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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

KING COUNTY,

Plaintiff,

v.

VINCI CONSTRUCTION GRANDS
PROJETS / PARSONS RCI / FRONTIER-
KEMPER, JV, a Washington joint venture; and
TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERICA, a Connecticut
corporation,

Defendants.

No.

COMPLAINT FOR DECLARATORY
RELIEF, MONEY DAMAGES, AND
ATTORNEY’S FEES

JURY (12) REQUESTED

Plaintiff King County (“King County” or the “County”) hereby alleges as follows:

I. SUMMARY OF COMPLAINT

1. King County seeks damages against a contractor, Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV (“VPFK”), that fell nearly three years behind its promised schedule on the County’s Brightwater wastewater treatment project. After months of effort to resolve this massive delay, King County found another contractor willing to finish the most delayed part of VPFK’s work. VPFK’s failure to meet its promised schedule is a material breach of its contract with the County.

1 2. VPFK’s work included construction of two large and deep tunnels. VPFK got
2 started, but worked slowly. Then both of its tunnel boring machines broke down. They
3 remained stuck hundreds of feet underground for months.

4 3. In October 2009, the County gave VPFK formal notice of default because it was
5 obvious that, without major changes, VPFK could not complete its work within the time allowed
6 under the its contract with the County. The County directed VPFK to submit a plan to make up
7 its lost time. VPFK responded with a plan that showed no time made up, but instead projected
8 substantial additional delays. In other words, VPFK admitted that it would not complete its work
9 as required by its contract.

10 4. The County began to look for others who might be able to perform part of
11 VPFK’s work. A contractor working on an adjacent portion of the Brightwater project expressed
12 an interest.

13 5. On February 15, 2010, King County and VPFK signed an agreement (the “Interim
14 Agreement”) by which VPFK agreed that the County could (a) hire another contractor to
15 complete part of VPFK’s tunneling work and (b) reserve its right to bring a claim of default
16 against VPFK.

17 6. On April 12, 2010, King County signed a contract with another contractor to
18 complete the most delayed part of VPFK’s tunneling work.

19 7. King County also seeks relief relating to defendant Travelers Casualty and Surety
20 Company of America (the “Surety”), which issued a bond promising to stand behind VPFK’s
21 timely performance.

22 8. King County now seeks a declaration that both VPFK has breached its contractual
23 obligations to the County. The County also seeks an award of damages against both defendants,
24 including but not limited to the costs of retaining the new contractor to complete VPFK’s work,
25 along with compensation for engineering services and all other costs and consequential damages
26 caused by VPFK’s default.

1 **II. PARTIES**

2 9. Plaintiff King County is a municipal corporation and a home rule charter county
3 of the state of Washington.

4 10. Defendant VPFK is a Washington joint venture made up of (1) Vinci
5 Construction Grands Projets, a foreign corporation doing business in Washington; (2) Parsons
6 RCI, Inc., a Washington corporation; and (3) Frontier-Kemper Construction, Inc., an Indiana
7 corporation doing business in Washington.

8 11. Defendant Travelers Casualty and Surety Company of America (the “Surety”) is a
9 corporation organized under the laws of the state of Connecticut and conducting business in the
10 state of Washington.

11 **III. JURISDICTION AND VENUE**

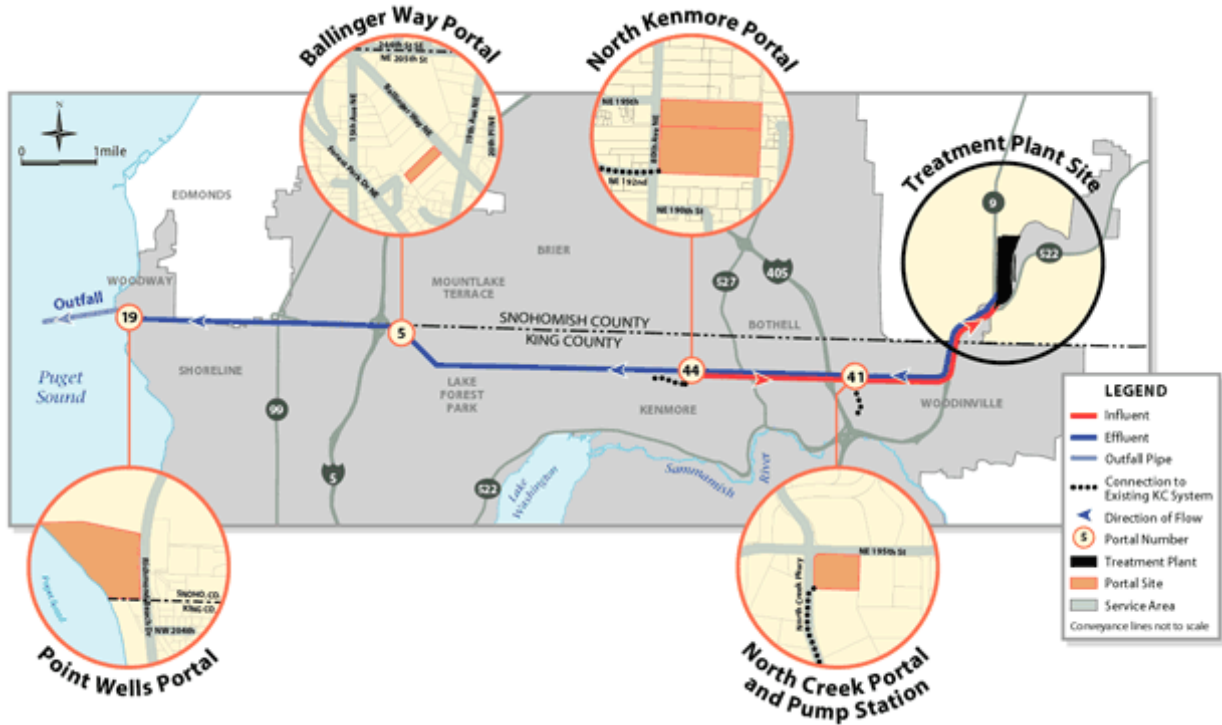
12 12. This action involves claims arising out of actions involving parties residing in
13 and/or doing business in King County, Washington. This Court has jurisdiction over this action
14 pursuant to RCW 4.12.025 and specifically over the claim against the Surety pursuant to RCW
15 39.08.010.

16 13. Venue is proper in King County Superior Court pursuant to RCW 36.01.050 and
17 RCW 4.12.025 because defendant VPFK resides in King County, Washington; RCW 4.12.020
18 because the cause arose in King County, Washington; and RCW 4.12.080 because VPFK has
19 agreed in its contract with the County that any claims it brings under that contract shall be
20 brought in King County Superior Court.

21 **IV. FACTUAL ALLEGATIONS**

22 14. In response to past and projected regional growth, King County is constructing a
23 wastewater treatment plant called Brightwater near the King/Snohomish County border.
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1 15. The Brightwater project includes a treatment plant and a conveyance system. The
 2 conveyance system includes 13 miles of tunnels allowing treated wastewater to be sent from the
 3 treatment plant to a marine outfall off Point Wells. The Brightwater project, including the
 4 conveyance system, is diagrammed below.



18 16. Timely and proper completion of the Brightwater project is very important to
 19 King County because the project will protect public health, the environment, and the economy by
 20 providing sewage treatment capacity to serve the growing population of King and Snohomish
 21 Counties.

22 17. The Brightwater conveyance system is being built under three separate contracts:
 23 the East, Central, and West Contracts. Only the Central Contract (County contract number
 24 C00005C06) is at issue in this case.

25 18. The Central Contract includes tunnel construction between the Ballinger Way
 26 Portal and the North Creek Portal and Pump Station, both of which are shown on the diagram

1 above. This stretch of tunnel is divided for reference purposes into two parts, one from the
2 Ballinger Way Portal to the North Kenmore Portal (called "BT-3"), and another from the North
3 Kenmore Portal to the North Creek Portal (called "BT-2").

4 19. The County solicited offers for the Central Contract through a public bid process.

5 20. VPFK was the low bidder for the Central Contract. Its bid was accepted by the
6 County. VPFK signed the Central Contract in June 2006.

7 21. The Central Contract provides, in the General Terms and Conditions:

8 4.0 TIME OF ESSENCE

9 All time requirements set forth in the Contract Documents are of the
essence.

10 22. One of the contractual time requirements was that VPFK achieve Substantial
11 Completion of all of its work within 1,540 calendar days of the County's notice to proceed.

12 23. The County's notice to proceed was issued on August 28, 2006, which established
13 the Substantial Completion deadline as November 14, 2010.

14 24. The County has granted requests from VPFK for extra time to perform the work.
15 With those agreed extra days, the Substantial Completion deadline is now November 23, 2010.

16 25. When it signed the Central Contract, VPFK made the following representations to
17 King County in Section 3.0 of the General Terms and Conditions:

18 **B. The Contract Price is reasonable compensation for the Work**
19 **and the Contract Time is adequate for the performance of the Work** as
20 represented by the Contract, site visit, and the general conditions
(including but not limited to weather, site, soil) known or reasonably
anticipated for the Site . . . [emphasis added]

21 * * *

22 **D. The Contractor is able to furnish plant, tools, material, supplies,**
23 **equipment, and labor required to complete the Work and perform the**
24 **obligations required by the Contract and has sufficient experience and**
25 **competence to do so**

26

1 26. The County relied on these representations when it awarded the Central Contract
2 to VPFK.

3 27. Included in the County's bid solicitation was the form of contract the County
4 proposed to use, a set of plans and technical specifications setting forth the nature of the work, a
5 Geotechnical Data Report ("GDR"), and a Geotechnical Baseline Report ("GBR").

6 28. The Geotechnical Data Report included data from soil core samples taken by the
7 County along or near the tunnel alignment, along with results of physical tests on those soil
8 cores. The soil cores themselves were made available for the bidders' inspection. The GDR did
9 not purport to describe any soils except those physically sampled, but it was easy to see that soil
10 types varied frequently along the tunnel alignment. In most cases, comparison of one soil core
11 sample to the next showed significantly different conditions at the tunnel elevation.

12 29. The Geotechnical Baseline Report was issued to set baselines for geotechnical
13 conditions to be encountered during construction, to provide a basis for bidding, and to provide a
14 basis for resolution of any claims of differing site conditions.

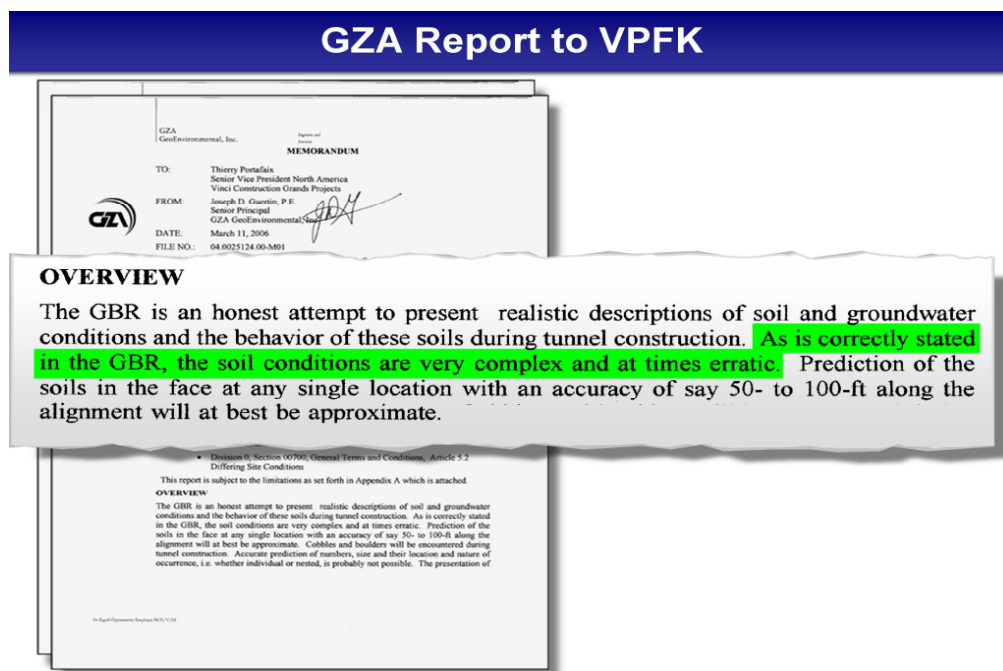
15 30. Setting baselines is a standard method for allocating risk between the project
16 owner and the contractor. For example, the GBR stated that "no contaminated soil or
17 contaminated groundwater will be encountered during construction of either BT-2 or BT-3." By
18 making this baseline statement, the County allocated to itself the risk of contaminated soil or
19 water along the tunnel alignment, instructed bidders to assume that they would not encounter
20 contaminated soil or water, and justified a claim for "differing site conditions" if contamination
21 were found.

22 31. The GBR stated that four soil types (labeled Teal, Purple, Yellow, and Red)
23 would be encountered along the tunnel alignment. The GBR did not include any location-
24 specific information on the material to be encountered along the tunnel alignments, but only
25 ranges of global percentages for each type of ground for the whole alignment of the tunnel. By
26 making these baseline statements, the County allocated to itself the risk that materially different

1 soil types or percentages of soil types might be encountered, instructed bidders to assume that
2 they would not encounter different soil types, and justified a claim for “differing site conditions”
3 if materially different soils were found.

4 32. One thing the Geotechnical Baseline Report did not state was how frequently the
5 soil types would change as the contractor tunneled along. In other words, the GBR did not
6 establish a baseline for the expected number of changes in the soil types or the expected location
7 and length of the soil types. However, the GBR did explain the complex history of the local
8 soils, which included at least three glacial cycles and three inter-glacial cycles. The GBR also
9 included profiles showing groups of geological deposits found in the soil cores, but warned,
10 “these broad groupings are a simplification of the complex geology and changes at the tunnel
11 face should be expected to occur more frequently.”

12 33. When it was preparing to bid on the Central Contract, VPFK hired a geotechnical
13 consulting firm to review the Geotechnical Baseline Report. The consulting firm, GZA
14 GeoEnvironmental, Inc. (“GZA”), submitted a written report to VPFK stating on the first page
15 that VPFK could expect to encounter soils that were very complex and even erratic:



1 34. VPFK reviewed the GZA report before submitting its bid to the County for the
2 Central Contract.

3 35. The BT-2 and BT-3 tunnels were designed to cause minimal surface impact.
4 Access shafts (also called portals) were planned at the ends of the BT-2 and BT-3 tunnel
5 segments and no surface access was planned between the portals. This plan for limited surface
6 access was important as the County obtained easements and other permissions from property
7 owners along the tunnel alignment.

8 36. VPFK knew when it submitted a bid for the Central Contract work that the only
9 planned surface access was at the portals.

10 37. VPFK began building the BT-2 and BT-3 tunnels in 2007 and 2008 using tunnel
11 boring machines (“TBMs”). TBMs are large machines that work underground, excavate soil,
12 install a concrete lining, and leave behind a fully lined tunnel.

13 38. VPFK’s mining progress was slower than it had projected in both tunnels, and the
14 amount of “downtime” (time when the TBMs were not mining) was substantially greater than it
15 had projected.

16 39. VPFK’s slow progress and excessive downtime were, in large part, VPFK’s own
17 responsibility. For example, (a) VPFK started the BT-3 tunnel over one month late because its
18 supplier failed to deliver the TBM to the project site on schedule; and (b) in early 2009, VPFK’s
19 BT-2 TBM broke down and required repair. VPFK acknowledges that these major delays were
20 its own responsibility.

21 40. In May and June 2009, VPFK discovered that both of its TBMs were badly worn.
22 VPFK took both machines out of service for repairs. Months passed while VPFK drilled wells
23 from the surface above the BT-2 TBM and pumped out water in an effort to lower the pressure at
24 the tunnel (VPFK was trying to match atmospheric pressure). VPFK never achieved
25 atmospheric pressure and eventually – in February 2010, nine months after the breakdown – it
26 repaired the BT-2 machine at an elevated pressure.

1 41. The County became concerned about the mounting delays. In October 2009, it
2 issued a formal notice that VPFK was in default of the Central Contract for failure to prosecute
3 the work so as to achieve timely completion. The County directed VPFK to submit a “corrective
4 action plan” showing how it would make up for its lost time. The County also asked VPFK to
5 confirm that it was keeping the Surety informed of project developments.

6 42. VPFK confirmed that it was keeping the Surety informed, but it never submitted a
7 satisfactory plan to make up any lost time. Instead, VPFK told the County that its work would
8 fall further and further behind schedule because it had decided to adopt new – and slower –
9 tunneling methods in both BT-3 and BT-2. VPFK announced that it would no longer perform
10 TBM maintenance unless it first drilled wells from the surface and pumped out water to lower
11 the pressure at the tunnel elevation (the same process that took many months in connection with
12 repairs to the BT-2 TBM) and that it would not proceed without drilling exploratory bore holes
13 to provide additional information about the soils it was to encounter. Both the drilling for
14 dewatering and the exploratory boreholes require substantial work on the surface of the ground.
15 Brightwater tunnels BT-2 and BT-3 pass under populated residential areas. The residents and
16 municipalities along the tunnel alignments were promised minimal disruption on the surface and
17 getting new easements and permits could be expected to consume substantial amounts of time
18 and money. VPFK demanded that the County accept responsibility for all costs and delays
19 associated with its new methods.

20 43. The County argued that VPFK’s proposed methods were unnecessary and would
21 add millions of dollars and perhaps many months to the project schedule. VPFK stated that it
22 would not proceed with the work on any other basis.

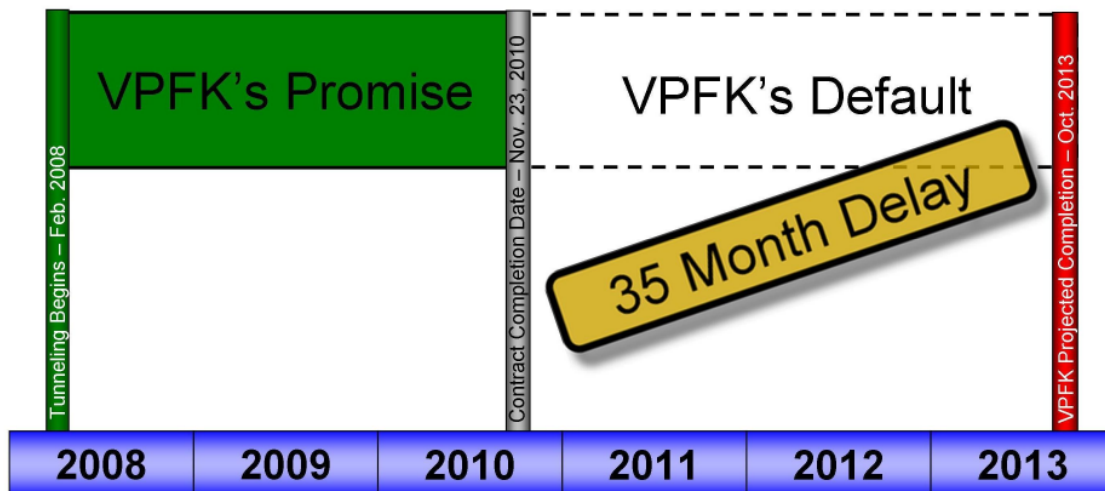
23 44. The County began to look for another contractor who would be willing to finish
24 VPFK’s tunneling work without prolonged, disruptive and expensive surface activities.
25 JayDee/Coluccio/Taisei (“JCT”), the contractor just completing the Brightwater West Contract
26

1 tunnel, expressed an interest in getting involved. Luckily, JCT's TBM would end its tunneling
2 work in the ground adjacent to the west end of the BT-3 tunnel.

3 45. The County suggested that VPFK hire JCT to help dig the BT-3 tunnel from west
4 to east. VPFK refused, but expressed no objection if the County hired JCT.

5 46. On February 15, 2010, the County and VPFK signed an agreement (the "Interim
6 Agreement"), according to which VPFK acknowledged that the County had given proper notice
7 of default and had provided VPFK an opportunity to cure. VPFK agreed that the County could
8 negotiate with and hire JCT while reserving its right to pursue a default claim against VPFK to
9 recover its costs of completing VPFK's work. The Interim Agreement reflected VPFK's
10 estimate that, if it were required to complete the BT-3 tunnel (using its new, slower methods), it
11 would complete the BT-3 tunneling work in December 2012. VPFK had considerable work to
12 perform after tunneling was complete. Based on the time VPFK showed that work would take
13 on its project schedules, completion of the BT-3 tunnel mining in December 2012 meant that
14 VPFK would not achieve Substantial Completion until approximately October of 2013.

15 47. As of February 15, 2010, the contractual substantial completion deadline (1,540
16 days after the start of work, as adjusted by agreed change orders) was in November of 2010.
17 Consequently, VPFK was projecting a 35-month project completion delay, as shown below.



1 48. After signing the Interim Agreement, the County pursued a contract with JCT.
2 The County signed a change order with JCT in the approximate amount of \$5 million to begin to
3 prepare for work on the BT-3 tunnel. JCT's work on its own contract was nearly done and
4 without the change order it would have removed its TBM from the project site and used it
5 elsewhere. One member of JCT, Taisei, declined to participate in the BT-3 work, so the County
6 continued to negotiate with the other two members, JayDee and Coluccio ("JDC").

7 49. Through a series of engineering studies, the County learned that for JDC to
8 complete the BT-3 tunnel, JDC would need to carry out a major overhaul of its TBM (lasting
9 several months and costing several million dollars). In addition, because JDC's TBM has a
10 smaller diameter than VPFK's, JDC would need to build all new tunnel liner rings (costing about
11 ten million dollars) for the BT-3 work. Despite these extraordinary costs, the County estimates
12 that JDC can complete VPFK's BT-3 mining work at less cost and in considerably less time than
13 VPFK has projected.

14 50. Before finalizing a contract with JDC, the County sent a notice to VPFK's Surety,
15 noting that VPFK had been in default since at least October 2009, that the Surety had obligations
16 under the Bond, and explaining the status and nature of the contract the County was discussing
17 with JDC. The County asked the Surety to respond without delay, based on the following
18 provisions in the Bond:

19 KNOW ALL BY THESE PRESENTS: That we, [VPFK], as Principal, and [the
20 Surety and others], as Surety, all corporations legally doing business in the State
21 of Washington, are held and firmly bound and obligated unto . . . King County,
22 pursuant to Chapter 39.08 RCW, in the full sum of the Contract Price of Two
23 Hundred Eleven Million Seventy Six Thousand Fifty Eight and No/100 Dollars
24 (\$211,076,058.00), and including any and all adjustments to the Contract
25 Amount, for the faithful performance of the Agreement referenced below, and for
26 the payment of which sum we do bind ourselves . . . jointly and severally, firmly
 by these presents.

 WHEREAS, THE CONDITIONS OF THIS OBLIGATION ARE SUCH THAT
 the Principal entered into a certain Agreement with KING COUNTY for
 Brightwater Conveyance System – Central Contract, Brightwater Tunnel,
 Sections 2 and 3 Contract C00005C06 incorporating herein by this reference all of
 the Contract Documents, as now and as hereinafter amended and modified.

1 NOW, THEREFORE, if the Principal shall faithfully perform all provisions of
2 such Agreement . . . then this obligation is void, otherwise to remain in full force
and effect.

3 51. Representatives of the Surety and the County met on March 24 and 30, 2010. The
4 Surety refused to admit that VPFK was in default and stated that it needed to analyze VPFK's
5 pending claims before providing a more substantive response. The Surety said that this review
6 would last until at least June 1, 2010, with no assurance that it would then agree to participate in
7 curing VPFK's default.

8 52. Following this notice from the Surety, the County signed the contract with JDC to
9 finish VPFK's BT-3 mining work because it judges that action presents the best available option
10 for mitigating the County's overall damages in terms of money and time. JDC's estimated
11 contract price is approximately \$69 million plus incentives for timely completion. This is in
12 addition to the approximately \$5 million change order given to the West Contractor, JCT, and
13 the County has incurred and will incur additional costs because of VPFK's default.

14 **V. FIRST CAUSE OF ACTION**
15 **BREACH OF CONTRACT AND DEFAULT**
16 **(Against VPFK)**

17 1. King County incorporates the allegations contained in the preceding paragraphs as
18 though fully set forth herein.

19 2. As of February 15, 2010, VPFK was in default of the Central Contract because it
20 had not prosecuted its work with sufficient diligence to ensure timely Substantial Completion of
21 the work and it had not provided a satisfactory corrective action plan when directed by the
County to do so.

22 3. King County gave notice of default to VPFK according to the terms of the Central
23 Contract and is entitled to pursue a claim of default, as agreed in the Interim Agreement.

24 4. King County reasonably chose JDC as the contractor to complete VPFK's BT-3
25 mining work, and negotiated a reasonable form of contract with JDC, given the circumstances.
26

1 **VIII. PRAYER FOR RELIEF**

2 WHEREFORE, King County prays for relief as follows:

3 1. Judgment against VPFK and the Surety, jointly and severally, for all damages and
4 costs arising from VPFK's default, including but not limited to the cost of hiring JDC to
5 complete the BT-3 mining work at an estimated cost of approximately \$69 million, the \$5
6 million paid to JCT for related work, and all additional incidental or consequential damages in an
7 amount to be determined at trial.

8 2. Judgment declaring the following:

9 a. As of February 15, 2010, VPFK was in default under the Central Contract;

10 b. VPFK and the Surety are jointly and severally liable for all the County's
11 damages and costs arising from VPFK's default, including but not limited to (1) compensation
12 for architect and engineering services and expenses made necessary thereby; (2) any other costs
13 or damages incurred by the County in completing and/or correcting the work; and (3) any other
14 special, incidental, or consequential damages incurred by the County that result or arise from the
15 breach or termination for default.

16 3. Judgment awarding King County such other relief the Court deems just and
17 equitable.

18 DATED this 19th day of April, 2010.

19
20 STOEL RIVES LLP

DANIEL T. SATTERBERG
King County Prosecuting Attorney

21 

22 Karl F. Oles, WSBA No. 16401
kfoles@stoel.com
23 David R. Goodnight, WSBA No. 20286
drgoodnight@stoel.com
24 Gloria S. Hong, WSBA No. 36723
gshong@stoel.com
25

By: s/Mary deVuono Englund
26 WSBA No. 17122
Senior Deputy Prosecuting Attorney

Attorneys for Plaintiff