No. 1023324

SUPREME COURT
OF THE STATE OF WASHINGTON

GRAHAM CONTRACTING, LTD.,

Petitioner,

v.

CITY OF FEDERAL WAY,

Respondent.

AMICUS MEMORANDUM OF ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON AND NATIONAL UTILITY CONTRACTORS ASSOCIATION OF WASHINGTON

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

A. ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON

The Associated General Contractors of Washington ("AGC"), in existence since 1922, is the state's largest, oldest, and most prominent construction industry trade association, representing and serving the commercial, industrial and highway construction industry. The three Washington chapters of the AGC serve more than 1,000 general contractors, subcontractors, construction suppliers and industry professionals.

B. NATIONAL UTILITY CONTRACTORS ASSOCIATION OF WASHINGTON

Founded in 1978, National Utility Contractors Association of Washington ("NUCA") has 79 member contractors performing an estimated $300 million in utility and road construction annually in Washington. NUCA members employ between 4,000-4,500 individuals.

II. STATEMENT OF THE CASE

The Court of Appeals incorrectly held that under the Washington State Department of Transportation ("WSDOT") *Standard Specifications for Road, Bridge, and Municipal Construction* ("Standard Specifications"), a Contractor must protest the actions of not only the "Engineer" but also the actions of any person or organization acting on behalf of the Owner. This holding is unprecedented and is not supported by the plain language of the Standard Specifications or by the authority (*Realm v. City of Olympia*. 168 Wn. App. 1, 277 P.3d 679, 680 (2012)) relied on by the Court of Appeals. No prior Washington appellate court had held that a protest was required in response to the actions of any person other than the contractually-defined Engineer.

The City of Federal Way (the "City"), in its Answer to Graham Ltd.'s ("Graham") Petition For Review, was unable to point to any appellate decision that allegedly so held, except for the *Realm* decision. This is telling because the City's claim that

Realm so held is completely refuted by the appellate briefing filed in *Realm.* This briefing shows that the City of Olympia's claim of waiver in *Realm* was entirely based on Realm's failure to protest ***the actions of the Engineer***.

Realm simply stands for the proposition that if a Contractor fails to timely protest the actions of the Engineer, then waiver may result. The *Realm* court simply confirmed that the obligation to protest actions of the Engineer applies even after a termination for convenience. *Realm* did not hold that a Contractor was required to protest the actions of persons other than the Engineer. The City of Federal Way's claim that *Realm* expands the actions a Contractor must protest under the Standard Specifications beyond those of the "Engineer" is false.

As such, the Court of Appeals erred in relying on *Realm* to in effect re-write the Standard Specifications to require protests of the actions of persons other than the "Engineer". If the Court of Appeals decision is not reversed, the impact on this state's construction industry will be devastating.

III. ARGUMENT

A proper interpretation of the WSDOT Standard Specifications (the most widely used form of contract for public projects in Washington) is of critical importance to AGC and NUCA members and the many people they employ directly and through subcontracts. Their collective economic livelihoods depend on being able to obtain fair compensation for work performed for public owners.

A. *REALM* DID NOT HOLD THAT THE STANDARD SPECIFICATIONS REQUIRE PROTEST OF THE ACTIONS OF PERSONS OTHER THAN THE ENGINEER AND THE CITY'S CLAIM TO THE CONTRARY IS FALSE.

At page 19 of the City's Answer, the City states the following:

> Graham argues that the Court of Appeals' interpretation of the WSDOT Standard Specifications is novel and that "[n]o prior Washington state appellate court has ever interpreted 1.04.5 in this manner ...." Pet. at 18. Wrong, Graham conspicuously fails to discuss the 2012 published opinion in Realm, Inc. v. City of Olympia. …the dispute in Realm did not involve the "Engineer."

Answer to Pet. for Rev. at 19.

The City's claim that *Realm* held that a Contractor had an obligation to protest, under the Standard Specifications, the actions of persons other than the Engineer is what is actually wrong. A review of the briefing to the Court of Appeals in *Realm* makes clear that *Realm* did not so hold. The City of Olympia, the public owner in that case and the party claiming waiver, stated the following in its brief to the Court of Appeals:

> Realm failed to protest three critical decisions **by the Engineer**:
> 1. The City's denial of Realm's notice of changed conditions;
> 2. The City's March 31, 2009 **denial of Realm's claim for reimbursable costs due to termination for convenience;**
> 3. The City's unilateral change order and **payment of amounts due (sic) issued on May 5, 2009.**
> **As a result, the Engineer's final determination of the amounts due Realm were final and Realm has waived any claims for additional compensation.**

See Appendix, p. A-5 (emphasis added).

Realm was, thus, exclusively about a Contractor's failure to protest the actions of the Engineer. The City's claim to the contrary in its answer to Graham's petition was false. As importantly, the City was unable to point to any appellate opinion

holding that a protest under the Standard Specifications was required in response to the actions of someone other than the Engineer. The City was unable to point to such a decision because none exist.

B. *REALM* DOES NOT SUPPORT THE CITY'S INTERPRETATION.

In addition to falsely claiming that Realm was not about the Engineer, the City also attempts to invoke *Realm* for the proposition that a Contractor must protest actions of persons other than the Engineer under section 1-04.5 in order to comply with Standard Specification sections 1-09.11 and 1-09.13. *Realm* does not support the City's position.

There was never any dispute in *Realm* that the order terminating further performance and the issuance of the unilateral change order were all actions taken by "the Engineer" on that project. *See* Appendix, p. A-5. The issue considered by the court in *Realm* was also a very simple one: "the dispositive issue on review is whether Realm was required to comply with

the contract's notice provision after the city terminated the contract[.]" 168 Wn. App. at 5.

Unlike here, in Realm there was no issue of fact as to the identity of the Engineer. Because there was no dispute as to the identity of the Engineer in *Realm* and no dispute that it was actions of the Engineer that Realm failed to protest, the *Realm* court was not asked to and did not address the issue before this Court. *Realm* did not decide whether there is an obligation to protest the actions of anyone (or indeed, as the City would have it, of *everyone*) on a project who is not the "Engineer" under 1-04.5.

Realm's holding that the Contractor was required to protest the actions of the Engineer, even after termination for convenience, is a far cry from the Court of Appeals holding in this case that 1-04.5 was triggered by the actions of someone other than the Engineer.

There is nothing in *Realm* that dictates that contractors must follow the detailed procedures in 1-04.5 in response to

every statement and action by each Owner representative on a project, or face forfeiture of the Contractor's rights. *Realm* only stands for the proposition that if the "Engineer" takes one of the actions listed in 1-04.5, the Contractor must protest under 1-04.5.

Therefore, despite the City's incorrect claim to the contrary, no Washington appellate court, including *Realm*, had ever held that a Contractor was obligated to protest an action of anyone other than the Engineer under the Standard Specifications. The reason no prior appellate decision has so held is because the plain language of the Standard Specifications only requires protest by the Contractor of actions of the contractually-defined Engineer.

C. THE COURT OF APPEALS DECISION IS IN DIRECT CONFLICT WITH THE PLAIN LANGUAGE OF THE STANDARD SPECIFICATIONS.

The City created the parties' Contract and incorporated the Standard Specifications into the Contract. As is typical on a public works contract, Graham was not allowed any input into the Contract's creation. CP 697.

The Engineer is a defined term in the Standard Specifications:

> **1-01.3 Definitions**
>
> …
>
> **Engineer** – The Contracting Agency's representative who directly supervises the engineering and administration of a construction Contract.
>
> …
>
> **Project Engineer** – Same as Engineer.

CP 138.

And the Contract makes the importance of the Engineer's role plain:

> **By not protesting as this section provides, the Contractor also waives any additional entitlement and accepts *from the Engineer* any written or oral order** (including directions, instructions, interpretations, and determinations).
>
> **…**
>
> If in disagreement with anything required in a change order, another written order, or an oral order ***from the Engineer*,** including any direction, instruction, interpretation, or determination ***by the Engineer*,** the Contractor shall:
>
> > 1. Immediately give a signed written notice of protest…

CP 140 (emphasis added).

In this case, the Contract identified the Engineer as John Mulkey by title and by description of duties. CP 292.

The evidence in the record on appeal demonstrates that after the Contract was signed, the City continued to ratify that Mulkey was the Engineer both in word and action:

> Mulkey was listed as the Project Engineer on contact lists (CP 717), on reporting surveys to the U.S. Census Bureau (CP 721), and in meeting minutes (CP 715). Actions that could only be taken by the Project Engineer under the Contract, such as issuing a formal notice to proceed, **were taken by Mulkey**. CP 719. And to avoid all doubt, at the commencement of the project, Mulkey himself prepared an organizational chart with his name, along with his Project Engineer title, situated above that of Ken Gunther at KPG.

Pet. Rev. at 4-5 (emphasis in original).

Neither the trial court nor the Court of Appeals were able to identify who the Engineer was on the Project as a matter of law. The trial court determined that there was an issue of fact as to the identity of the Engineer (CP 1053) and the Court of Appeals ruled that the identity of the Engineer did not matter because Graham was obligated to protest the actions of any

person or entity working for the City on the Project whether they were the Engineer or not. Op. at 11.

The Court of Appeals stated the following in this regard when discussing Sections 1-04.5 and 1-09.11(1) of the Standard Specifications:

> Nothing in these sections narrow the procedural requirement to claims arising only from orders or decisions of the Project Engineer.

Op. at 11.

By so holding the Court of Appeals had to ignore the plain language in Section 1-04.5 (the protest section of the Standard Specifications) which states:

> If in disagreement with anything required in a change order, another written order, or an oral order ***from the Engineer,*** including any direction, instruction, interpretation, or determination ***by the Engineer,*** the Contractor shall:
>
> 1. Immediately give a signed written notice of protest…

CP 140 (emphasis added).

The Court of Appeals holding is completely at odds with 1-04.5.

1-04.5 **does** expressly limit the obligation to protest to actions taken by "the Engineer." As a result, the Court of Appeals should have granted Graham's appeal because the identity of who the Engineer was on the project was a material issue of fact that precluded summary judgment. Because under 1-04.5 a Contractor's obligation to protest is only triggered by the action of the Engineer, Graham's appeal should have been granted as there is no evidence in the record that Graham ever failed to timely protest the actions of John Mulkey.

D. THE CITY OF FEDERAL WAY MISSTATES THE EFFECT OF SECTIONS 1-09.11 AND 1-09.13.

The City argues that Sections 1-09.11 and 1-09.13 support its argument that Graham was required to protest every single action by any person or entity employed by the Owner.

The portion of 1-09.11 upon which the City relies reads:

> When protests occur during a Contract, the Contractor shall pursue resolution through the Project

> Engineer. The Contractor shall follow the procedures outlined in Section 1-04.5. However, required "protests" are dealt with under 1-04.5 which is entitled "Procedure and Protest by Contractor".

CP 155; Answer to Pet. Rev. at 15.

The City argues that this paragraph of section 1-09.11 and similar language in 1-09.13 require a Contractor to protest under 1-04.5, even if the language of 1-04.5 does not itself require such compliance. Answer to Pet. Rev. at 15.

However, Sections 1-09.11 and 1-09.13's reference to Section 1-04.5 can only reasonably be read to mean that **if** there was something to protest under 1-04.5, **then** one must have complied with 1.04.5 **before** moving on to 1-09.11 or 1-09.13. The language in these Sections cannot reasonably be read to expand when a Contractor is required to protest under 1-04.5 beyond the list of actions of the "Engineer" for which protest is expressly required under 1-04.5 in the first place.

If the drafters of 1-09.11 and 1-09.13 intended to expand the reasons to protest under 1-04.5 beyond what is required to be

protested under 1-04.5 itself, the logical and unambiguous thing to do would have been to simply expand the obligations to protest under 1-04.5. The drafters of the Standard Specifications, or the City in a modification specific to this Project, could have stated that the Contractor was obligated to protest the actions of not just the Engineer but the actions of any person or entity working for the Owner. Neither the drafters of the Standard Specifications nor the City did so.

Rather, the City is attempting to argue after the fact that the language of section 1-09.11 and 1-09.13 somehow rewrites 1-04.5 to require a broader range of protests than is required by the language of 1-04.5 itself. This interpretation of the Standard Specifications would lead to the absurd result that a Contractor would be required to file a protest of every objectionable action by any employee or consultant of the Owner. This would not only not be possible but would also not be desirable for either the Owner or the Contractor. It is for this exact reason that the

Standard Specifications limits the obligation to protest to the actions of one person, the Engineer.

However, even if the City's interpretation were one reasonable interpretation, an at least equally reasonable reading of these provisions is that they do not expand the obligations to protest beyond those stated expressly in 1-04.5. As such, there is at a minimum ambiguity as to whether 1-09.11 and/or 1-09.13 expand the Contractor's obligation to Protest under 1-04.5. Any such ambiguity must be construed against the City as the drafter of the Contract. *Universal/Land Const. Co. v. City of Spokane*, 49 Wn. App. 634, 638, 745 P.2d 53 (1987).

IV. CONCLUSION

The Court should accept review because the Court of Appeals unprecedented holding is in direct conflict with the language of 1-04.5 and a failure to reverse would cause significant and unwarranted harm to Washington State's contractors and subcontractors and those that they employ.

For these reasons, amici respectfully urge this Court to hear this appeal and to rule for Graham.

I certify that this brief contains 2,472 words, in compliance with the RAP 18.7.

DATED this 30th day of October, 2023.

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V. APPENDIX

2011 WL 7172273 (Wash.App. Div. 2) (Appellate Brief)
Court of Appeals of Washington, Division 2.

REALM, INC., Appellant,

v.

CITY OF OLYMPIA, Respondent.

No. 41563-1-II.
May 25, 2011.

Brief of Respondent

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CASES

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Appendix A, 2006 Standard SpecificationSY ***1 I. INTRODUCTION**

The trial court dismissed Realm's claims based upon Realm's failure to meet contractual claim notice requirements. This is a typical ***Michael M. Johnson*** case where the contractor, Appellant Realm, Inc. ("Realm"), has completely failed to follow claim notice requirements in its public works contract with Respondent City of Olympia ("City"). Realm asks this Court to make a special exception to the clear contract requirements because these claims related to a "termination for convenience." But Realm fails to cite any rule of law, contract provision, or court decision to support this position. The well recognized rule in Washington is that contract claim provisions are to be enforced. The language of the contract is clear. Therefore Realm's appeal must be denied and the trial court's summary judgment ruling in favor of the City affirmed.

II. ISSUES ON APPEAL

1. ***Realm Failed To Meet Contractual Notice Requirements.*** Where a contractor on a public works contract fails to timely provide notice of claims and fails to timely protest change orders, ***2** does the contractor waive any claims for additional compensation? Answer: Yes.

III. RESTATEMENT OF THE CASE

This case involves the trial court's dismissal of Realm's claims for additional costs on the City's Ellis Creek Fish Passage/Culvert Replacement Project (the "Project"). [1] The City chose Realm to perform the work because Realm was the lowest responsible bidder. The City awarded the contract to Realm on June 18th, 2008 and gave notice to proceed with the work on July 21, 2008. [2] The City executed a contract with Realm that included the 2006 WSDOT Standard Specifications (hereinafter the "Std. Specs."). [3] The Std. Specs. provide general conditions of the contract as well as specific guidance and requirements of the work. [4]

In general terms, the Project consisted of making a new fish passage route and stream channel by tunneling under the adjacent ***3** roadway and bypassing an old culvert that impeded salmon migration. The length of the new tunnel was about 250 ft. [5] Realm almost immediately fell behind schedule. One critical element of this project was that the project had to be completed before salmon returned to spawn in the fall, i.e. the "fish window" as established by the hydraulic permit issued by the Washington Department of Fish and Wildlife. Realm complained about site conditions but continually promised to meet the completion deadline. By late August, it was clear that Realm could not meet the completion deadlines and had not even started any tunneling. Realm gave the City numerous excuses and eventually requested a change order for differing site conditions and obstructions encountered. [6] The City timely denied the request for a change order. [7]

Realm did not protest the denial of the request for a change order as required by the Std. Specs. 1-04.5. [8] In fact, at no time did Realm ***4** comply with the protest requirements of Std. Spec. 1-04.5. This was admitted by Realm in its answers to the City's interrogatories. [9]

On September 30, 2008 the City terminated the contract "for convenience" in accord with Std. Spec. 1-08.10(2). [10] That specification and related sections require that the contractor will be paid "in accordance with Section 1-09.5 for the actual work performed." Those sections also require that the contractor submit a claim for cost reimbursement within 90 days of termination. [11] During October and November Realm attempted to convince the City to reconsider the City's position. Various alternatives were reviewed and discussed but the termination for convenience remained effective and was never waived or altered by the City. [12]

On December 29, 2008 Realm submitted its claim for reimbursement due to the termination for convenience and also submitted ***5** claims for "extra work" and for "extra costs in removing tunnel obstructions." The Claim totaled $1,251,250.00. [13]

The City conducted an audit of Realm's costs and concluded that the total recoverable costs incurred by Realm for the entire project were $711,526.00, less previous payments of $162,331.00. [14] The City's determination was based upon the findings of the City's auditor, Navigant Consulting, Inc. [15]

On April 24, 2009, the City sent a proposed change order (the "Change Order") to Realm stating that the amount of $711,526.00 was full and final payment for all work performed by Realm on the Project. [16] On May 4, 2009 Realm informed the City it would not sign the Change Order. [17] On May 5, 2009 the City unilaterally issued the Change Order. [18] The Change Order reflects the City's determination that the total amounts recoverable by Realm were limited to $711,526.00. The City ***6** delivered its unilateral Change Order to Realm together with payment for the amounts determined by the City Engineer to be due Realm. [19] Realm received and cashed the check. [20]

Realm contests whether it received the "unilateral change order." But this is based upon truly suspect testimony Ms. Follett and conflicting documents. [21] In fact, Realm's own documents showed that Realm received the City's payment reconciliation clearly marked "Final." [22]

On July 7, 2009 the City unilaterally accepted the project. [23] At no time before or after the City issued the Change Order and made payment did Realm protest any of the City's actions. [24]

Realm filed suit on its claims for additional costs. [25] The City filed its motion for summary judgment in response based upon Realm's failure to meet the contractual notice provisions and accord and ***7** satisfaction. [26] The trial court agreed with the City on Realm's failure to meet contractual notice provisions and dismissed all of Realm's claims. The trial court did not reach the issue of accord and satisfaction.

Realm claims in its appeal that the trial court based its decision solely upon Realm's failure to protest the City's unilateral change order. That is not the case, and there is no support in the record for that statement. The trial court dismissed all of Realm's claims based upon Realm's complete failure to meet the contract's claim notice requirements. Realm seeks to ignore its clear failure to protest the City Engineer's March 31, 2009 letter denying Realm's claim for equitable adjustment.

No transcript or verbatim report of proceedings has been filed or requested by Realm.

IV. LEGAL ARGUMENT

1. Standard Of Review.

The standard of review on appeals from a trial court's order on summary judgment is de novo review:

> The court considers the facts and the inferences from the facts in a light most favorable to the nonmoving ***8** party. ***Bremerton Pub. Safety Ass'n v. City of Bremerton,*** 104 Wn. App. 226, 230, 15 P.3d 688 (2001) (citing ***Reid v. Pierce County,*** 136 Wn.2d 195, 201, 961 P.2d 333 (1998)). The court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. [27]

Here, Realm unequivocally admitted in its interrogatory answers that it did not follow the contract's claim procedures. Those claim procedures apply to any claim for additional compensation and any claim for equitable adjustment. They also provide that any decision by the Engineer is final and binding unless timely protested. It remains uncontested that no such protest was ever filed.

Therefore the trial court's summary judgment in the City's favor was proper.

2. Failure To Follow The Contract Claim Provisions Invalidated Realm's Claims.

Washington law is very clear that failure to follow contract claim procedures will result in waiver of the contractor's claims:

> Washington law generally requires contractors to follow contractual notice provisions unless those procedures are waived. ***Absher Constr. Co. v. Kent Sch.*** ***9** ***Dist. No. 415,*** 77 Wn. App. 137, 142, 890 P.2d 1071 (1995). A party to a contract may waive a contract provision,

which is meant for its benefit, and may imply waiver through its conduct. ***Reynolds Metal Co. v. Elec. Smith Constr. & Equip. Co.,*** 4 Wn. App. 695, 700, 483 P.2d 880 (1971). [28]

Realm admitted in its interrogatory answers that it did not follow any of the contract claim procedures: [29]

INTERROGATORY NO. 7: Describe all written protests (and all updates or supplements to each protest) you filed or sent to the City of Olympia in conformance with 1-04.5 of the Standard Specifications for the project that is the subject of this action. Include the date and description of each protest.
ANSWER:

Object the this Interrogartory [sic] is ambiguous. Without waiving this objection **the only written protest that Realm can uncover is the protest regarding the letter sent for the city of Olympia's letter for termination. Other responses to change order for the termination were not done pursuant to 1-04.5 of the Standard Specifications.**

INTERROGATORY NO. 8: Describe all written protests you filed or sent to the City of Olympia in conformance with 1-04.5 of the Standard Specifications related to the unilateral change order issued by the City of Olympia on May 5, 2009 attached to these interrogatories as Exhibit A hereto. Include the date and description of each such protest.

***10** ANSWER:

No protests were filed or sent pursuant to 1-04.5 of the Standard Specifications.

INTERROGATORY NO. 9: Describe all written protests you filed or sent to the City of Olympia in conformance with 1-04.5 of the Standard Specifications related to the March 31, 2009 determination of reimbursable costs contained in the City's unilateral change order issued by the City of Olympia on May 5, 2009 attached to these interrogatories as Exhibit B hereto. Include the date and description of each such protest.

ANSWER:

No protests were filed or sent pursuant to 1-04.5 of the Standard Specifications.

Realm failed to protest three critical decisions by the Engineer:
1. The City's denial of Realm's notice of changed conditions;

2. The City's March 31, 2009 denial of Realm's claim for reimbursable costs due to termination for convenience;

3. The City's unilateral change order and payment of amounts due issued on May 5, 2009.

As a result, the Engineer's final determination of the amounts due Realm were final and Realm has waived any claims for additional compensation.

***11** Std. Spec. 1-04.5 requires that the contractor must protest any action by the Engineer within 15 days with a detailed written explanation for the basis of the protest.[30] Failure to protest in a timely manner is a waiver of any claims related to the contract. "By not protesting as this section provides, the Contractor also waives any additional entitlement and accepts from the Engineer any written or oral order (including directions, instructions, interpretations, and determination).[31]

As admitted in its Answers To Interrogatories, Realm failed to protest the Engineer's denial of changed conditions. Furthermore, Realm never fulfilled the second requirement under Std. Spec. 1-04.5 to give a detailed notice of the protest including: a) the date of the protested order; b) nature and circumstances that caused the protest; c) the contract provisions that support the protest; d) the estimated dollar cost; and e) analysis of the progress schedule.[32] All of those items must be presented in writing within 15 calendar days of the date of the ***12** protested decision by the Engineer.[33] Thus the September 3, 2008 letter from Realm claiming changed conditions was not in compliance with the contract's claim provisions because it was never followed up with a detailed protest as required by the Std. Specs. Any claim for changed conditions was thereby waived.

The City also determined that it was in its best interest to terminate the contract for convenience.[34] The effect of a termination for convenience is to pay the contractor "in accordance with Section 1-09.5 for the actual work performed."[35] If the parties cannot agree to the amount of payment "then the matter will be resolved as outlined in Section 1-09.13."[36]

Section 1-09.13 requires that "the Contractor shall proceed under the administrative procedures in Sections 1-04.5, 1-09.11 and any special provision provided in the contract for resolution of disputes."[37] Thus ***13** Realm was obligated under the Std. Specs. to comply with Section 1-04.5 in requesting any additional compensation. Moreover, Section 1-09.11 requires compliance with Section 1-04.5 in order to have any right to file a claim:

"***The Contractor agrees to waive any claim for additional payment if the written notifications provided in Section 1-04.5 are not given,*** or if the Engineer is not afforded reasonable access by the Contractor to complete records of actual cost and additional time incurred as required by Section 1-04.5, or if a claim is not filed as provided in this section."[38]

Realm failed to protest the Engineer's determination of the amounts due Realm as stated in the City's March 31, 2009 denial letter.[39] Thus the Engineer's determination of the amounts due Realm was final and again Realm waived any claims for additional compensation.

Finally, Realm failed to protest the May 5, 2009 Change Order that included the City Engineer's determination of reimbursable costs. Failure to protest any change order issued by the Engineer is deemed accepted by the Contractor if not timely protested:

> The Contractor ***accepts all requirements of a change order*** by: (1) endorsing it, (2) writing a separate ***14** acceptance, or (3) ***not protesting in the way this section provides.*** A change order that is not protested as provided in this section shall be full payment and final settlement of all claims for contract time and for all costs of any kind, including costs of delays, related to any work either covered or affected by the change.[40]

On December 29, 2008 Realm submitted a claim to the City in the amount of $1,109,418.75.[41] The City requested and received access to Realm's accounting records and conducted an audit.[42] The audit found that the total substantiated costs recoverable by Realm were only $722,526.00.[43] The City then issued its Change Order on May 5, 2009 together with a check to Realm in the amount of $513,618.45.[44] At no time did Realm protest the Engineer's decision denying Realm's December 29, 2008 request for reimbursement and at no time did Realm protest the provisions of the Change Order that specifically provided as follows:

Pursuant to Standard Specification WSDOT 1-08.10(2) this contract was terminated for convenience on ***15** September 30, 2008. Realm, Inc. submitted a claim on December 29, 2008 in the amount of $1,109,418.75. The City retained Navigant Consulting to review Realm's claim. As reflected in Navigant's report dated March 26, 2009, Realm has substantiated costs and markup on the contract in the amount of $711,526.00. ***This Change Order No. 1 reflects full and final payment for all work performed under the contract.***[45]

Realm cashed the check and did not protest any of the terms of the Change Order. The City then unilaterally accepted the project on July 7, 2009.[46] Realm did not protest either the Change Order or the Final Acceptance. This represents a complete failure by Realm to follow the contract claim procedures that require a timely protest of any change order. No such protest was ever filed and in accord with Std. Spec. 1-04.5, failure to object to a change order issued by the Engineer is deemed acceptance of that change order.[47] The contract requirements could not be clearer and Realm's failure to follow them is equally clear.

Realm now attempts to draw some distinction between what is required for a claim of reimbursement related to a termination for ***16** convenience vs. a claim for changed work. Realm states there must be some "dispute" before the claim provisions can apply. But this is contrary to the express terms of the contract.

Std. Spec. 1-08.10(4) provides that if the Contractor and the City cannot agree on reimbursable costs for a termination for convenience, the dispute will be resolved as "outlined in 1-09.13."[48] Std. Spec. 1-09.13 provides that "Prior to seeking claim resolution through nonbinding alternative dispute resolution processes, binding arbitration, or litigation, the Contractor shall ***proceed under the administrative procedures in Section 1-04.5, 1-09.11*** and any special provision provided in the contract for resolution of disputes."[49] Thus all claims for reimbursable costs associated with a termination for convenience must meet the contract claim notice provisions of Std. Spec. 1-04.5 and 1-09.11. If they don't they are waived. Realm admits it never met those requirements and its claims are therefore waived. Realm has not presented any rule of law or supporting cases to the contrary.

***17 3. Realm Misreads And Mischaracterizes The Claim Resolution Process Of Std. Spec. 1-09.13 And 1-09.11**

Section 1-09.13 provides that the claim resolution procedures of Sections 1-04.5 and 1-09.11 apply before any litigation may be initiated:
1-09.13(1) General.

Prior to seeking claim resolution through nonbinding alternative dispute resolution processes, binding arbitration, or litigation, ***the Contractor shall proceed under the administrative procedures in Sections 1-04.5, 1-09.11*** and any special provision in the contractor for resolution of disputes. The provisions of these sections must be complied with in full, as a condition precedent to the Contractor's right to seek claim resolution through any nonbinding alternative dispute resolution process, binding arbitration or litigation.[50]

Section 1-09.11 specifically provides that 1-04.5 applies to all disputes during a contract:

> 1-09.11(1) - Disputes. When disputes occur during a contract, the Contractor shall pursue resolution through the Project Engineer. The Contractor shall follow the procedures outlined in Section 1-04.5. If the negotiation using the procedures outlined in Section 1-04.5 fails to provide satisfactory resolution, the Contractor shall pursue the more formalized method outlined in Section 1-09.11(2). [51]

***18** Thus all disputes relating to the contract must be first submitted to the Engineer. Only after meeting the requirements of 1-04.5, i.e. timely protesting the Engineer's decisions, can they be submitted as a claim under 1-09.11(2). In addition, Std. Spec. 1-09.11(2) requires that any claim for additional compensation must comply with both Std. Spec. 1-04.5 and 1-09.11:

> 1-09.11(2) Claims. If the Contractor claims that additional payment is due and the Contractor has pursued and exhausted all the means provided in Section 1-09.11(1) to resolve a dispute, the Contractor may file a claim as provided in this section. ***The Contractor agrees to waive any claim for additional payment if the written notifications provided in Section 1-04.5 are not given,*** or if the Engineer is not afforded reasonable access by the Contractor to complete records of actual cost and additional time incurred as required by Section 1-04.5, or if a claim is not filed as provided in this section. [52]

Realm's argument that the contract claim provisions do not apply in this instance are directly contrary to the plain meaning of the Std. Specs. Realm's attempts to skirt the contract's requirements are understandable. None of the notices or protests required under Std. Spec. 1-04.5 were ever filed. No claim as required by 1-09.11(2) was ever filed. Realm has not met a single notice provision in the contract.

***19** For instance, the City's Engineer determined the amount of the equitable adjustment as provided in the City's letter dated March 31, 2009 as follows:

> "Despite delays caused by Realm's failure to provide certain types of records in a timely manner, Navigant completed the audit and the city had determined that Realm has supported costs on the contract that total $711,526 ... The balance of Realm's claim is denied, and the City reserves all rights and defenses including defenses based on entitlement." [53]

The City's position could not be clearer. There is no ambiguity as to how much the City is willing to pay and no doubt that the decision is final: "Please note that this final claim determination includes the cost of the tunnel

shield and liner." [54] It is also clear that the City is saying it was denying over one-half of Realm's claimed reimbursement. [55]

The City's Claim Denial [56] was a final decision of the Engineer. Std. Spec. 1-04.5 specifically requires the Contractor to file a two part written protest "If in disagreement with ***anything required in a change*** ***20** ***order, another written order, or an oral order from the Engineer, including any direction, instruction, interpretation, or determination by the Engineer*** ..." [57] No protest was ever filed.

Realm argued to the trial court that this and the other claim provisions only apply to changes in the work. But as demonstrated above, the purpose of Std. Spec. 1-04.5 is to encourage and require negotiation of disputes and is broadly worded. The clear intent of the language is to resolve questions about decisions by the Engineer before they develop into formal claims and ultimately litigation.

If Realm had protested the City's March 31, 2009 Claim Denial the parties could have explored their viewpoints on allowable charges and the audit findings. They could have reviewed cost records and discussed the various means of computing costs and associated charges. They may have resolved these disputes at that time. But none of that occurred because Realm failed to protest the Engineer's determination of the allowable costs associated with the termination for convenience.

This is a clear failure to follow the contract claim procedures and is remarkably similar to *Mike M. Johnson v. County of Spokane* where ***21** our Supreme Court interpreted and applied these same contract provisions:
Both the Apple Valley and Wolfland contracts required MMJ to ***use mandatory notice, protest, and formal claim procedures for claims of additional compensation, time extensions, and changed conditions.*** Specifically, the contracts required MMJ to give a signed written notice of protest of work required by a change order, other written order, or oral order from the engineer before doing any work. Clerk's Papers (CP) at 116-17 (Standard Specification Section 1-04.5). The contracts required MMJ thereafter to: Supplement the written protest within 15 calendar days with a written statement providing the following:

a. The date of the protested order;

b. The nature and circumstances which caused the protest;

c. The contract provisions that support the protest;

d. The estimated dollar cost, if any, of the protested work and how that estimate was determined; and

e. An analysis of the progress schedule showing the schedule change or disruption if the Contractor is asserting a schedule change or disruption. Id. at 116.

The contracts further provided that MMJ accept all requirements of a change order by endorsing it, writing a separate acceptance, or not protesting it as required by section 1-04.5. Id. MMJ's failure to protest constituted "full payment and final settlement of all claims for contract time and for all costs of any kind, including costs of delays, related to any work either covered or affected by the change." Id. ***Additionally, the contracts stated that "by failing to follow the procedures of this section*** ***22** ***and Section 1-09.11, the Contractor completely waives any claims for protested work."*** Id. at 117.

Section 1-09.11 provided a mandatory formal claim procedure if the protest procedures of section 1-04.5 failed to provide MMJ with a satisfactory resolution. CP at 119-22 (Standard Specification Section 1-09.11). The formal

claim procedures required MMJ to submit a claim to the project engineer in sufficient detail to enable the engineer to ascertain the basis and amount of the claim. CP at 119. At a minimum, MMJ was required to submit 10 items of specific information to support a claim, including a notarized statement to the project engineer swearing to the truth and veracity of the submitted claim (the "Final Contract Voucher Certification"). [58]

Realm admits none of these procedures were followed. Realm's argument that a termination for convenience involves a different procedure because there was "no dispute during the contract" [59] is both inaccurate and irrelevant. It is inaccurate because the City disputed the amount of costs due Realm for the termination for convenience. [60] The Engineer specifically determined that the remainder of Realm's claimed costs were denied: "The balance of Realm's claim is denied, and the City reserves all rights and defenses including defenses based on ***23** entitlement." [61] Realm's argument is irrelevant because any order of the Engineer is subject to Std. Spec. 1-04.5 and 1-09.11 regardless of whether there is a dispute. The Std. Specs. simply don't say what Realm claims.

4. The Contract Claim Procedures Apply To All Claims For Additional Compensation.

As stated in ***Mike M. Johnson,*** the claim requirements apply to all "claims for additional compensation." This is borne out by the fact that 1-04.5 addresses both changed work and "other entitlements":
"The Contractor *accepts all requirements of a change order* by: (1) endorsing it, (2) writing a separate acceptance, or (3) *not protesting in the way this section provides.* A change order that is not protested as provided in this section shall be full payment and final settlement of all claims for contract time and for all costs of any kind, including costs of delays, related to any work either covered or affected by the change.

By not protesting as this section provides, the Contractor also waives any additional entitlement and accepts from the Engineer any written or oral order (including directions, instructions, interpretations, and determinations)." [62]

***24** Thus any determination by the Engineer (like the disallowance of Realm's claim in the City's March 31, 2009 letter) is deemed accepted by the Contractor unless it is protested. Realm's claim that there must be a "dispute" before the Engineer's decision is deemed final is directly contrary to the contract language and common sense.

Engineers make numerous decisions concerning a project while it is being constructed. If the Engineer's decisions were all tentative and subject to protest until a dispute actually develops, there would be no finality and no progress on the work. Every project utilizing such a rule would be subject to retroactive litigation of every decision ever made on the project. This is obviously counterproductive and would lead to litigation on every public works contract. Realm's argument leads to clearly absurd results and should be rejected.

5. Realm Received The City's Unilateral Change Order And Failed To Protest.

Realm failed to protest the City's unilateral change order issued along with payment on May 5, 2009. Realm claims it did not receive the change order, but it clearly did.

***25** The City sent Mr. Miller (attorney for Realm) the proposed Change Order which his client refused to sign. The Change Order included the language "Estimate #2 (final)" and specifically provided that the final payment was being made as a final settlement. When Mr. Miller informed the City that Realm would not sign the Change Order Ms. Harksen on behalf of the City informed Mr. Miller by email prior to payment: "Tom, in light of the

fact that Realm will not execute a bilateral change order, the City will Issue it unilaterally. A check will be ready this Thursday." [63] This email directly contradicts Ms. Follett's declaration that "the City would issue a unilateral Change Order." [64] The difference being that Ms. Harksen was referring to "the" Change Order rather than "a" as yet unissued change order.

In any case this dispute over whether Realm actually received the unilateral change order (which is identical to the proposed change order) is of little significance. The City's March 31, 2009 Claim Denial, audit results, and proposed Change Order informed Realm that ***26** the payment was a final payment. In addition, the Reconciliation Statement that accompanied the City's check definitively stated "final" pay estimate No. 2 (the same as the Change Order.) [65]

Where the admitted facts can only support a single conclusion, claims that would otherwise be a factual dispute can be determined as a matter of law. "[I]f reasonable minds can reach but one conclusion" on an issue of fact, it may be determined on summary judgment." [66]

Ms. Follett claims that her subjective belief was that the City's check was a "progress payment" [67] but the subjective intent of a party to a contract is irrelevant:

This court interprets settlement agreements in the same way it interprets other contracts. *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.,* 164 Wn.2d 411, 424 n.9, 191 P.3d 866 (2008). In doing so, we attempt to determine the intent of the parties by focusing on their objective manifestations as expressed in the agreement. *See Hearst Commc'ns, Inc. v. Seattle Times Co.,* 154 Wn.2d 493, 503, 115 P.3d 262 (2005). The subjective intent of the parties is generally irrelevant if we can impute an intention corresponding to the reasonable meaning of the actual words used. Id. at 503-04. [68]

***27** The overwhelming objective evidence is that the Engineer made a clear determination of the amount to be paid to Realm. The decision of the Engineer was repeatedly communicated to Realm. Realm failed to protest as required by the contract. As a result, Realm waived its claims.

6. Claim For Attorney Fees On Appeal.

In accord with RCW 39.04.240 and RAP 18.1 the City requests attorney fees and costs on appeal. The trial court awarded attorney fees to the City as the prevailing party. Washington statute provides that RCW 4.84.250 shall apply to lawsuits involving public works. "RCW 4.84.250, made applicable to FCCC and King County through RCW 39.04.240, provides simply that "there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees." [69] "Because the City has ***28** prevailed here, it is entitled to reasonable attorney fees and costs. RCW 39.04.240." [70]

RCW 39.04.240 incorporates the provisions of RCW 4.84.250 et seq:
§ 39.04.240. Public works contracts -- Awarding of attorneys' fees

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

(2) The rights provided for under this section may not be waived by the parties to a public works contract that is entered into on or after June 11, 1992, and a provision in such a contract that provides for waiver of these rights is void as against public policy. However, this subsection shall not be construed as prohibiting the parties from mutually agreeing to a clause in a public works contract that requires submission of a dispute arising under the contract to arbitration. [71]

***29** Under RCW 4.84.270 the defendant is deemed the prevailing party entitled to attorney fees if the defendant makes an offer of settlement that is not accepted and the plaintiff recovers less than what is offered:
§ 4.84.270. Attorneys' fees as costs in damage actions of ten thousand dollars or less -- When defendant deemed prevailing party

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280. [72]

RCW § 4.84.270.

The City is the prevailing party entitled to its attorney fees under the statute because it made its offer of settlement in a timely manner and obtained a result more favorable than its offer. [73] As the prevailing party on appeal the City is entitled to its attorney fees and costs on appeal.

***30** It must also be noted that Realm has not appealed the trial court's order awarding attorney fees and should not now be allowed to contest award of fees and costs as allowed by statute.

V. CONCLUSION

Realm failed to protest the Engineer's determination of amounts due under the contract. Despite receiving the City's final determination dated March 31, 2009 and the unilateral Change Order dated May 5, 2009, Realm failed to protest the Engineer's decision. Realm cannot now undo its failure to follow the contract's claim procedures. Realm has waived its claims as a matter of law and the trial court's dismissal of Realm's claims should be affirmed.

Appendix not available.

Footnotes

1 Declaration of Fran Eide (“Eide Decl.”), [CP 91-94.]

2 Id.

3 Eide Decl., 14, [CP 91-92.] A copy of the Std. Specs applicable to this case are attached to this brief as Appendix A (hereinafter “App. A.”)

4 Id.

5 See, eg. Eide Decl, 15, [CP 92.]

6 Id.

7 Id.

8 Eide Decl., ¶6, [CP 92.]

9 See, Interrogatory Answers, City's Motion For Summary Judgment (hereinafter the "City SJ") Ex. G, p.11, Rog.No.7, [CP 73.]

10 Termination For Convenience, Sept. 30, 2008, City SJ Ex. A, [CP 41-42.]

11 Std. Spec. 1-08.10(3), App. A Attached, p.18.

12 Eide Decl., ¶ 8, [CP 93.]

13 Realm Claim For Reimbursement, City SJ Ex. B, [CP 43-46.]

14 Claim Denial March 31, 2009, City SJ Ex. C, [CP 47.]

15 Audit Report April 14, 2009, City SJ, Ex. D, [CP 49-56.]

16 Declaration of Carrie Follett ("Follett Decl."), 1 11, [CP 112.]

17 Follett Decl., 112, [CP 112.]

18 Eide Decl., ¶11, [CP 93.]

19 Id.

20 Id.

21 See, e.g. 2nd Decl. of William A. Linton, [CP 189-191.]

22 See, City SJ Ex. J, pp. 1-3, [CP 232-234.]

23 Final Acceptance, City SJ Ex. F, [CP 62.]

24 Eide Decl. ¶6, [CP 92.]

25 Complaint, [CP 4-7.]

26 City SJ, [CP 28-40.]

27 *Jones v. Allstate Ins. Co.,* 146 Wn.2d 291, 300-301 (2002).

28 ***Mike M. Johnson, Inc. v. County of Spokane,*** 150 Wn.2d 375, 386 (2003).

29 Answers To Interrogatories, City SJ, Ex. G, pp.11-12, [CP 73-74].

30 Std. Spec. 1-04.5, App. A Attached, p.4-5.

31 Std. Spec. 1-04.5, App. A Attached, p.4.

32 Id.

33 See, Std. Spec. 1-04.5, App. A Attached., p.4; See also, Eide Decl., ¶6 [CP 92.]

34 Termination For Convenience Letter, Sept. 30, 2008, City SJ Ex. A, [CP 41.]

35 Std. Spec. 1-08.10(4), App. A Attached., p.18.

36 Std. Spec. 1-08.10(4), App. A Attached., p.18.

37 Std. Spec. 1-09.13(1), App. A Attached., p.38.

38 Std. Spec. 1-09.11(2) Claims, App. A Attached., p.33.

39 City Claim Denial, March 31, 2009, City SJ Ex. C [CP 47-48.]

40 Std. Spec. 1-04.5, App. A Attached, p.4

41 Realm Claim, City SJ Ex. B [CP 43.]

42 City Letter, March 31, 2009, City SJ Ex. C [CP 47-48.]

43 Id.

44 Change Order, City SJ Ex. E, [CP 57-61.]

45 Id.

46 Unilateral Acceptance, City SJ Ex. F, [CP 62.]

47 Std. Spec. 1-04.5 "The Contractor accepts all requirements of a change order by:... (3) not protesting in the way this section provides." App. A Attached, p.4.

48 Std. Spec. 1-09.13, App. A, p.38.

49 Std. Spec. 1-09.13(1), App. A Attached, p.38.

50 Std. Spec. 1-09.13(1), App. A Attached, p.38.

51 Std. Spec. 1-09.11(2), App. A Attached, p.33.

52 Std. Spec. 1-09.11(2), App. A Attached, p.33.

53 City Claim Denial, March 31, 2009, City SJ Ex. C, p.1 [CP, 47.]

54 [Id.]

55 Realm claimed $1,109,418.75 in its Claim. Claim, City SJ Ex. B, p.4, [CP 46.] The city denied Realm's Claim and only paid $513,618.45. Chg. Order, City SJ Ex. E, p.1, [CP 57.]

56 Claim Denial, March 31, 2009, City SJ Ex. C, [CP 47.]

57 Std. Spec. 1-04.5, App. A Attached, p.4.

58 ***Mike M. Johnson, Inc. v. County of Spokane,*** 150 Wn.2d 375, 379-380 (2003) (Emphasis Added.)

59 Appellant's Opening Brief, p.8

60 See, Claim Denial Letter March 31, 2009, City SJ Ex.C, [CP 47.]

61 Id.

62 Std. Spec. 1-04.5, Ex. I, p. 1-24 (Emphasis Added).

63 Harksen Email, May 5, 2009, [CP 130.] Reconciliation Statement and Check, City SJ, Ex. J, [CP 232-234.]

64 Follett Decl., p.3, [CP 113.]

65 *See,* Payment Reconciliation, City SJ Ex. J, [CP 232-234.]

66 *Allen v. State,* 118 Wn.2d 753, 760, 826 P.2d 200 (1992); *M.A. Mortenson Co. v. Timberline Software Corp.,* 140 Wn.2d 568, 579 (2000).

67 Follett Decl., p.3, [CP 113.]

68 *McGuire v. Bates,* 169 Wn.2d 185, 188-189 (2010).

69 ***Frank Coluccio Constr. Co. v. King County,*** 136 Wn. App. 751, 780 (2007).

70 ***Am. Safety Cas. Ins. Co. v. City of Olympia,*** 162 Wn.2d 762, 773 (2007).

71 RCW § 39.04.240.

72 RCW § 4.84.270.

73 See, Offer of Settlement, [CP 259-260.]

End of Document

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served this *AMICUS MEMORANDUM OF ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON AND NATIONAL UTILITY CONTRACTORS ASSOCIATION OF WASHINGTON* in the below described manner:

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Washington State Supreme Court

Email Copy via Washington State Supreme Court's Secure Portal:

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Dated this 30th day of October, 2023.

s/ Trang Nguyen
Trang Nguyen, Legal Assistant

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