See, e.g., Delhur Indus., Inc. v. United States*, 95 Fed. Cl. 446, 457 (2010) (applying *Comtrol*); *Orlosky Inc. v. United States*, 64 Fed. Cl. 63, 69 (2005) (discussing *Comtrol*).

VPFK's fourth argument – regarding the expert panel's recommendations concerning interventions and bore holes (VPFK Br. 50-51) – is also flawed. The expert panel did not say that the STBM specification was defective. The expert panel merely recommended bore holes and safe havens to facilitate future work without rendering any opinion about who should pay for these efforts. Ex. 1626.

VPFK's fifth and final argument – regarding tunnel face instability (VPFK Br. 51) – is likewise without merit. In support of this argument, VPFK cites evidence (RP 1103) that was not part of the summary judgment record. On this basis alone, the Court should ignore VPFK's argument. In addition, VPFK's argument on this point (similar to its arguments about soil transitions, bore holes, and safe havens) does not concern the STBM requirement. VPFK admits as much in stating that "the Contract specifications for performing *interventions* proved unworkable, i.e., defective." *Id.* (emphasis added). The County did not move for summary judgment on that issue, and the trial court did not grant summary judgment on that issue. This is really another claim for differing site conditions, which VPFK presented to the jury and the jury rejected. CP 1319 (Question 9.b). This evidence, too, is irrelevant.

Finally, even if the trial court erred (it did not), any such error was harmless. VPFK's real complaint appears to be that the trial court's jury

instruction enforcing the court's summary judgment ruling regarding the STBM requirement hindered its ability to present a generalized argument that the Contract specifications were defective given its inability to timely complete its work and its alleged need to dig additional bore holes and create safe havens. VPFK Br. 57-58. Because the trial court's summary judgment ruling is correct, it did not abuse its discretion or otherwise err in giving an instruction reiterating that ruling. *See Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cnty.*, 164 Wn. App. 641, 645, 662, 266 P.3d 229 (2011) (discerning "no error" in jury instruction "reiterating the trial court's summary judgment order").

Moreover, VPFK cites no instances where the trial court precluded it from pursuing a defective specifications claim unrelated to the STBM requirement. Indeed, when asked to specifically identify any such unrelated claim, VPFK was unable to do so. RP 6241-54. And to the extent that the contract documents were somehow defective with regard to bore holes, safe havens, face pressure and instability, and interventions generally (which they were not), VPFK either (a) was paid before trial for work that exceeded the applicable baseline (*see* RP 1197-98, regarding extra work for interventions) or (b) was permitted to pursue those claims as differing site condition claims (which is what they are) at trial. For

these reasons too, the trial court's summary judgment ruling regarding the STBM requirement should be affirmed.

C. The Trial Court Did Not Abuse Its Discretion Or Otherwise Err In Refusing To Give VPFK's Implied Warranty Instruction.

In addition to arguing that the trial court erred by granting King County's motion for summary judgment regarding its defective specifications claim, VPFK advances a closely related argument that the trial court also erred by refusing to give VPFK's corresponding instruction that the County impliedly warranted the adequacy of its plans and specifications. VPFK Br. 59-66. VPFK's proposed instruction states:

> You are instructed that when the County, as here, furnishes plans and specifications for a construction project to a Contractor, the County warrants that those plans are adequate to accomplish the work. This warranty applies to all plans, specifications, and subsurface information furnished by the County, regardless of whether the County actually prepared those documents or hired another firm to prepare the documents.
>
> Where plans or specifications lead a Contractor such as VPFK reasonably to believe that conditions represented in those documents do exist and may be relied upon in bidding, the Contractor is entitled to compensation for extra expense incurred as a result of the inaccuracy of those representations.
>
> VPFK has the burden of proving by a preponderance of the evidence that the County breached its implied warranty of specifications.

CP 9040. As VPFK correctly notes, the Court generally "review[s] a trial court's decision on whether to give an instruction for an abuse of

discretion." VPFK Br. 59 n.8 (internal quotation marks and citation omitted). Significant here, Washington law is equally clear that a trial court has no duty to give or rewrite an erroneous instruction. *State v. Robinson*, 92 Wn.2d 357, 361, 597 P.2d 892 (1979); *State v. Barber*, 38 Wn. App. 758, 771, 689 P.2d 1099 (1984).

The trial court correctly rejected VPFK's proposed instruction because it repeatedly misstates the law as it applies to VPFK's claims. For example, the first paragraph of the instruction indicates – *without qualification* – that King County warranted the adequacy of its plans, specifications, and "subsurface information." CP 9040. But this is too broad. The County expressly disclaimed any warranty that the subsurface information provided was "complete or sufficient for the Contractor's performance of the Work." CP 5434-35. VPFK's proposed instruction ignores this disclaimer.

The second paragraph of the proposed instruction is equally flawed. There, VPFK asked the trial court to instruct the jury that VPFK "is entitled to compensation for extra expense incurred as a result of the inaccuracy of those representations." CP 9040. In its brief, VPFK similarly asserts that it "was entitled to *extra compensation* if the warranty was breached." VPFK Br. 59 (emphasis added). In *Dravo*, in contrast, the Washington Supreme Court squarely held that the implied warranty

doctrine is, "by its terms, a defensive weapon, not a weapon of offense." 79 Wn.2d at 221. The court also explained that where, as here, a contractor complains of performing additional work to complete the project, the implied warranty doctrine "has no application." *Id.* By seeking to use the implied warranty doctrine as an offensive weapon to recover extra time and compensation, VPFK's proposed instruction further misstated the law.

Finally, VPFK's argument fails for two additional reasons. First, as Section V.B above also explains, there was no evidence to support VPFK's proposed instruction. Far from showing that King County breached any asserted warranty regarding the plans and specifications, the trial court *correctly* concluded that "[t]here is no evidence the specifications were defective." CP 1083 ¶ 2. Nor is there any evidence to support VPFK's other asserted defects. *See* Section V.B.2.b above. As a result, the trial court was not required to give VPFK's corresponding instruction. *See Thompson v. Berta Enters., Inc.*, 72 Wn. App. 531, 541, 864 P.2d 983 (1994) ("A trial court does not abuse its discretion in refusing to give an instruction where there is insufficient evidence to support it."). Second, the trial court's ruling was not in any event prejudicial to VPFK. VPFK was free to – and did – seek to recover for alleged additional work, including some items that it now characterizes as

"defective specification work." The jury accepted some of VPFK's claims and rejected others. CP 1318-29.

For all these reasons, the trial court did not abuse its discretion or otherwise err in refusing to give VPFK's implied warranty instruction.

D. The Trial Court Correctly Denied VPFK's Motion For Partial Summary Judgment Regarding Liquidated Damages.

1. The County Could Properly Recover Its Actual Damages Caused By VPFK's Default Because The Central Contract Provided That VPFK Would Be Liable For All Damages Arising From Default And The Interim Agreement Preserved That Right.

VPFK next argues that the trial court erred in denying VPFK's motion for partial summary judgment regarding liquidated damages. VPFK Br. 67-73. According to VPFK, the liquidated damages clause of the Central Contract provided the exclusive remedy for any delays and King County, therefore, could not properly recover more than that amount. VPFK Br. 69. The trial court rejected this argument because it concluded that "[a]dditional damages are allowed under the contract if proven." CP 1083 ¶ 4. The trial court's ruling is correct and should be affirmed.

Two sets of contract terms governed the scope of recoverable damages on the County's claim for default: (1) the Central Contract; and (2) the Interim Agreement. Starting with the Central Contract, Section 8.0(A)(4) of that agreement provides:

> *The Contractor [VPFK] and its sureties shall be liable for all damages and costs, including* but not limited to: (1) compensation for architect and engineering services and expenses made necessary thereby; (2) any other costs or damages incurred by the County in completing and/or correcting the Work; and (3) *any other special, incidental, or consequential damages incurred by the County which results or arises from the breach* or termination for default.

CP 1453 (emphases added). Section 8.0(A)(7) of the Central Contract further states that the County's rights and remedies for default – "all damages and costs" – "are *in addition* to any other rights and remedies provided by law or under this contract." *Id.* (emphasis added).

The Interim Agreement, in turn, expressly preserves these rights and remedies. It states that the County has "the right to pursue a claim against VPFK based on the allegation that VPFK is in default and that King County's costs to complete the BT-3 tunnel that exceeded $16,487,552 ... were caused by that default." CP 585. VPFK does not dispute this point; to the contrary, it concedes (as it must) that "the Interim Agreement changed nothing material to the recovery of liquidated damages for delay but simply preserved the County's rights to seek damages under the Contract." VPFK Br. 71.

On this record, the trial court correctly concluded that "[a]dditional damages are allowed under the contract if proven." CP 1083 ¶ 4. The goal of interpreting a contract is to give effect to the contracting parties'

mutual intent as expressed in their contract. *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 569, 919 P.2d 594 (1996); *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). Here, the above provisions plainly manifest the parties' mutual intent that the County was entitled to recover "*all damages*" caused by VPFK's breach or default. CP 1453 (emphasis added). The trial court's summary judgment ruling is consistent with the plain language of the agreement and should therefore be affirmed.

2. VPFK Misinterprets The Parties' Agreement, Ignores Case Law Allowing Recovery Of Actual Damages, And Erroneously Relies On Extrinsic Evidence That Does Not Support Its Argument.

VPFK argues that because the County claimed that VPFK's default caused certain delays, its right of recovery for delay-related damages should be limited to liquidated damages. VPFK Br. 69. This argument, among other flaws, misconstrues the County's claim. The County did not allege that VPFK should be liable for damages solely because it completed its work in more time than the Central Contract permitted. Indeed, VPFK *never* completed the BT-3 mining work. Rather, as permitted by the Central Contract and the Interim Agreement, the County brought a claim for default, the remedies for which are governed by Sections 8.0(A)(4) and (A)(7) of the Central Contract. As quoted above, those provisions allow

the County to recover "all damages" caused by VPFK's default – not just liquidated damages.

Nor is it necessary to "harmonize clauses that seem to conflict," as VPFK also claims. VPFK Br. 69 (internal quotation marks and citation omitted). There is no conflict. The liquidated damages provision in the Central Contract provides that certain liquidated amounts "shall be construed as the actual amount of damages sustained by the County" for VPFK's "failure to achieve Substantial Completion within the Contract Time." CP 603-04. The default provision in the Central Contract, in turn, clearly states that the County can recover "*all damages*" caused by VPFK's breach or default and that these rights and remedies "are *in addition* to any other rights and remedies provided by law or under this contract." CP 1453 (emphases added).

These Contract provisions complement each other and apply to different situations. If King County sought damages solely because the contractor "fail[ed] to achieve Substantial Completion within the Contract Time," then its exclusive remedy would be liquidated damages under Section 10.7(A) of the Central Contract. CP 603-04. But if, as here, the County claims instead that the contractor was in default, then it is entitled to *greater* relief under Sections 8.0(A)(4) and (A)(7) of the Central Contract – "in addition to" liquidated damages. And VPFK acknowledges

that the Interim Agreement did not change the remedies set forth in Section 8.0(A)(4) of the agreement. VPFK Br. 71.

Indeed, if VPFK's argument were accepted, both the "all damages" language in Section 8.0(A)(4) and the "in addition to" provision in Section 8.0(A)(7) of the Central Contract would be superfluous because the County would be limited to liquidated damages and would not be entitled to any additional rights and remedies provided under the Contract. Such a result is to be avoided under Washington case law.[10] This result, moreover, is consistent with a leading construction law treatise, which explains that when a contract contains a liquidated damages provision the owner "may collect only liquidated damages, *unless* the contract specifically authorizes the assessment of actual damages as an alternative or as a supplement." John Cibinic, Jr. & Ralph C. Nash, Jr., *Administration of Government Contracts* 1044 (2006) (emphasis added). If a contract provides rights and remedies to a party in addition to the right to recover liquidated damages – as is the case here – an award of liquidated damages is not the sole remedy. The trial court did not err in so holding.

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[10] *See Am. Agency Life Ins. Co. v. Russell*, 37 Wn. App. 110, 114, 678 P.2d 1303 (1984) ("Such an interpretation makes section one superfluous and is contrary to our duty to read each contract in such a manner that every section is given effect.").

Finally, VPFK attempts to rewrite the parties' agreement based on the County's response to a question that was submitted in March 2006 during the bidding period. VPFK Br. 72 (citing CP 598). There, the County was asked: "In the unlikely event of a termination for default will the counties [sic] sole remedy for all delay related costs be liquidated damages?" The County responded:

> The extent of damages in a termination for default setting will depend on the underlying facts and circumstances. This response should not be construed as binding the County or the Contractor to a particular position in a given situation. In general, however, the termination for default provision in Section 00700 is intended to provide for the recovery of damages, such as the ones listed therein, that are not necessarily covered in the liquidated damages provisions in Section 01014.

CP 598. As can be seen, in addition to explaining that its recovery in the event of default "will depend on the underlying facts and circumstances" and that its response was not "binding," the County stated that Section 00700 expressly provides for the recovery of damages "that are not necessarily covered in the liquidated damages provisions." *Id.* As such, even if extrinsic evidence were relevant and admissible to vary the terms of the parties' agreement – which it is not[11] – the County's pre-bid explanation is entirely consistent with the trial court's ruling that the

[11] Section 1.1(A) of Central Contract expressly states that the Contract is an "integrated" agreement that supersedes "all prior negotiations, representations, or agreements, either written or oral." CP 5433. Moreover, under Washington law, extrinsic evidence is inadmissible to "vary, contradict or modify the written word." *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

parties' agreement does *not* limit the County's right of recovery to liquidated damages when VPFK is in default. For this reason too, the trial court's summary judgment ruling should be affirmed.

E. The Trial Court Did Not Abuse Its Discretion In Limiting The Testimony Of VPFK's Scheduling Expert Concerning Alleged Concurrent Delay Because The Proposed Testimony Was Both Inexcusably Late And Irrelevant To King County's Delay Damages.

1. Mr. Habashi's Proposed Testimony Regarding BT-1 Pipe Repair Work Was Both Untimely And Substantively Irrelevant.

In its fifth and final assignment of error, VPFK contends that the trial court incorrectly limited its scheduling expert, Nessim Habashi, from giving opinion testimony that the County's delay damages were caused by an alleged "concurrent delay" in completing repairs to defective pipes in the East Tunnel (BT-1) – *i.e.*, work for which VPFK was not responsible. VPFK Br. 73-82. Mr. Habashi's opinion on this issue was disclosed for the first time midway through trial in a 43-page report. CP 9130-78.[12] As VPFK correctly notes, the trial court's ruling is reviewed for abuse of discretion. VPFK Br. 73 n.11. The trial court did not abuse its discretion for two separate and independent reasons:

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[12] The supplemental report also disclosed for the first time new and different testimony regarding work on an influent pump station, which Mr. Habashi similarly claimed was a concurrent delay. CP 9165-75. VPFK does not challenge the trial court's ruling excluding that testimony. RP 5042-52; VPFK Br. 78-82.

First, the proposed testimony was not timely disclosed. This Court has appropriately recognized that "[a] party's untimely designation of a witness without reasonable excuse will justify an order excluding the witness." *Scott v. Grader*, 105 Wn. App. 136, 140, 18 P.3d 1150 (2001). In addition, the King County Local Civil Rules, which applied in this case, provide that "[a]ny person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires." KCLCR 26(k)(4). Although the local rule and Washington precedent address the exclusion of a *witness*, there is no reason why a late-disclosed *portion* of an expert witness's testimony should be treated differently. Analogous federal law supports that approach where, as here, a party discloses new and different expert testimony in a supplemental report.[13]

Applying these principles here, it is clear that the trial court correctly excluded Mr. Habashi's proposed testimony regarding the BT-1

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[13] *See, e.g., O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1368 (Fed. Cir. 2006) (affirming exclusion of expert opinion in supplemental report on theory not contained in initial report); *Regents of Univ. of Minn. v. AGA Med. Corp.*, 835 F. Supp. 2d 711, 728 (D. Minn. 2011) (exclusion of expert opinion in supplemental report addressing topic that could have been covered in initial report and on which no permission to supplement had been granted); *Minebea Co. v. Papst*, 231 F.R.D. 3, 6 (D.D.C. 2005) (exclusion of expert opinion in supplemental report that substantially refined original report, contained new or different material, and provided additional information to support specific elements of plaintiff's case); *see also Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 806, 292 P.3d 147 (2013) ("When a Washington court rule is substantially similar to a present Federal Rule of Civil Procedure, we may look to the interpretation of these federal rules for guidance.").

pipe repair work. To begin with, there can be no dispute that VPFK did not timely disclose Mr. Habashi's proposed testimony. Under the Case Schedule, primary and responsive expert reports were due on February 24 and March 23, 2012, respectively. CP 9293. VPFK was aware of this requirement, as it disclosed a report by Mr. Habashi on each of these dates. CP 9135 ("Cogeric's reports"). Neither report expressed Mr. Habashi's opinion about the BT-1 pipe repair work. *Id.* ("Cogeric's new mandate"). That opinion was not disclosed until October 29, 2012 – seven months late. CP 9130.

VPFK had recognized the concurrent delay issue before these disclosure deadlines. King County provided substantial document discovery regarding the damages that King County claimed were caused by VPFK's delays. That, alone, should have put VPFK on notice regarding the need to analyze the causes of those claimed costs. Then, in his primary report, King County's damages expert, Ron Maus, expressly noted that he was aware of "other minor delays" on the Brightwater Project other than VPFK's default. CP 7574. In response to that analysis, Mr. Habashi criticized Mr. Maus for not including a "detailed schedule analysis of the overall Project" and acknowledged the issue of concurrent delay: "[I]f there were other delays to the Project, whether minor or not, they should be examined to establish whether or not they were concurrent

with the Central Tunnel delay." CP 7629 (March 23, 2012 report). Given Mr. Habashi's assessment of Mr. Maus' February 2012 expert report, VPFK had ample time to examine this issue if it really believed it was a viable defense to the County's damages.

The record also shows that VPFK's failure to pursue discovery on this issue was intentional, as confirmed by the following colloquy:

> THE COURT: Why didn't you discover it earlier?
>
> MR. KRIDER: Because, your Honor, the County never carried its burden of providing us the schedule analysis that demonstrated it in the first place. They never produced any documents in discovery relating to the other contracts and their delays and impacts.
>
> THE COURT: But you knew that there were delays, and you just accepted their word that they didn't impact anything?
>
> MR. KRIDER: No. We had an expert who said that that level of proof was insufficient on a prima facie basis for a delay claim.

RP 5042-43. As can be seen, VPFK knew about this issue, but chose to rely on their view that King County had a burden to show the absence of any concurrent delay rather than pursue discovery that might show that there was such delay. The trial court appropriately responded:

> The fact that you don't think they met their burden so you didn't do any discovery on it, is a choice that you made, not to do any discovery on it. You don't get to go back and see how that impact [sic] anything.

RP 5044. On this record, the trial court was well within its discretion to exclude testimony that VPFK failed to disclose in accordance with the

trial court's deadlines. *See Scott*, 105 Wn. App. at 140; KCLCR 26(k)(4).[14] On this basis alone, the Court can affirm.

Second, even if VPFK had timely disclosed the proposed testimony regarding the BT-1 pipe repair work (which it did not), the testimony was in any event substantively irrelevant. VPFK thoroughly examined King County's witnesses at trial regarding any alleged concurrent delays that could impact the County's damages analysis. In response to VPFK's questioning, Ms. Cochran testified that the County was not asking VPFK for any damages arising from the BT-1 pipe repair work. RP 5532. Mr. Maus likewise testified that King County was not seeking damages for any such delays. RP 5884-87.

The record confirms the above testimony. The BT-1 pipe repair work was first identified by the King County Auditor's Office as being on the critical path for the project in August 2012.[15] The Auditor's report indicated only that the repair work would delay final commissioning of the

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[14] *See also Allied Fin. Servs. v. Mangum*, 72 Wn. App. 164, 168, 864 P.2d 1 (1993) ("violation of a court order without reasonable excuse will be deemed willful" (citing *Lampard v. Roth*, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984))).

[15] The phrase "critical path" refers to work that has a material impact on a project's completion date. *See G.M. Shupe, Inc. v. United States*, 5 Cl. Ct. 662, 728 (1984) ("If work on the critical path was delayed, then the eventual completion date of the project was delayed. Delay involving work not on the critical path generally had no impact on the eventual completion date of the project."). If work is not on the critical path, it cannot be a concurrent delay. *See Haney v. United States*, 230 Ct. Cl. 148, 168 (1982); 5 Philip L. Bruner & Patrick J. O'Connor, Jr., *Bruner & O'Connor on Construction Law* § 15:68 (2002).

conveyance system from late September 2012 to sometime in October 2012. CP 7425-27. But King County's claim for delay damages was based on the 18-month delay from March 2011 to September 2012. RP 2500, 2550-51. That is why, as Ms. Cochran and Mr. Maus testified, the BT-1 pipe repair work had no possible impact on King County's damages. CP 1744-47. Further, as Ms. Cochran testified, the County did not seek delay damages for the BT-1 pipe repair work. RP 5531-32.

Both VPFK's counsel and the trial court also recognized this point. When asked by the trial court (repeatedly) how the BT-1 pipe repair work was relevant to the County's delay damages, VPFK's counsel eventually admitted that any delay during the September to October 2012 time period – by itself – was "irrelevant." RP 5050-51. The trial court then ruled:

> Then I guess what I'm going to say is that issue's not going to be discussed at all, and you can make it in a post-trial motion, if you want to make a motion for a new trial, if – because you're saying that the fact that it was delayed from September to October is irrelevant, it's what happened before September that is the most important part....

Id. For this reason too – because the BT-1 pipe repair work and associated delay were "irrelevant" to King County's damages – the trial court did not abuse its discretion in excluding Mr. Habashi's proposed testimony.

2. VPFK Misrepresents The Record Regarding The Disclosure And Alleged Significance Of The BT-1 Pipe Repair Work.

VPFK's principal argument regarding the BT-1 pipe repair work is that the County violated its discovery obligations by failing to timely produce documents relating to this work. VPFK Br. 79-80. VPFK's argument is premised on a request for production of documents (RFP No. 6) "relating to the County's review or analysis of the critical path." CP 1673. King County did not produce information regarding the BT-1 pipe repair work in response to this request because the work did not affect the critical path until late August 2012, when the County determined that more extensive repairs were necessary (as identified in the King County Auditor's August 24, 2012 report). *See* CP 7425, 7427.[16] As noted above, King County's claim for delay damages was not based on this delay. RP 2500, 2550-51, 5531-32.

Nor did any King County witness provide misleading deposition testimony on this point, as VPFK also claims. VPFK Br. 79-80. VPFK points to the testimony of "[t]he County's scheduling expert" (Ven-Hung Tseng), Ms. Cochran, and Mr. Maus. VPFK Br. 79. Mr. Tseng and Ms. Cochran each testified in June 2012 – approximately two months *before*

[16] VPFK suggests that the East Tunnel pipe repair work was included in the critical path as of June 30, 2012. *See* VPFK Br. 74. VPFK has misread the King County Auditor's report, which analyzes the two fiscal quarters ending in March and June 2012 but was dated August 24, 2012. *See* CP 7425, 7427.

the County recognized any effect of the BT-1 pipe repairs on the critical path. CP 1742-45. As to Mr. Maus, when asked in May 2012 if he was aware of "other potential concurrent delays," he testified as follows:

> I'm confident that there are other potential concurrent delays. I don't know what they are, and I'm equally – I'm equally confident that the County will present, you know, its presentation that says that these 18 months are the Central Tunnel's.

CP 1747 (referring to March 2011 through September 2012 delay caused by VPFK). There is nothing misleading about this testimony either; it merely confirms that King County's witnesses would testify – as they did – that the County's delay damages are directly attributable to VPFK.

VPFK's real complaint appears to be that the County did not advise it that pipe repair work in BT-1 would be needed, even though such work was not part of the critical path during the period for which King County was seeking delay damages from VPFK. If VPFK wanted that information, it could have – and should have – asked King County and its witnesses whether there were *any* delays in completion of BT-1. VPFK never requested such information during discovery, and it has no excuse for not investigating factual issues that Mr. Habashi identified as important. VPFK's decision was a strategic choice and, just as the trial court ruled, it should be held to that choice.

Unwilling to take responsibility for its choice, VPFK attacks the trial court's reasoning. In one line of attack, VPFK argues that "[t]o the extent the court's exclusionary ruling rested on the ground asserted by the County – that VPFK could not limit its expert's evidence to the East Tunnel (BT-1) delays – the court's ruling lacked support in the record." VPFK Br. 79. As an initial matter, the trial court never stated that it was basing its ruling on such a conclusion. In addition, the County never argued that VPFK's expert could not isolate any alleged impact of the BT-1 pipe repair work. Rather, King County's counsel argued that it would be very hard for VPFK "to extract the part that they claim is late" (RP 5043) – *i.e.*, the BT-1 pipe repair work on the critical path – from other inadmissible portions of Mr. Habashi's proposed opinion testimony and disclaimed any objection if VPFK could do so (RP 5047 ("they can bring that [the East Contract pipe delay] in if they want")).[17] Regardless, VPFK never argued to the trial court that Mr. Habashi's analysis of the BT-1 pipe repair work could be carved out from other parts of his report. This argument should be ignored because it was not raised at trial.

[17] VPFK also cites RP 5039 as an instance in which the County contended that the BT-1 pipe repair work and other inadmissible portions of Mr. Habashi's proposed opinion testimony "were inextricably combined." VPFK Br. 78. It is unclear why VPFK cites this page of the transcript, as there is no mention there of any other portions of Mr. Habashi's proposed testimony.

In VPFK's other line of attack, it argues that the trial court's ruling was manifestly unreasonable because the trial court, VPFK asserts, first allowed VPFK to take discovery regarding whether any of the delays on BT-1 occurred between March 2011 and September 2012 but then excluded the resulting evidence. VPFK Br. 81. The trial court permitted VPFK to conduct such discovery to determine if there was a concurrent delay. RP 3326. But the information that VPFK obtained was (a) information that it could *and should* have obtained and disclosed earlier and (b) ultimately irrelevant to King County's delay damages. This attack on the trial court's reasoning, like VPFK's other concurrent delay arguments, lacks merit.

Finally, VPFK's prejudice argument (VPFK Br. 81-82) likewise lacks merit. As will be explained below, the record confirms that VPFK was able to introduce evidence concerning the significance of concurrent delays, cross-examine King County's witnesses regarding the BT-1 pipe repair work, and argue its concurrent delay theory to the jury. As a result, even if the trial court erroneously excluded any portion of Mr. Habashi's proposed opinion testimony (which it did not), the resulting error was harmless. *See In re Det. of McGary*, 175 Wn. App. 328, 341, 306 P.3d 1005 (2013) ("Evidentiary error warrants reversal only when there is a reasonable probability that the error materially affected the outcome at

trial." (citing *In re Det. of West*, 171 Wn.2d 383, 410, 256 P.3d 302 (2011))).

Mr. Habashi testified that, in his view, the County's delay claim was "not based on a proper detailed schedule analysis, which is essential to be able to establish a delay for a certain problem." RP 5501-02. He explained the significance of the "critical path" (RP 5506), described examples of concurrent delay, and opined as to the significance of any concurrent delay on the project:

> Q. Now, if, hypothetically, there was another delay on the conveyance system that finishes after the Central contract, what would be the controlling critical delay then for the overall Brightwater project?
>
> A. It would be the other critical delay that delayed the project.
>
> Q. And if there's another controlling critical delay, what would that make the Central contract delay?
>
> A. It would make it the concurrent delay, but not the controlling delay.
>
> Q. And if the Central contract is the concurrent delay, what would that entitle King County to with regard to damages against VPFK?
>
> A. Not that much.

RP 5507-08. Thus, VPFK elicited testimony from Mr. Habashi establishing the framework for its theory that the BT-1 pipe repair work was a concurrent delay.

After doing so, VPFK examined King County's witnesses at trial about *any* concurrent delays and the method of calculating King County's

damages. VPFK's counsel first questioned Ms. Cochran regarding the project schedule, the BT-1 pipe defects, and the effect of the BT-1 pipe repair work on the critical path for the project. RP 5511-29. VPFK's counsel then examined Mr. Maus about concurrent delay and the BT-1 pipe repair work. RP 5935-39. Based on this evidence, the trial court instructed the jury on concurrent delays[18] and VPFK's counsel then argued the issue in closing:

> Remember how Mr. Habashi explained how the only accurate method to analyze a schedule delay is after the work is completed, for the benefit of 20/20 hindsight.
>
> The history of this project has borne out that the actual cause of the delay for the startup of the treatment plant was the defective piping in BT-1. Of course, that's the County's responsibility, that's not VPFK's.

RP 7028. Thus, notwithstanding its deliberate failure to *timely* pursue discovery that would have shown the actual impact of any other alleged concurrent delay, VPFK nonetheless was able to argue this concurrent delay theory to the jury.

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[18] Instruction No. 23 states: "Some of King County's claimed damages relate to costs incurred because of the passage of time due to the later-than-planned startup of the Brightwater Project. VPFK claims that some or all of these delay damages were concurrently caused by factors for which VPFK is not responsible. Concurrent delay occurs when a Contractor and an Owner have both caused independent delays – separate delays each of which would delay completion of the project in the absence of the other. King County has the burden to prove that the delay damages it seeks were caused by VPFK's delays and by concurrent delays for which VPFK is not responsible." CP 9115.

As VPFK notes (VPFK Br. 81), the standard for determining prejudice is whether the evidentiary ruling at issue "entirely prevented the defendant from rebutting the plaintiff's evidence." *Aubin v. Barton*, 123 Wn. App. 592, 610, 98 P.3d 126 (2004). As the above discussion shows, VPFK was permitted to conduct discovery and re-depose witnesses during trial, examine witnesses at trial, present its expert on concurrent delay, and argue its theory (with a corresponding jury instruction) at closing. Accordingly, even if the trial court erred (which it did not), any such error was harmless. Instead, the jury *correctly* concluded, as both Mr. Maus and Ms. Cochran testified, that the damages claimed by King County were all caused by VPFK's default, not by any concurrent delay in the East Contract. CP 1316-17. VPFK should not be permitted to avoid the full consequences of its default based on unrelated work by another contractor. In this respect as well, the Court should affirm.

VI. LEGAL ARGUMENT REGARDING KING COUNTY'S CROSS-APPEAL

For its cross-appeal, King County raises a single issue: Whether the trial court erred in denying King County's motion for judgment as a matter of law with regard to VPFK's claims for "extended repair of rim bar." The trial court's ruling is reviewed de novo, applying "the same standard as the trial court." *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29,

948 P.2d 816 (1997). Pursuant to that legal standard, judgment as a matter of law is appropriate where, as here, "there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Id.*

As set forth in Section IV.C above, VPFK discovered severe damage to both the BT-2 STBM and the BT-3 STBM in May/June 2009. RP 755-56, 1624-25. Because of the damage, both STBMs were shut down awaiting extensive repairs. RP 775, 1664. To facilitate those repairs, VPFK tried moving each STBM forward to find a spot where it assumed it could lower the groundwater pressures and do the repairs more easily. RP 2173, 4238. VPFK alleged that it encountered soil conditions at those locations that were different from what it anticipated based on the contract documents and that these differing site conditions extended the time and cost of the repairs. CP 9098. The jury found in favor of VPFK on these claims and awarded $3,106,619 for the BT-2 repair work and $5,190,932 for the BT-3 repair work (a total of $8,297,551). CP 1327-28.

These claims fail for two separate and independent reasons. First, the contract documents made no representation regarding soil conditions at the locations where VPFK decided to repair the damaged rim bars so VPFK had no basis to recover damages based on those conditions. As noted previously with regard to VPFK's transitions claim (which was properly dismissed on summary judgment), to establish a differing site

condition claim a contractor must show that the contract documents represented certain conditions and that actual conditions differed. *See* discussion in Section V.A.1 above. Here again, VPFK cannot establish these elements because of the absence of any location-specific soil conditions between bore holes.

VPFK's own evidence shows, and its own witnesses conceded, that the contract documents made no representation regarding soil conditions at the locations where the rim bar damage repair work occurred. In a November 7, 2008 letter to King County, for example, Mr. Suquet conceded that the baselines for soil conditions in the GBR are "global ranges of percentages and *are not location specific*." Ex. 68 at 2 (emphasis added). When Mr. Portafaix was asked about that letter at trial, he testified:

> Q. ... Again, VPFK knew at bid time that the baselines for soil conditions in the GBR were not location specific, right?
>
> A. For some information on the ground, yes.
>
> Q. Like soil type?
>
> A. Yes.

RP 3334. Mr. Launay similarly testified:

> Q. Did the GBR tell you any specific location where you would find any one of those particular face [*i.e.*, soil] conditions?
>
> A. Not at all.

RP 2978. That is because, as VPFK also recognized during the project, the GBR "stopped short of providing location specific soil conditions." Ex. 110 at 2.

Without location specific soil information, VPFK has no basis to claim that it encountered soil conditions at the locations where the rim bar damage repair work occurred that were different from what the contract documents allegedly represented. Even if VPFK encountered conditions that were unfavorable to repairs, those conditions could not have been any less favorable than what was represented in the contract documents because the County's GBR provided *no information* about soil conditions at locations other than bore holes. It necessarily follows that there is no substantial evidence or reasonable inference to sustain the jury's verdict.

Second, even if VPFK could establish the above elements of a differing site conditions claim, there was no evidentiary basis for an award of substantial damages. VPFK argued at trial that the contract documents represented that atmospheric conditions could be achieved in full face clay and that it was unable to achieve such conditions even though both STBMs were in full face clay where it planned to repair the damaged rim bars. CP 9098. But the contract documents represented only that full face clay would be capable of "providing up to 24 hours of stand-up time" before becoming unstable. Ex. 7 at 13 (§ 5.2.1); RP 1184. VPFK's repair

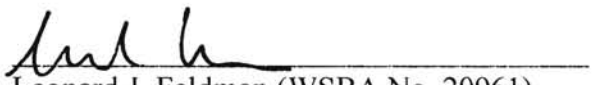
of the BT-2 rim bar took several months (RP 1649, 1701, 1782; Ex. 122 at 3), and of course the BT-3 machine was *never* repaired and did not do *any* further tunneling. CP 5410; RP 3201-02. There was no evidence at trial that VPFK's repair costs would have been any different if the soils at the STBM repair locations had stood up for 24 hours and then become unstable. For this reason too, VPFK's rim bar repair claims fail.

VII. CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's ruling denying King County's motion for judgment as a matter of law regarding VPFK's claims for "extended repair of rim bar" and set aside the jury's award of damages on those claims, thereby increasing the net award to King County by $8,297,551. In all other respects, the trial court's rulings should be affirmed.

DATED: April 7, 2014.

STOEL RIVES LLP



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No. 70432-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

KING COUNTY,

Plaintiff/Respondent/Cross-Appellant,

v.

VINCI CONSTRUCTION GRANDS PROJETS/PARSONS RCI/FRONTIER-KEMPER, JV, a Washington joint venture, *et al.*,

Defendants/Appellants/Cross-Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Laura Gene Middaugh)

APPENDIX TO BRIEF OF RESPONDENT/CROSS-APPELLANT KING COUNTY IN RESPONSE TO BRIEF OF APPELLANT VINCI CONSTRUCTION GRANDS PROJETS/PARSONS RCI/FRONTIER-KEMPER, JV

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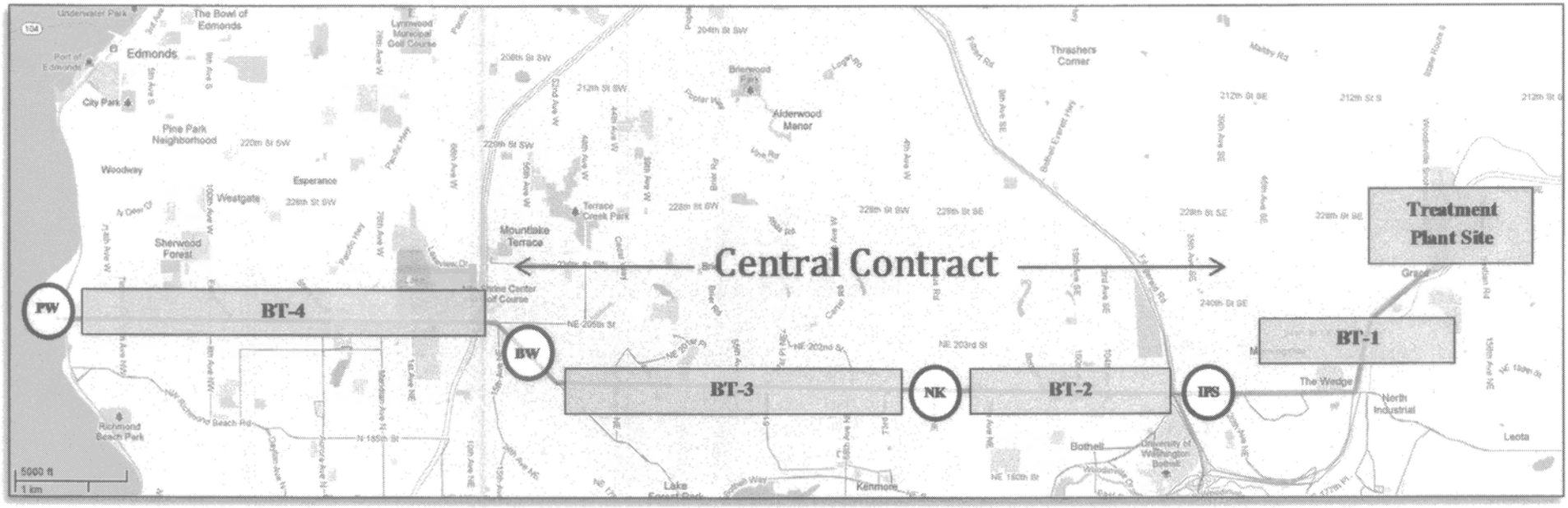
Map of the Brightwater Treatment System project, showing the treatment plant and conveyance systems of tunnels running to Puget Sound.



Source: King County Trial Brief (Dkt. No. 309)

App. 1

PLAINTIFF'S
EXHIBIT
37
No. 19-2-14397-1
KC0154648

North Kenmore Portal - 10/13/08 - Impeller that came from a hydrocyclone pump
\\bwcmdata\data\Photographs\Central\2008\10 - October 2008\BWC-06045.jpg
Central
North Kenmore Portal (P44)
2008-10-13 12:52:33
Roger Johnson

EXHIBIT
248
CHATELET

KC0127949

PLAINTIFF'S
EXHIBIT
63
No. 10-2-14397-1

Central
North Kenmore Portal (P44)
2008-11-10 08:11:54
Roger Johnson
Tank Farm
North Kenmore Portal - 11/10/08 - ST-2 working slurry tank

\\bwcmdata\data\Photographs\Central\2008\11 - November 2008\BWC-06398.jpg

EXHIBIT
254
CHATELET

KC0127855

PLAINTIFF'S
EXHIBIT
72
No. 10-2-14397-1

PLAINTIFF'S EXHIBIT 92 No. 19-2-14397-1

KC0127836

Central
North Kenmore Portal (P44)
Separation Plant
2008-12-09 09:31:05
J:\Photographs\Central\2008\12 - December 2008\BWC-06840.jpg
Roger Johnson
North Kenmore Portal 12/09/08 Cleaning under belts with a mini excavator

EXHIBIT 260 CHATELET

PLAINTIFF'S EXHIBIT 84 NO. 10-2-44017-4

Central
North Kenmore Portal (P44)
Separation Plant
2008-12-12 11:19:55
J:\Photographs\Central\2008\12 - December 2008\BWC-06955.jpg
Roger Johnson
North Kenmore Portal - 12/12/2008 - Pulling the top cone off of centrifuge #1

EXHIBIT 263 CHATELET

KC0127993

App. 6

PLAINTIFF'S EXHIBIT 85 No. 10-2-16927-4

Central
North Kenmore Portal (P44)
Equipment
2008-12-16 06:59:30
J:\Photographs\Central\2008\12 - December 2008\BWC-06993.jpg
Roger Johnson
North Kenmore Portal - 12-16-08 - A Hatachi 330 excavator in the muck pit

EXHIBIT 264 CHATELET

KC0127838

App. 7

Central
North Kenmore Portal (P44)
Muck/Spoils Pile
2008-12-17 14:58:58
J:\Photographs\Central\2008\12 - December 2008\BWC-07045.jpg
Roger Johnson
North Kenmore Portal - 12/17/08 stacker belt

PLAINTIFF'S EXHIBIT 88

KC0127839

EXHIBIT 265 CHATELET

App. 8

Central
North Kenmore Portal (P44)
2009-01-06 11:26:27
Roger Johnson
Slurry Tank
North Kenmore Portal - 1/06/09 - BT-3 working slurry tank
\\bwcmdata\data\Photographs\Central\2009\01 - January 2009\BWC-07211.jpg

EXHIBIT
267
CHATELET

KC0127857

PLAINTIFF'S
EXHIBIT
91
No. 18-2-14397-1

Central
BT-3 Tunnel
Tunnel excavation and lining
2009-01-16 05:12:40
J:\Photographs\Central\2009\01 - January 2009\BWC-07341.jpg
Ken Burton
BT-3 Tunnel - 1/16/09 A rock that came from the pump

PLAINTIFF'S EXHIBIT 93

EXHIBIT 270 CHATELET

KC0127931

App. 10

Central
North Kenmore Portal (P44)
2009-01-16 09:31:04
Roger Johnson
Slurry Tank
North Kenmore Portal - 01/16/09 - BT3 working slurry tank
\\bwcmdata\data\Photographs\Central\2009\01 - January 2009\BWC-07347.jpg

EXHIBIT
268
CHATELET

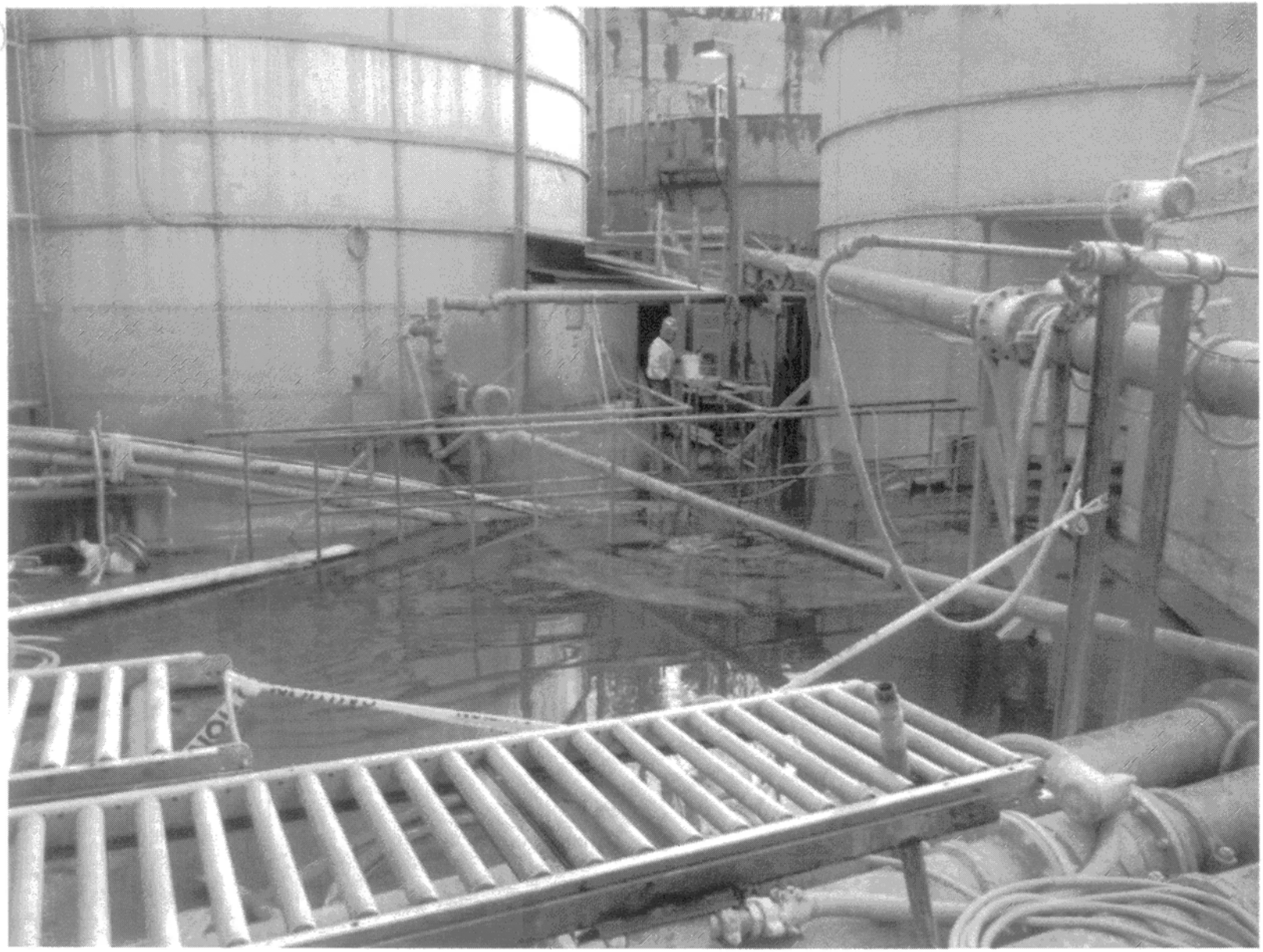
KC0127858

PLAINTIFF'S
EXHIBIT
94
No. 10-2-14397-1

Central
BT-2 Tunnel
2009-01-31 10:21:56
Matt Fagan
Slurry Tank
North Kenmore Portal - 01-31-2009 - Working tank at slurry plant.
\\bwcmdata\data\Photographs\Central\2009\01 - January 2009\BWC-07564.JPG

EXHIBIT
274
CHATELET
KC0127860

PLAINTIFF'S
EXHIBIT
98
No. 10-2-14397-1



PLAINTIFF'S
EXHIBIT
101
No. 10-2-14397-1

Central
North Kenmore Portal (P44)
Tank Farm
2009 02-09 11 28 53
J:\Photographs\Central\2009\02 February 2009\BWC-07662.jpg
Roger Johnson
North Kenmore Portal 02/09/09 -

EXHIBIT
276
CHATELET

KC0127843