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CONSTRUCTION LAW JURY INSTRUCTIONS

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1.1 Contract Definition – Use WPI 301.01

Notes

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.¹ A contract may be oral.² A contract may be implied in fact with its existence depending on some act or conduct of the party sought to be charged.³ If the parties' intention is clear and they have agreed upon the terms of a contract, then a contract exists, even though one or both of the parties may have contemplated formalizing it in a written document.⁴ The acceptance of an offer is always required to be identical with the offer, or there is no meeting of the minds and no contract.⁵

Consideration is sufficient when the promisor undertakes some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is void.⁶ Courts are loath to inquire about the "adequacy" of consideration, that is, into the comparative value of the promises and acts exchanged.⁷ "[P]arties who are competent to contract will not be relieved from a bad bargain they make unless the consideration is so inadequate as to be constructively fraudulent."⁸

¹ *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 531, 424 P.2d 290 (1967) (citing Restatement of Contracts § 1 (1932)).

² *Bell v. Hegewald*, 95 Wn.2d 686, 690, 628 P.2d 1305 (1981).

³ *Id.*

⁴ *Pietz v. Indermeuhle*, 89 Wn. App. 503, 519, 949 P.2d 449 (1998).

⁵ *Blue Mountain Constr. Co. v. Grant County Sch. Dist. No. 150-204*, 49 Wn.2d 685, 688, 306 P.2d 209 (1957).

⁶ *Luther v. Nat'l Bank of Commerce*, 2 Wn.2d 470, 483, 98 P.2d 667 (1940).

⁷ *Browning v. Johnson*, 70 Wn.2d 145, 147, 422 P.2d 314 (1967).

⁸ *Id.* (quoting *Rogich v. Dressel*, 45 Wn.2d 829, 843, 278 P.2d 367 (1954)).

1.2 Offer and Acceptance: Use WPI 301.03

Notes:

It is essential to the formation of a contract that the parties manifest to one another their mutual assent to the same bargain at the same time.¹ Generally, mutual assent takes the form of an offer and an acceptance.² An offer consists of a promise to render a stated performance in exchange for a return promise being given.³ It is often difficult to distinguish between offers and preliminary negotiations.⁴ "Great care should . . . be taken not to construe the conduct, declarations, or letters of a party as proposals when they are intended only as preliminary negotiations."⁵ The question in such cases is, did the offeror mean to submit a proposition, or was the offeror only setting the terms of an agreement on which the offeror proposed to enter, after all its particulars are adjusted.⁶ An agreement, to be finally settled, must comprise all the terms that the parties intended to introduce into the agreement, and until the terms of a proposal are settled, the proposer is at liberty to retire from the bargain.⁷ A bid is no more than an offer to contract.⁸ There is no contract until the offer is accepted.⁹ "Once a written bid is submitted and accepted, a legally binding contract is formed."¹⁰

"Acts and conduct, as well as words, may show an offer and acceptance."¹¹ A revocable offer can be accepted only by the person to whom it is made.¹² An expression of assent that changes the terms of the offer in any material respect should be interpreted as a counter offer; it

¹ *Pacific Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 555-56, 608 P.2d 266 (1980).

² *Id.* at 556.

³ *Id.* (citing Restatement of Contracts § 24 (1932)).

⁴ *Id.*

⁵ *Id.* (quoting *Coleman v. St. Paul & Tacoma Lumber Co.*, 110 Wash. 259, 272, 188 P. 532 (1920)).

⁶ *Id.* (citations omitted).

⁷ *Id.* at 556-57 (citations omitted).

⁸ *Mottner v. Town of Mercer Island*, 75 Wn.2d 575, 579, 452 P.2d 750 (1969).

⁹ *Id.*

¹⁰ *Modern Builders, Inc. of Tacoma v. Manke*, 27 Wn. App. 86, 93, 615 P.2d 1332 (1980) (citation omitted).

is not an acceptance and does not constitute a contract.¹³ If a person, with a reasonable opportunity to reject an offer, takes the benefit of the offer under circumstances that would indicate to a reasonable person that the offer was made with the expectation of compensation, a contract is formed.¹⁴ The question of what is a reasonable time for acceptance must be determined from the nature of the contract and the character of the business in which the parties were engaged.¹⁵

¹¹ *Johnson v. Whitman*, 1 Wn. App. 540, 545, 463 P.2d 207 (1969).

¹² *Dorsey v. Strand*, 21 Wn.2d 217, 224, 150 P.2d 702 (1944).

¹³ *Rorvig v. Douglas*, 123 Wn.2d 854, 858, 873 P.2d 492 (1994).

¹⁴ *Jones v. Brisbin*, 41 Wn.2d 167, 172, 247 P.2d 891 (1952).

¹⁵ *Coleman v. Davies*, 39 Wn.2d 312, 318, 235 P.2d 199 (1951).

1.3 Intent of the Parties Use WPI 301.05

1.4 Parole Evidence Use WP 301.06

1.5 Quasi Contract: Use WPI 301.A02

Notes:

The law recognizes two classes of implied contracts: those implied in fact and those implied in law.¹⁶ A contract implied in fact is an agreement of the parties arrived at from their conduct rather than their expressions of assent.¹⁷ Like an express contract, *it grows out of the intentions of the parties to the transaction, and there must be a meeting of the minds.*¹⁸ A contract implied in law, or "quasi contract," on the other hand, arises from an implied duty of the parties not based on a contract, or on any consent or agreement.¹⁹ To establish a quasi contract, (1) the enrichment of the [Defendant] must be unjust, and (2) the [Plaintiff] cannot be a mere volunteer.²⁰ Since recovery in quasi contract is based on the prevention of unjust enrichment, the doctrine is applied when money or property has been placed in one party's possession such that in equity and good conscience it should not be retained.²¹

¹⁶ *Trane Co. v. Randolph Plumbing & Heating*, 44 Wn. App. 438, 441, 722 P.2d 1325 (1986) (citations omitted) (quoting *Heaton v. Imus*, 93 Wn.2d 249, 252, 608 P.2d 631 (1980)).

¹⁷ *Id.*

¹⁸ *Id.* at 441-42.

¹⁹ *Id.* at 442.

²⁰ *Id.*

²¹ *Id.* at 441.

2.1 Mutual Mistake: Use WPI 301.08

Notes:

A mutual mistake is a mistake independently made by both parties regarding a basic assumption of the contract that has a material effect on the contract.¹ The test for mutual mistake is whether the contract would have been entered into if there had been no mistake, in other words, that neither party would have entered into the contract if they had a proper understanding of the material facts.² A mutual mistake alone, however, does not entitle a party to rescind the contract.³ "Equity will grant rescission only where there is a clear bona fide mutual mistake regarding a material fact."⁴ The truest test of materiality is whether the contract would have been entered into if the parties had been aware of the mistake.⁵ A party bears the risk of mistake when, at the time the contract is made, the party is aware that it has limited knowledge of the facts to which the mistake relates, but treats such limited knowledge as sufficient.⁶

¹ *Draper Machine Works, Inc. v. Dep't. of Natural Resources*, 117 Wn.2d 306, 320, 815 P.2d 770 (1991).

² *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 190, 840 P.2d 851 (1992).

³ *Simonson v. Fendell*, 101 Wn.2d 88, 92, 675 P.2d 1218 (1984).

⁴ *Id.* (citation omitted)

⁵ *Id.*

⁶ *Watson*, 120 Wn.2d at 190.

2.2 Unilateral Mistakes—Prior to Award of Contract: Use WPI 301.09

Notes:

If the bidder (a) acted in good faith, (b) without gross negligence, (c) was reasonably prompt in giving notice of the bid error to the other party when discovered, (d) will suffer substantial detriment by forfeiture unless equity relieves it of forfeiture, and (e) at the time the owner was informed of the bidder's bid error, the owner would have suffered no substantial hardship because of the bidder's withdrawal, the bidder is entitled to withdraw its bid.¹

Washington courts have adopted the modern trend of according equitable relief to mistakes that render the bid incompatible with the true intent of the bidder, and which can be clearly and convincingly demonstrated by objective proof.² However, there are certain types of mistakes, such as underestimating the cost of labor and materials, which are purely judgmental and never entitle a bidder to equitable relief.³ Mistakes of this type are inherent business risks assumed by the contractor in all bidding situations.⁴

¹ *La Conner v. American Const. Co.*, 21 Wn. App. 336, 339-40, 585 P.2d 162 (1978).

² *Peter Kiewit Sons' Co. v. Washington State Dep't of Transp.*, 30 Wn. App. 424, 430-31, 635 P.2d 740 (1981).

³ *Id.* at 431.

⁴ *Id.*

2.3 Unilateral Mistakes—After Award of Contract: Use WPI 301.09

Notes:

A unilateral mistake of fact may be grounds for relief if the other party knows of or is charged with knowing the mistake.¹ No party may retain money by claiming ignorance of facts that are reasonably ascertainable and would alert that party to the mistake.² An offeree who has reason to know of a unilateral mistake will not be permitted to "snap up" such an offer and profit therefrom.³ A party must promptly rescind an agreement if it discovers facts warranting such an action.⁴ When a party fails to take steps to rescind within a reasonable time and instead follows a course of conduct consistent with the contract as written, the party has waived its right of rescission and chosen to continue the contract.⁵

¹ *Snap-On Tools Corp. v. Roberts*, 35 Wn. App. 32, 35, 665 P.2d 417 (1983).

² *Id.* (citation omitted).

³ *Clover Park Sch. Dist. No. 400 v. Consolidated Dairy Products Co.*, 15 Wn. App. 429, 434, 550 P.2d 47 (1976).

⁴ *Id.*

⁵ *Id.*

2.4 Bid Quotation/Promissory Estoppel Use WPI 301A.01

Notes:

Washington courts define promissory estoppel as (1) a promise that (2) the promisor should reasonably expect to cause the promisee to change its position (3) that does cause the promisee to change its position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise.⁶

In contract law, construction bidding is a unique category.⁷ Because construction bidding deadlines make the drafting of written agreements difficult, contractors must often rely on oral bids.⁸ Courts consider the subcontractor's oral bid as an irrevocable offer until the general contractor has been awarded the prime contract.⁹ The courts then apply promissory estoppel to ensure that the subcontractor does not raise the bid.¹⁰ After the general contractor has been awarded the prime contract, the general contractor's acceptance of the subcontractor's bid creates a traditional contract.¹¹

⁶ *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 539, 424 P.2d 290 (1967).

⁷ *See Arango Constr. Co. v. Success Roofing, Inc.*, 46 Wn. App. 314, 321, 730 P.2d 720 (1986).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 322.

3.1 Duty to Investigate Site: Consider using WPI 302.02

Notes:

The contractor's reliance will be deemed reasonable if the contractor has made a reasonable investigation under the circumstances.¹ If the contractor is advised that the soil is suitable and no soils report was made, the contractor is entitled to rely on the owner's representations in entering the contract and has no duty to investigate further.²

When the contract contains a site inspection clause, it places a duty on the contractor to exercise "professional skill" in inspecting the site and estimating the cost of the work.³ If the contractor conducts a site investigation that reveals discrepancies in the information furnished to the contractor, the contractor cannot reasonably rely on the original information.⁴

In a case involving subsurface/differing site conditions, the following added instruction may be appropriate: "Generally, however, bidders are not required to conduct independent subsurface investigations in the form of borings or test pits, unless specifically required by the bidding documents. The contractual requirement that the contractor make its own investigation of the project site does not negate the differing site conditions/concealed conditions clause."

¹ *Clevco, Inc. v. Municipality of Metro. Seattle*, 59 Wn. App. 536, 543, 799 P.2d 1183 (1990).

² *Douglas Northwest, Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 679-80, 828 P.2d 565 (1992).

³ *Green Constr. Co. v. Kansas Power & Light Co.*, 1 F.3d 1005, 1009 (10th Cir. 1993).

⁴ *Umpqua River Navigation Co. v. Crescent City Harbor Dist.*, 618 F.2d 588, 594-95 (9th Cir. 1980).

3.2 Covenant of Good Faith and Fair Dealing: Use WPI 302.11

Notes:

The implied duty of good faith and fair dealing obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.¹ However, the duty of good faith and fair dealing does not extend to obligate a party to accept a material change in the terms of its contract.² The duty arises only in connection with the terms agreed to by the parties.³

Good faith means being faithful to one's duty or obligation.⁴ The duty of good faith implies honesty and lawfulness of purpose.⁵

¹ *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991).

² *Id.*

³ *Id.*

⁴ *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 73, 659 P.2d 509 (1983).

⁵ *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385, 715 P.2d 1133 (1986).

3.3 Duty Not to Hinder Construction: Use WPI 302.08

Notes:

There is an implied term in every construction contract that the owner will not hinder or delay the contractor, and for such delays the contractor may recover additional compensation.¹ Parties to a construction contract can be expected to foresee that a contract document might contain an error that requires a change in the plans.² In contrast, those parties cannot always be expected to foresee that actions taken by an owner on a different project will substantially interfere with the progress of the contractor's work, particularly where the project did not exist and was not within the contemplation of the parties at the time the contract was signed.³

¹ *Bignold v. King County*, 65 Wn.2d 817, 825-26, 399 P.2d 611 (1965); *Lester N. Johnson Co. v. City of Spokane*, 22 Wn. App. 265, 268, 588 P.2d 1214 (1978).

² *Lester N. Johnson*, 22 Wn. App. at 272.

³ *Id.*

3.4 Accuracy of the Plans and Specifications — Spearin Doctrine

If you find that the contractor followed the design documents provided by owner and the design documents prove to be defective or insufficient, then the contractor is not responsible for loss or damage resulting from the defective design documents and is entitled to compensation for extra work or expense made necessary by conditions being other than as represented in the design documents.

Notes

1. When an owner holds itself out as qualified to furnish, and does furnish, specifications and plans for a construction project, it thereby impliedly warrants their sufficiency for the purpose in view. *Weston v. New Bethel Missionary Baptist Church*, 23 Wash. App. 747, 753, 598 P.2d 411 (1978); *Prier v. Refrigeration Eng'g. Co.*, 74 Wn.2d 25, 29, 442 P.2d 621 (1968); *Hoye v. Century Builders, Inc.*, 52 Wn.2d 830, 833, 329 P.2d 474 (1958).

2. If a contractor is bound to build according to plans and specifications prepared by the by the owner, architect, or engineer and the plans prove to be defective or insufficient, the contractor will not be responsible to the owner for loss or damage that results solely from the defective or insufficient plans or specifications and will be entitled to compensation for extra work or expense made necessary by conditions being other than as so represented. *Maryland Cas. Co. v. City of Seattle*, 9 Wn.2d 666, 676, 116 P.2d 280 (1941); *see, also, Dravo Corp. v. Municipality of Metro. Seattle*, 79 Wn.2d 214, 218, 484 P.2d 399, 402 (1971); *Valley Constr. Co. v. Lake Hills Sewer Dist.*, 67 Wn.2d 910, 915, 410 P.2d 796 (1966).

3.5 Owner's Duty to Disclose

A party soliciting construction contract bids has a duty to disclose information particularly within the scope of its own knowledge and not readily obtainable by the bidder.⁴

⁴ *Nelson Constr. Co. v. Port of Bremerton*, 20 Wn. App. 321, 327-28, 582 P.2d 511 (1978).

3.6 Waiver/*Mike M. Johnson* WPI 302.07

Notes:

A contract may be reinstated in cases where defective or late performance has been accepted or acquiesced in prior to any notice of termination.⁵ If the owner accepts performance of a contract with knowledge of defective performance, the owner is precluded from resorting to the remedy of rescission.⁶

In the absence of conduct showing a waiver or modification of the requirement of a written order by the owner for alterations or changes, the contractor may not recover without a writing in compliance with the provision.⁷

⁵ *J & J Electric, Inc. v. Gilbert H. Moen Co.*, 9 Wn. App. 954, 960, 516 P.2d 217 (1973).

⁶ *Whatcom Builders Supply Co. v. H.D. Fowler, Inc.*, 1 Wn. App. 665, 672, 463 P.2d 232 (1969).

⁷ *Bjerkeseeth v. Lysnes*, 173 Wash. 229, 232, 22 P.2d 660 (1933).

3.7 Change Orders. Use WPI 301.07

Notes:

"Change order work" is typically defined as work not included in the original contract.⁸ When parties create written change orders, those orders embody the parties' agreement.⁹ It is the agreement itself that is controlling, not the subjective intent of the parties.¹⁰

Changes are issued pursuant to the changes clause in the contract, and they are evidenced by written orders from the contracting officer to the contractor.¹¹ If a contract contains a changes clause, no new consideration is required to support a change order, nor is the consent of the contractor required.¹² In other words, as long as the proposed change is within the general scope of the work contemplated by the contract, the contracting officer may issue a unilateral order, and a failure on the part of the contractor to perform the change is a breach of contract.¹³

The parties may waive the requirement to enter into a written change order prior to the commencement of agreed extra work.¹⁴ However, absent a waiver, failure to comply with the requirements of a change order provision is fatal to a later claim for compensation based on extra work.¹⁵

⁸ *Sime Const. Co. v. Washington Public Power Supply Syst.*, 28 Wn. App. 10, 16, 621 P.2d 1299 (1980).

⁹ *Donald B. Murphy contractors Inc. v. State*, 40 Wn. App. 98, 109, 696 P.2d 1270 (1985).

¹⁰ *Id.*

¹¹ *F.S. Jones Constr. Co. v. Duncan Crane & Rigging Inc.*, 2 Wn. App. 509, 511, 468 P.2d 699 (1970) (quoting 4 *J. McBride & I. Wachtel, Government Contracts* § 28.10[1] (1969)).

¹² *Id.*

¹³ *Id.*

¹⁴ *CKP, Inc. v. GRS Constr. Co.*, 63 Wn. App. 601, 619, 821 P.2d 63 (1991).

¹⁵ *Clevco v. Municipality of Metro. Seattle*, 59 Wn. App. 536, 542, 799 P.2d 1183 (1990).

3.8 Implied Warranty of Habitability—Residential Construction

If you find that the owner 1) is the first purchaser, 2) of a new home, 3) from the seller whose business is building new homes and 4) one or more defects render the home unfit for its intended purpose, then you must find for the owner on the owner's claim for breach of the implied warranty of habitability. If you find that any of these conditions have not been met then you must find for the seller on the owner's claim for breach of the implied warranty of habitability.

Notes:

1. *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 694 (2005).
2. Despite the implied warranties of quality under RCW 64.34, a condominium is a home for purposes of the implied warranty of habitability. *Atherton v. Blume*, 115 Wn. 2d 506 (1990).
3. A builder of a new home impliedly warrants that the construction is "of proper workmanship and reasonable fitness for its intended use" *Hoye v. Century Builders, Inc.*, 52 Wn.2d 830, 833 (1958).
4. A deviation "from the fundamental aspects of the applicable building code" is a breach of the implied warranty of habitability. *Atherton v. Blume*, 115 Wn. 2d 506 (1990). On the other hand, *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 416 (1987) holds that the covered defects must so egregious and fundamental as to "profoundly compromise the essential nature of the subject property as a dwelling." It is unnecessary for the occupants to have moved from the residence in order to prevail on an implied warranty of habitability claim. *Lian v. Stalik*, 106 Wn. App. 811, 816 (2001).

3.9 Substantial Performance: Use WPI 302.03

Notes:

Before you can find that Plaintiff is entitled to recover for the Defendant's breach of contract, you must find that Plaintiff performed the contract and all of the important particulars thereof, even though you need not find exact performance of every slight or unimportant detail. Where a contractor has substantially performed the contract, although there are some defects or omissions in his performance, it is entitled to recover the contract price minus a fair allowance for the defects or omissions in its performance.¹⁶ Substantial performance of a contract to [construct a building] has been defined as existing where (1) any variations from the specifications or contract are inadvertent or unimportant, and (2) they may be remedied by a relatively small expense and without material change to [the building].¹⁷ There is not substantial performance of the contract where, in order to make [the building] comply with the contract, [the structure] in whole or material part must be changed, or there will be damage to part of [the building], or the expense or repair will be great.¹⁸

¹⁶ *Eastlake v. Hess*, 102 Wn.2d 30, 41, 686 P.2d 465 (1984).

¹⁷ *Eastlake*, 102 Wn.2d at 40; *White v. Mitchell*, 123 Wash. 630, 637, 213 P. 10 (1923).

¹⁸ *Eastlake*, 102 Wn.2d at 40.

3.11 Agency: Use WPI's 50.01, 50.02.01

Notes:

In various relationships between the parties, the law imposes liability upon one party for the acts of another. Where agency is established, the principal is liable for the acts of the agent committed within the scope of its employment.

Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.¹ An agent is one who is authorized by another to transact business or manage some affair for him.

An agency relationship can be found in any of one of four categories:

1. "Apparent authority" means authority that is created by objective manifestations of a principal to a third party.² Such manifestations will support a finding of apparent authority only if they have two effects. First, they must cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for the principal.³ Second, they must be such that the claimant's actual, subjective belief is objectively reasonable.⁴ Apparent authority can exist without actual authority.
2. "Actual authority" of an agent to act on behalf of a principal, may be "express" or "implied."⁵

¹ *Walter v. Everett Sch. Dist. No. 24*, 195 Wash. 45, 48, 79 P.2d 689 (1938); *Matsumura v. Eilert*, 74 Wn.2d 362, 368, 444 P.2d 806 (1968) (citing Restatement (Second) of Agency § 1 (1958)).

² *King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994); *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn. App. 355, 363, 818 P.2d 1127 (1991), review denied, 118 Wn.2d 1023, 827 P.2d 1392 (1992) (citing Restatement (Second) of Agency § 7 cmt. b, at 29 (1958)).

³ *King*, 125 Wn.2d at 507.

⁴ *Id.* (citing *Smith*, 63 Wn. App. at 364).

⁵ *King*, 125 Wn.2d at 507.

3. "Express authority" means authority that is given to an agent by words or conduct that expressly or directly authorizes the agent to do an act.⁶
4. "Implied authority" means authority to do whatever is proper, usual and necessary to exercise any authority which has been expressly given.⁷

⁶ *Matsumura v. Eilert*, 74 Wn.2d 362, 368-69, 444 P.2d 806 (1968).

⁷ *Walker v. Pacific Mobile Homes, Inc.*, 68 Wn.2d 347, 351, 413 P.2d 3 (1966).

3.12 Independent contractor – Definition Use WPI 50.11

Notes:

An independent contractor is a person who undertakes to perform work for another but who is not subject to that other person's control of, or right to control, the manner or means of performing the work.

One who engages in independent contractor is not liable to others for the negligence of the independent contractor.¹

¹ This instruction is Washington Pattern Instruction 50.11. For more information on the use of this instruction *see* the Washington Pattern Instructions.

3.13 Distinguishing Between Agents and Independent Contractors: Use WPI 50.11.01

You must decide whether (entity A) was an agent or an independent contractor when performing work for (entity B). This decision requires you to determine whether (entity B) controlled, or had the right to control, the details of (entity A's) performance of the work.

In deciding control or right to control, you should consider all the evidence bearing on the question, and you may consider the following factors, among others:

- (1) the extent to which, by their agreement, (entity B) could exercise control over the details of performance of the work by (entity A);
- (2) whether or not (entity A) was engaged in a distinct occupation or business;
- (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of an employer or by a specialist without supervision;
- (4) the skill required and the particular occupation;
- (5) whether (entity A) or (entity B) supplied the [tools] [equipment] [instrumentalities] in place of work for the person doing the work;
- (6) the length of time for which (entity A) was performing work for (entity B);
- (7) the method of payment, whether by the time or by the job;
- (8) whether or not the work was part of the regular business of (entity B);
- (9) whether or not (entity A) and (entity B) believed they were creating an employment relationship or an independent contractor relationship; and
- (10) whether (entity B) was not in business.

These factors are of varying importance. All of the factors do not need to be present for you to make your decision.¹

¹ This instruction is taken from the Washington Pattern Instruction 50.11.01. For more information on the use of this instruction, *see* the Washington Pattern Instructions.

3.14 Accord and Satisfaction Use WPI 301.07

3.15 Impossibility/Impracticability Use WPI's 302.09, 302.10

Notes:

If a contractor wishes to protect against the hazards of the soil, weather, labor, or other uncertain contingencies, the contractor must do so by contract.² That the contract is unprofitable because of increased difficulty of performance due to failure to foresee problems is no basis for a defense of impracticability.³ However, impossibility of performance excuses a party's performance.⁴ This doctrine encompasses both "strict impossibility and impracticability due to extreme and unreasonable difficulty, expense, injury or loss."⁵

Frustration of purpose provides that "[w]here, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary."⁶ The doctrine requires more than the unforeseeability of the frustrating event; the assumption that a desired objective was possible must "be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense."⁷

² *Valley Constr. Co. v. Lakes Hills Sewer Dist.*, 67 Wn.2d 910, 916, 410 P.2d 796 (1966).

³ *McBride v. Callahan*, 173 Wash. 609, 628, 24 P.2d 105 (1933).

⁴ *Thornton v. Interstate Sec. Co.*, 35 Wn. App. 19, 30, 666 P.2d 370 (1983).

⁵ *Id.*

⁶ *Washington State Hop Producers, Inc. Liquidation Trust v. Goschie Farms, Inc.*, 112 Wn.2d 694, 700, 773 P.2d 70 (1989) (quoting Restatement (Second) of Contracts § 265 (1979)).

⁷ *Felt v. McCarthy*, 78 Wn. App. 362, 367, 898 P.2d 315 (1995) (quoting *Hop Producers*, 112 Wn.2d at 700).

3.16 Concurrent Delay

A concurrent delay of a project occurs when two or more events cause a delay at the same time. Delay damages for a concurrent delay are not compensable and are barred unless the party claiming delay damages can prove by a preponderance of the evidence that it is not responsible for the delay period.

Notes.

1. To recover for compensable delay, the contractor must demonstrate that the owner was the sole cause of the delay, and that the contractor did not contribute to, or concurrently cause, the delay. Insulation Specialties, Inc., ABSCA No. 52-090, 03-2 B.C.A. (CCH) ¶ 32,361 (2003).
- 2 To prevail on a claim of compensable delay claimant must establish the extent of the delay, the contractor's harm resulting from the delay, and the causal link between the [owner's] wrongful acts and the delay. Intercontinental Manufacturing Co., ASBCA No. 48,506 (2003).
3. There are no published Washington decisions on concurrent delay. Alcan Electrical & Engineering v. Samaritan Hospital, 109 Wn. App. 1072 (2002), an unpublished opinion, should be reviewed when drafting this instruction.

3.17 Unforeseen Condition (Type I)

For each claimed differing site condition, the contractor has the burden of proving each of the following propositions:

1. That the contractor reasonably interpreted the contract documents as indicating a certain [underground] condition and relied upon that interpretation in preparing its [bid/cost estimate];
2. That the actual [underground] condition differed materially from the condition indicated in the contract documents;
3. That the contractor could not have reasonably foreseen the actual condition with all the information available to it at the time of [bid/cost estimate];
4. That the contractor incurred costs or delay specifically attributable to the differing site condition; and
5. That either a) the contractor complied with the notice requirements of the contract documents, b) the contractor could not have so complied, or c) the contractor proves that the owner unequivocally waived the contract notice provision.

For each [Type I] differing site condition claim by the contractor, if you find from your consideration of the evidence that all of these propositions have been proved, your verdict should be for the contractor on that claim. On the other hand, if any of these propositions have not been proved, your verdict should be for the owner on that claim.

Notes:

Travelers Cas. and Surety Co. of Am. v. United States, 75 Fed. Cl. 696, 703, 720, 722–23 (2007) *Int'l Tech. Corp. v. Winter*, 523 F.3d 1341, 1348–49 (Fed. Cir. 2008) (summarizing elements of a claim for a Type I differing site condition); *Md. Cas. Co. v. City of Seattle*, 9 Wn.2d 666, 670, 116 P.2d 280 (1941) (defining elements of a differing site condition claim); *Dravo Corp. v. Municipality of Metro. Seattle*, 79 Wn.2d 214, 218, 484 P.2d 399 (1971); *Basin Paving Co. v. Mike M. Johnson, Inc.*, 107 Wn. App. 61, 65, 27 P.3d 609 (2001).3.18

Unforeseen Condition (Type II)

For each claimed differing site condition, the contractor has the burden of proving each of the following propositions:

1. That the actual [underground] condition was unknown to the contractor when it entered into the contract;
2. That the contractor could not have reasonably foreseen the actual condition with all the information available to it at the time of [bid/cost estimate];
3. That the actual [underground] condition differed materially from those conditions ordinarily encountered and generally recognized as inherent in this locale for this type of work;
4. That the contractor incurred costs or delay specifically attributable to the differing site condition; and
5. That either a) the contractor complied with the notice requirements of the contract documents, b) the contractor could not have so complied, or c) the contractor proves that the owner unequivocally waived the contract notice provision.

For each [Type II] differing site condition claim by the contractor, if you find from your consideration of the evidence that all of these propositions have been proved, your verdict should be for the contractor on that claim. On the other hand, if any of these propositions have not been proved, your verdict should be for the owner on that claim.

Notes:

Hardwick Bros. Co. v. United States, 36 Fed. Cl. 347, 409 (Fed. Cl. 1996) (analyzing elements of a Type II differing site condition claim); *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 311–12 (Fed. Cl. 1999) (same); *Nelson Constr. Co. of Ferndale, Inc. v. Port of Bremerton*, 20 Wn. App. 321, 329, 582 P.2d 511 (1978) (listing elements of differing site conditions claims); *Basin Paving Co. v. Mike M. Johnson, Inc.*, 107 Wn. App. 61, 67-68, 27 P.3d 609 (2001).

4.1 Breach of Contract Use WPI 302.01

4.2 Acceleration as a Breach of Contract Use WPI 301.07

Notes

In order to recover for such acceleration costs, the contractor must prove that: (1) the delays in performance are not the fault of the contractor; (2) the owner ordered the contractor to accelerate its work performance or refused to grant the contractor an extension of time (to which the contractor was contractually entitled); and (3) the contractor sustained extra costs as a result of accelerating its work performance.¹ If you find that the contractor has failed to prove any one of the above, then you may not award the contractor additional compensation for any costs it seeks as acceleration costs.

This instruction addresses the issue of directed acceleration only, not constructive acceleration. For constructive acceleration see the five (5) suggested elements cited *infra*.

An owner's acceleration may also be constructive. *See* Peter M. Kutil & Faith M. Martin, *Constructive Acceleration*, Construction Briefings 95-13 (Dec. 1995). Constructive acceleration occurs when "a construction contractor's request for a time extension on a project is ignored by an owner or denied in whole or in part and the owner continues to pressure the contractor to complete the project on time." *Id.* at 1. In this instance, the owner's denial of a legitimate request for an extension of time is in effect an "order" for contractor acceleration to maintain the original schedule. *See Continental Heller Corp.*, GSBCA 6812, 84-2 BCA ¶ 17275 (1984). Some contract review boards have adopted a five-element test for constructive acceleration, requiring: (1) an excusable delay; (2) owner knowledge of the delay; (3) owner action which reasonably can be construed as an "order" to accelerate; (4) contractor notice to the owner that the "order" constitutes a constructive change; and (5) contractor acceleration and additional costs incurred. *See McNutt Constr. Co., Inc.*, ENGBCA 4724, 85-3 BCA ¶ 18397 (citing *Fermont Div.*, ASBCA 15806, 75-1 BCA ¶ 11139 (1975)). However, the United States Court of Appeals, Federal Circuit, has used the *Norair* test to determine constructive acceleration claims in several unpublished decisions.

A contractor cannot recover increased performance costs if it voluntarily accelerates for its own convenience. *See McNutt, supra* (finding that contractor's acceleration was partly due to a "desire to impress the [owner], and doubtless, to establish a reputation from which future business with the [owner] might emanate").

¹ *Norair Eng'g Corp. v. United States*, 666 F.2d 546 (Ct. Cl. 1981), serves as the basis for this instruction. In its holding, the United States Court of Claims stated that a contractor must establish all three elements in order to recover acceleration costs. *Id.* at 548.

4.3 Material Breach Use WPI 302.03

4.4 Anticipatory Breach Use WPI 302.04

5.1 Expectation Damages: Use WPI 303.01

Notes:

Damages for breach of contract can only be recovered for such losses that were reasonably foreseeable at the time the contract was made.¹ If the injury was not foreseeable, then it must be specifically shown that the Defendant had special knowledge of the risk he or she was undertaking.²

The rule requires only reason to foresee, not actual foresight.³ It does not require that the Defendant had the resulting injury actually in contemplation; damages are awarded for a breach not because they were contemplated and promised to be paid, but to compensate the Plaintiff for harm done that ought to have been foreseen, whether it actually was or not.⁴

A court actually deals in fiction with regard to the field of damages. The true test is not necessarily what the Defendant foresaw, but what a reasonable person in the position of the Defendant would have foreseen as the probable action Plaintiff would take as a result of the breach.⁵ When this test is met, neither foreseeability of a specific injury, nor the exact amount of the harm, is required, if it proximately results from the breach.⁶ Damages that follow a breach because of special circumstances are actionable so long as they are the direct and proximate consequence of the breach.⁷

¹ *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 6, 390 P.2d 677 (1964).

² *Id.*

³ *Id.* at 7.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

5.2 Liquidated Damages Use WPI 303.07

5.3 Lost Profits Use WPI 303.04

5.4 Construction Defect Damages Use WPI 303.03

Notes:

If a breach results in defective or unfinished construction, and the loss in value to the Plaintiff is not proven with sufficient certainty, the Plaintiff may recover damages based on: (a) the diminution in the market price of the property caused by the breach, or (b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to the Plaintiff.⁸ This rule achieves a fair measure of damages while avoiding the potentially confusing concepts of substantial completion and unreasonable economic waste.⁹

"If the contract is one for construction, including repair or similar performance affecting the condition of the property, and the work is not finished, the injured party will usually find it easier to prove what it would cost to have the work completed by another contractor than to prove the difference between the values to it of the finished and the unfinished performance. Since the cost to complete is usually less than the loss in value to him, it is limited to damages based on the cost to complete."¹⁰

If the performance is defective, as distinguished from incomplete, it may not be possible to prove the loss in value to the Plaintiff with reasonable certainty.¹¹ In that case, the Plaintiff can usually recover damages based on the cost to remedy the defects.¹²

Sometimes, however, such a large part of the cost to remedy the defects consists of the cost to undo what has been improperly done that the cost to remedy the defects will be clearly

⁸ *Eastlake Constr. Co. v. Hess*, 102 Wn.2d 30, 47, 686 P.2d 465 (1984) (citing Restatement (Second) of Contracts, § 348).

⁹ *Id.* at 48.

¹⁰ *Id.* at 47 (quoting Restatement (Second) of Contracts, § 348, Cmt. c).

¹¹ *Id.* at 47-48.

¹² *Id.* at 48.

disproportionate to the probable loss in value to the Plaintiff.¹³ Damages based on the cost to remedy the defects would then give the Plaintiff a recovery greatly in excess of the loss in value to the Plaintiff and result in a substantial windfall.¹⁴ Such an award should not be made.¹⁵ It is sometimes said that the award would involve "economic waste," but this is a misleading expression since the Plaintiff will not, even if awarded an excessive amount of damages, usually pay to have the defects remedied if to do so will cost the Plaintiff more than the resulting increase in value.¹⁶ If an award based on the cost to remedy the defects would clearly be excessive, and the Plaintiff does not prove the actual loss in value to it damages will be based instead on the difference between the market price that the property would have had without the defects and the market price of the property with the defects.¹⁷ This diminution in market price is the least possible loss in value to the Plaintiff, since the Plaintiff could always sell the property.¹⁸

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

5.5 Mitigation of Damages: Use WPI 303.06

Notes:

Maryhill Museum of Fine Arts v. Emil's Concrete Constr. Co., 50 Wn. App. 895, 900, 751 P.2d 866 (1988).

Tacoma Athletic Club v. Indoor Comfort Sys., 79 Wn. App. 250, 260, 902 P.2d 175 (1995).

5.6 Total Cost Theory of Recovery

If you find that the owner caused changes to the work, which changes were of a nature which was not contemplated by the terms of the contract and for which the contract does not prescribe a remedy or otherwise provide a means of compensation for such changes, then you must find for contractor on its claim for additional compensation.

If you find for the contractor for such change or changes, the measure of damages is the difference between the contractor's costs and the contract amount, less any mistakes in the contractor's bid, and less any costs incurred as a result of causes for the overruns which are not the owner's responsibility, plus a reasonable overhead and profit.

Notes:

1. This instruction applies where the contractor seeks recovery on a basis outside the contract terms.
2. "The total cost basis of establishing damages can be used, but only in a limited category of cases. It may be used In building and construction contract cases when substantial changes occur which are not covered by contract or within contemplation of parties and which are not such that the contractor should have anticipated or discovered them, the contractor may show damages on a total cost basis and recover in quantum meruit for extra work and materials including a profit factor on such amount." *Rowland Construction v. Beall Tank and Pipe*, 14 Wa. App. 297, 540 P.2d 912 (1975).
3. "When the parties to contract foresee a condition what may develop and provide in their contract a remedy for the happening of that condition, presumption is that parties intended that prescribed remedy as sole remedy for condition, this presumption is controlling where there is nothing in contract itself or in conditions surrounding its execution that necessitates a different conclusion." *Rowland*, 14 Wa. App. at 309.
4. "[I]f owner-caused delay in construction was of a nature contemplated by the parties and specific provisions of their contract provide a remedy, or the contract otherwise supplies a means of compensation for such delay, then the delay cannot be deemed unreasonable to the extent the contract terms should be abandoned in favor of quantum meruit recovery. *Mortenson & Co. v. Group Health*, 17 Wa. App 703, 727, 556 P.2d 560 (1977) .
5. The correct test is whether the kind of delay was within the contemplation of the parties, not whether the delay itself was unreasonable. Thus the nature of the delay is the correct focus of inquiry, not the magnitude of the delay. *Hensel Phelps v. King County*, 57 Wa. App. 170, 181 (footnote 7), 787 P.2d 58 (1990), citing *Mortenson*.
6. "The total cost method of proving damages consists of subtracting the bid on the project or the estimated cost of completion from the actual cost. This approach has been termed a 'last resort' method of determining damages, and is sometimes permitted only where no better method of proof of damages is available. The usual objections to the method are that it assumes the initial bid was reasonable and fails to take into account causes of cost overruns other than the defendant's acts." *Seattle Western Industries v. David A. Mowat Company*, 110 Wn.2d 1, 6, 750 P.2d 245 (1988). The

court allowed a “modified” total cost approach because the claim deducted from the total cost whatever additional costs the contractor or its subcontractors caused.

7. In determining whether the changes were contemplated by the contract, “the focus of the inquiry should be whether the types of changes were covered by the contract, not the degree of variation in job conditions from what was originally relief upon in the bid” *Hensel Phelps*, 57 Wa. App. at 180.
8. The inquiry is whether the modified job is essentially the same work as the parties bargained for when the contract was awarded. “Plaintiff will have no right to recover if the project that is ultimately constructed is essentially the same one as it contracted to construct.” *Hensel Phelps*, 57 Wa. App. at 182.
9. Thus, where the contractor’s complaints concerned having to work on an accelerated schedule, having to redo work, and contending with the stacking of trades, the court found that none of these complaints reflected a fundamental alteration of the project, concluded that the contract contained remedial provisions that cover the kinds of contingencies the contractor encountered and denied recovery where the contractor did not choose to follow the contractual provisions for redress, even while acknowledging that the contractor suffered enormous damages. *Hensel Phelps* 57 Wa. App. at 183.
10. “The term ‘quantum meruit’ literally means ‘as much as deserved.’ It is not a legal obligation like a contract or quasi-contract, but rather, is a remedy – ‘a reasonable amount for work done.’ A claim in quantum meruit is properly dismissed as a matter of law where that same claim is covered by specific remedial provisions under the contract.” *Douglas Northwest v. Bill O’Brien & Sons Construction*, 64 Wa. App. 661, 828 P.2d 565 (1992). However, recovery in quantum meruit was allowed in this case because the contract change provision did not cover the owner’s failure to deliver complete site access, the owner’s delay in obtaining plat approval and satisfying EIS requirements, casualties to [contractor’s] work, shutdowns, stop work orders and other costs for which [the contractor] was not responsible. Where the contract provided for recovery of additional costs resulting from the changes caused by the owner, the trial court did not err in dismissing the contractor’s quantum meruit claim, distinguishing *Douglas. Merrill Contractors v. GST Telecom*, 115 Wa. App. 1049, 2003 WL 464069 (2003).