FILED
SUPREME COURT
STATE OF WASHINGTON
8/31/2023
BY ERIN L. LENNON
CLERK

102332-4

No. 83494-1

FILED
Court of Appeals
Division I
State of Washington
8/31/2023 11:37 AM

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

GRAHAM CONTRACTING, LTD.,

Appellant,

v.

CITY OF FEDERAL WAY,

Respondent.

GRAHAM CONTRACTING, LTD.'S PETITION FOR REVIEW BY THE WASHINGTON SUPREME COURT

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I. IDENTITY OF PETITIONER

The Petitioner is Graham Contracting, Ltd. (Graham).

II. COURT OF APPEALS DECISION

Graham seeks review of the Court of Appeals decision filed on May 30, 2023, a copy of which is attached in the Appendix at A-1 through A-14 (the "Decision"). This Petition is timely filed because Graham filed a motion for reconsideration on June 16, 2023, and an order denying the motion for reconsideration was entered on August 1, 2023. A copy of the order denying reconsideration is in the Appendix at A-15.

III. ISSUES PRESENTED FOR REVIEW

Issue 1. Whether protests of the actions of persons other than the contractually defined "Engineer" are required under Standard Specification Section 1-04.5. In direct contradiction to the language of the Washington State Department of Transportation ("WSDOT") Standard Specifications, the Court of Appeals ruled that under Standard Specification Section 1-04.5 the Contractor ("Graham") was obligated to protest actions

of persons other than the contractually defined “Engineer.” There is significant public interest as to when notice of protest is required to be given under the widely used WSDOT Standard Specifications. No Washington appellate court interpreting the Standard Specifications has ever before ruled that notice of protest under Section 1-04.5 was required in response to the actions of anyone other than the “Engineer.” By so holding, the Court of Appeals strayed dramatically from prior Supreme Court and Court of Appeals precedent by, in effect, rewriting the parties’ contract to require contractors to protest under Section 1-04.5 in response to the actions of persons other than the contractually defined “Engineer.”

The Supreme Court should accept review so that it can provide a definitive ruling as to whether protests of the actions of persons other than the “Engineer” are required under Standard Specification Section 1-04.5.

Issue 2. Whether the Court of Appeals erred by refusing to consider all evidence that was considered by the trial court with

respect to Graham's motion for reconsideration of the trial court's order granting summary judgment. The Court of Appeals' decision conflicts with recent appellate decisions that hold, with respect to a motion for summary judgment, that an appellate court should consider all evidence presented to the trial court.

Issue 3. Whether the award of attorney fees by the Court of Appeals was premature where no determination can yet be made that Graham has "recovered nothing" in this action.

IV. STATEMENT OF THE CASE

The City of Federal Way (the "City") hired Graham to serve as the general contractor for the Pacific Highway South HOV Lanes South Phase V Project (the "Project") pursuant to a Public Works Contract executed on August 25, 2016 (the "Contract").

The Contract incorporated the 2016 edition of the WSDOT Standard Specifications. The Contract also separately provided for the administration of the contract as follows:

> The Contractor's performance under this contract will be monitored and reviewed by John Mulkey, P.E., Street Systems Project Engineer. Questions by the Contractor regarding interpretation of the terms, provisions and requirements of this contract shall be addressed to John Mulkey, P.E., Street System Project Engineer, for response.

CP 292.

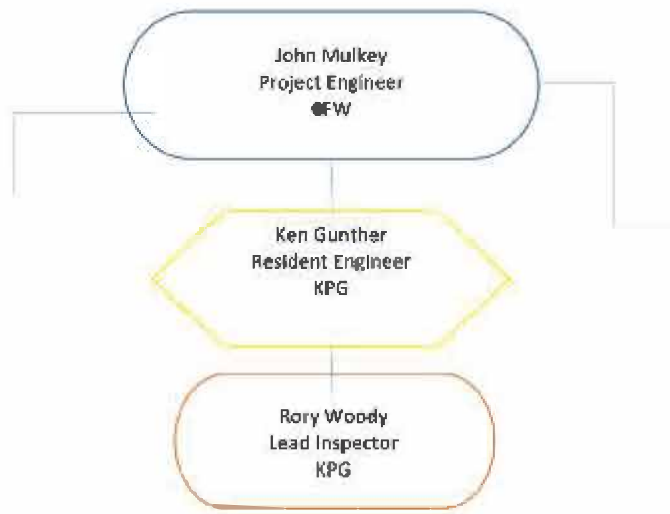
The Engineer is a defined term in the Standard Specifications:

> **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.

The City continued to identify Mulkey as the Engineer/Project Engineer both before and after construction of the Project had commenced. 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.[1]



CP 1018.

The identity of the Engineer is of enormous significance under the Standard Specifications because Section 1-04.5 provides:

---

[1] KPG was an outside consultant to the City.

> 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 to the Project Engineer…

CP 140 (emphasis added).

When a City-caused delay arose on the Project related to the design of a Joint Utility Trench (JUT), Graham notified Mulkey, the Project Engineer, of design issues and related delays and cost impacts on November 3, 2016. CP 163-165. Mulkey never responded to Graham's notice of delay nor did he issue any direction or order to Graham.

Graham continued to provide notice to Mulkey of delays and associated costs. Approximately nine months later, in a footnote to a letter dated July 7, 2017, the City for the first time

took the position that Gunther, an employee of KPG, was the Project Engineer. CP 1004. Before this letter, the City had consistently referred to Mulkey as the Project Engineer and Gunther as the Resident Engineer. *See Organizational Chart, infra*, at 5; CP 1018; *see also* CP 715 (meeting minutes); CP 717 (contact list). In the footnote to the letter, the City stated the following:

> Graham was informed by the City at the Partnering Meeting in September, 2016 that KPG would act as the Engineer for this Project in collaboration with City personnel, and KPG has been acting in that role from the beginning of the Project — as Graham is more than aware.

CP 1004.

Every Graham representative in attendance at the September 2016 meeting has testified that no such appointment of Gunther was made at this meeting. CP 696-698; CP 700-702; CP 703-705; CP 731-732; CP 733-737. Furthermore, the City's own documents prepared in relation to and after this meeting do not support the City's position, as they continue to refer to Mulkey as the Project Engineer and Gunther as his subordinate,

the Resident Engineer. The City-prepared meeting minutes do not discuss this supposed appointment, and the Project Contact list distributed after the meeting identified Mulkey as the Project Engineer. CP 715-717; *see also* CP 720; *see also* Organizational Chart, *infra*, at 5 (prepared by Mulkey shortly after the meeting); CP 1018.

Graham responded to the City's letter on July 14, 2017, and provided evidence that Mulkey had been acting as the "Project Engineer," Gunther as Mulkey's subordinate with the title "Resident Engineer," and that Graham had never been previously informed that Gunther was allegedly the Project Engineer. CP 1008-09. Graham advised that if the City wanted to change this arrangement, it should issue a change order. CP 1009. The City never did so. *Id.*; Resp't's Br. 44 n.1.

However, out of an abundance of caution, Graham began protesting the actions of persons other than Mulkey, even though the City refused to officially replace him as Project Engineer. *See* CP 1104-1920.

As a result of the City's refusal to equitably compensate Graham for the JUT issue and for other damages, Graham timely made claims under the Contract. The City denied Graham's claims and Graham timely commenced this lawsuit. CP 1.

The City moved for partial summary judgment on the grounds that Graham failed to timely protest Gunther's November 8, 2016 response to Graham's notice of delay related to the JUT. CP 15-39. The trial court granted the City's motion, **even though the trial court also determined that there were "material issues of fact as to whether John Mulkey, Ken Gunther, or others" were the Project Engineer as of November of 2016**. CP 1053.

In so holding, the trial court decided that Graham was obligated to protest actions of persons other than the Project Engineer, including, in this case, actions of an outside third-party consultant. CP 1051-1054.

Graham moved for reconsideration on multiple grounds, including that the trial court's interpretation of 1-04.5 was wrong

and, even if correct, that Graham had timely protested the actions of the City with respect to many claims that the trial court had dismissed in its order. CP 1061-1079. In support of this latter portion of its motion, Graham submitted declarations and exhibits which demonstrated that Graham had timely protested City actions and that the trial court had erred in dismissing certain of Graham's claims, even if the Court was correct that Graham was required to protest the actions of persons other than the Project Engineer. Evidence of Graham's timely protests was contained in the declarations and associated exhibits of Richard Skalbania (CP 1081-92), Seth Crites (CP 1093-1103), and Ed Schepp (CP 1104-1920). The court explicitly considered this evidence:

> The Court has heard **and considered**… the pleadings and files contained in this matter, including but not limited to the following:…
>
> > 14. **Declaration of Richard Skalbania** in support of Graham's Motion for Reconsideration; (Dkt. 71)
> > 15. **Declaration of Seth Crites** in support of Graham's Motion for Reconsideration; (Dkt. 72)

> 16. **Declaration of Ed Schepp** in support of Graham's Motion for Reconsideration; …

CP 2038 (emphasis added).

Despite considering this evidence, the trial court denied the substance of Graham's motion for reconsideration. CP 2037-2041.

On appeal, the Court of Appeals wrongly interpreted 1-04.5 to require protests by a Contractor like Graham of actions of persons other than the Project Engineer. The Court of Appeals also refused to consider evidence that the trial court had considered in ruling on Graham's motion for reconsideration. Op. at 8 n.6.

V. ARGUMENT

A. THIS COURT SHOULD ACCEPT REVIEW TO CLARIFY WHEN CONTRACTORS MUST PROTEST TO AVOID WAIVER UNDER THE STANDARD SPECIFICATIONS.

The Court of Appeals adopted the novel but incorrect position that the Standard Specifications require a Contractor to protest actions of not just the Project Engineer/Engineer but the

actions of anyone acting on behalf of the City to avoid claim waiver under 1-04.5. Op. at 11.

The penalty for the Contractor's failure to protest under 1-04.5 is enormous, as "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." CP 140.

This structure, with the attendant risk that the Contractor could be forced to work without compensation because of its failure to protest, is mitigated in one crucial way: it is only the actions of the "capital 'E' Engineer" (also defined as Project Engineer) that a Contractor must protest. Section 1-04.5 provides:

> 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 to the Project Engineer…

CP 140 (emphasis added).

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.

The Project Engineer is contractually the same person as the Engineer. The Engineer/Project Engineer is the only person whose actions trigger the Contractor's obligation to protest on pain of forfeiture of its right to compensation.

The Court of Appeals' decision improperly expands the obligation to protest beyond what 1-04.5 requires. The Court of Appeals, in its decision, stated the following:

> **Nothing in these sections** [1-04.5 and 1-09.11] **narrow the procedural requirement to claims arising only from orders or decisions of the Project Engineer.**

Op. at 11 (emphasis added).

This holding directly contradicts the express language of Section 1-04.5, which provides for waiver only with respect to orders "from the Engineer" and only requires protest of orders "from the Engineer." CP 140.

The Court of Appeals' holding amounts to a blatant and impermissible rewriting of the parties' contract. The ruling effectively, *ex-post facto*, changes the very rules of engagement regarding notice that were set forth in 1-04.5

The Court of Appeals tries to justify its rewriting of 1-04.5's clear language by stating:

> Instead, the provisions [1-04.5 and 1-09.11] as a whole reflect an intent for the parties to seek

> resolution of all disputes through the Project Engineer before filing a claim. *See Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 5, 277 P.3d 679 (2012) **(when contract provisions seem to conflict, we will harmonize them to give effect to all provisions**).

Op. at 11.

However, there must be ambiguity before there is a need to "harmonize" and a court is not allowed to rewrite the parties' contract under the guise of harmonization. *Puget Sound Power & Light Co. v. Shulman*, 84 Wn.2d 433, 439, 526 P.2d 1210, 1214 (1974). The Supreme Court in *Puget Sound Power* stated the following:

> It is a basic rule of contract law that courts will not revise an agreement for the parties-or for one party, where the agreement itself is clear and unambiguous. Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves or the imposition upon one party to a contract of an obligation not assumed.

Id. at 439.

The Court of Appeals wrongful imposition on Graham of an obligation to protest the actions of persons other than the Engineer is especially egregious as the City drafted the Contract.

The City controlled what language it included in the Contract. If it wanted a broad obligation to protest any decision by any employee or representative of the City, it could have inserted that language into Standard Specification 1-04.5. Instead it chose to use WSDOT's standard language.

There are good reasons why WSDOT Standard Specification 1-04.5 limits the obligation to protest to only decisions of the identified Engineer. The potential for chaos and disruption on a construction project if binding decisions could be made by any City employee or City consultant (and protests required of all such decisions) is obvious.

The Court of Appeals' claim that its holding was needed to harmonize sections of the Standard Specifications is false. The Court of Appeals was simply incorrect when it stated that nothing in section 1-04.5 "narrow[s] the procedural requirement to claims arising only from orders or decisions of the Project Engineer." Op. at 11. Section 1-04.5 expressly and clearly does

exactly that. It expressly limits the obligation to protest (and the punishment of waiver) to orders "from the Engineer." CP 140.

If there is no order to protest from the Engineer, there is no obligation to protest under 1-04.5 and no waiver.

Here, the Court of Appeals acknowledged that the November 8, 2016 letter (which it held Graham was obligated to protest) came not from Mulkey (who the City repeatedly represented to Graham was the Project Engineer) but, instead, from Gunther. The Court of Appeals stated the following in this regard:

> Graham did not immediately provide Gunther or Mulkey a written notice of protest related to **Gunther's November 8, 2016 denial** of its request for additional time and compensation before it completed the JUT work.

Op. at 10 (emphasis added).

The Court of Appeals ruling, thus, changes the notice rules after the fact and requires protests under 1-04.5 of persons other than the Engineer/Project Engineer. This is clear because the Court of Appeals did not find that Gunther was the Project

Engineer as a matter of law. It instead inexplicably found that the identity of the Project Engineer did not matter.

This ruling affects all Contractors that are required to follow the widely used Standard Specifications and creates an unfair, after the fact, playing field by requiring the protest of the actions of potentially dozens of persons rather than the protest of one central decision maker, the contractually defined Project Engineer/Engineer. No prior Washington state appellate court has ever interpreted 1.04.5 in this manner – for good reason.

This case does not raise the issue of whether notice provisions in a construction contract must be complied with by a Contractor. Instead, the issue at hand is whether a public owner should be allowed to unilaterally change the notice rules after the signing of the Contract.

According to WSDOT itself, the Standard Specifications "reflect years of refinement through the literally hundreds of projects the Department delivers each year," are "the result of countless hours of development and review by both … internal

WSDOT staff as well as … industry partners," and "reflect the contracting philosophy and balance of risk-allocation that the Department has adopted through the years." Standard Specifications M41-10, 3 (2023). Perhaps because the Standard Specifications dictate the work of "literally hundreds" of public works projects every year, this Court has routinely granted review of controversies over their terms. *See, e.g., Conway Constr. Co. v. City of Puyallup*, 197 Wn.2d 825, 490 P.3d 221 (2021); *see also NOVA Contracting, Inc. v. City of Olympia*, 191 Wn.2d 854, 426 P.3d 685 (2018) (interpreting 1-04.5); *see also Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 174 P.3d 54 (2007); *and see Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 78 P.3d 161 (2003).

Even where a contract is bespoke, specific, and binds only the parties thereto, principles of justice and the development of state law frequently require this Court to weigh in on issues of contract interpretation. Where such a fundamental contract interpretation issue attaches to the Standard Specifications,

which govern hundreds of projects by which the flow of goods, services and people is accomplished in this state, the significance of the issue of interpretation is greatly elevated.

Graham respectfully requests that the Court grant review of the issue of whether protests of the actions of persons other than the "Engineer" are required under Standard Specification Section 1-04.5 and whether summary dismissal of Graham's claims was proper.

B. THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS' REFUSED TO CONSIDER EVIDENCE CONSIDERED BY THE TRIAL COURT.

Graham disputes that it was obligated to protest orders issued by persons other than the Engineer. But when it became apparent that the parties were not in agreement regarding the identity of the Engineer, out of an abundance of caution, Graham adopted the practice of following 1-04.5 protest procedures for all Unilateral Change Orders (UCOs), proposed change orders (PCOs), and orders regarding liquidated damages (LDs), regardless of whether or not they came from Mulkey, from

Gunther, or from others. Evidence regarding this compliance was submitted to the trial court as part of Graham's motion for reconsideration of the trial court's summary judgment order. The trial court explicitly stated that it considered this new evidence.

> The Court has heard ***and considered***… the pleadings and files contained in this matter, including but not limited to the following:…
>
> > 14. **Declaration of Richard Skalbania** in support of Graham's Motion for Reconsideration; (Dkt. 71)
> > 15. **Declaration of Seth Crites** in support of Graham's Motion for Reconsideration; (Dkt. 72)
> > 16. **Declaration of Ed Schepp** in support of Graham's Motion for Reconsideration; …

CP 2038 (emphasis added).

Despite the trial court's appropriate exercise of discretion to review this evidence, the Court of Appeals outright declined to consider either the evidence or Graham's argument that the trial court committed reversible error by dismissing Graham's claims for recovery under certain UCOs and for inappropriately withheld liquidated damages. Op. at 8 n.6. Instead, the court cited to *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d

343 (1999), *as amended on reconsideration in part* (Aug. 25, 1999) and to CR 59 for the proposition that a litigant "may not raise for the first time on reconsideration new theories that it could have raised before the trial court issued an adverse ruling." These authorities, as discussed below, do not support the Court of Appeals' ruling.

Furthermore, the Court of Appeals' decision is not only in conflict with prior appellate decisions, but the issue of what evidence must be considered on appeal of a summary judgment is of manifest public concern.

1. **The Court of Appeals failed to consider all evidence evaluated by the trial court, as is required in reviewing a grant of summary judgment.**

If a litigant submits new evidence as part of a motion for reconsideration of a ruling on summary judgment, then the trial court may consider such evidence, regardless of whether or not the evidence was newly discovered. *Martini v. Post*, 178 Wn. App. 153, 162, 313 P.3d 473 (2013). This decision is "squarely" within the discretion of the trial court. *Id.* If the trial court **does**

elect to consider new evidence as part of a motion to reconsider a grant of summary judgment, and if that new evidence presents a genuine issue of material fact that would have been sufficient to defeat summary judgment had it been timely presented, then the trial court must grant the motion for reconsideration, or else abuse its discretion. *Cullerton v. Cmty. Action Council of Lewis, Mason & Thurston Ctys*., 196 Wn. App. 1062 (2016) (reversing grant of summary judgment where newly presented evidence on reconsideration created a genuine issue of material fact and the trial court stated in its order that it reviewed all pleadings filed in support of the motion).

Such failure to consider all materials brought to the attention of the trial court is reversible error. *Mithoug v. Apollo Radio of Spokane*, 128 Wn.2d 460, 462, 909 P.2d 291, 292 (1996).

Here, because the new evidence was called to the attention of the trial court and the trial court considered it, the Court of Appeals should have taken notice of the new evidence and

evaluated whether a genuine issue of material fact was thereby created.

Like the plaintiff in *Cullerton*, Graham neither contended that this evidence was newly discovered nor availed itself of the related exception at CR 59 (a)(4). Graham simply presented the new evidence and asked the trial court to consider it. The trial court agreed to consider the evidence. In fact, the trial court went beyond the *Cullerton* trial court, which simply averred that it had "reviewed the motion as well as *all pleadings filed in support of the motion*." *Id.* at *4 (emphasis in original). Here, the trial court explicitly listed the Skalbania, Crites, and Schepp Declarations as materials which it had "heard and considered" as part of its ruling. CP 2038. As such, under *Mithoug, Cullerton* and RAP 9.12, the Court of Appeals was required to also review this evidence and determine whether it raised an issue of material fact precluding summary judgment as to all or some of Graham's claims.

2. **The decision of the Court of Appeals not to consider the new evidence conflicts with guidance from this Court.**

In *Keck v. Collins*, this Court held that an order striking untimely evidence at summary judgment amounts to a severe sanction, and, therefore, a court must conduct a three-factor *Burnet* analysis before so striking. 184 Wn.2d 358, 368, 357 P.3d 1080, 1085 (2015). This Court reasoned that "our overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action." *Id.* at 369 (*quoting Burnet*, 131 Wn.2d at 498). And the "'purpose [of summary judgment] is not to cut litigants off from their right of trial by jury if *they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.'" *Keck*, 184 Wn.2d at 369 (*quoting Preston v. Duncan,* 55 Wn.2d 678, 683, 349 P.2d 605 (1960)) (emphasis in original).

At least one unpublished Court of Appeals case has applied this directive to a motion for reconsideration and reversed a trial court's decision **not** to consider new evidence presented for the first time in a motion to reconsider. Division III reasoned that "[w]hile *Martini* recognizes the discretionary ability of the trial court to consider new or additional evidence on reconsideration, more recent authority suggests that it may be required to do so." *Matter of Estate of Roe*, 200 Wn.App. 1001 (2017) (*citing Keck*, 184 Wn.2d 358). The *Roe* court found that the trial court had erred in declining to consider additional evidence, presented for the first time as part of a motion for reconsideration, without considering the *Burnet* factors. *Id.* at *2-3.

Here, the purpose of summary judgment would be served by considering this evidence. These declarations contain extensive evidence that Graham properly protested under the Contract in order to preserve its claims related to UCOs and LDs. Graham should have the right to present such evidence at trial,

and to deny Graham such a right, without even considering the evidence, is inconsistent with the *Keck* decision and the principles of justice expressed therein.

3. **Neither CR 59 nor *JDFJ v. International Raceway* support the Court of Appeals' decision.**

Neither of the two authorities cited by the Court of Appeals support its decision not to consider the reconsideration evidence.

Specifically, the court stated:

> Graham also argues that the trial court erred by dismissing its claims for several unilateral change orders and its claim to recover inappropriately withheld liquidated damages because it complied with the contractual notice requirements for those claims. But Graham raised those issues for the first time on reconsideration. And a party may not raise for the first time on reconsideration new theories that it could have raised before the trial court issued an adverse ruling. *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn.App. 1, 7, 970 P.2d 343 (1999); see CR 59. As a result, we do not consider them.

Op. at 8 n. 6.

CR 59 does not prohibit the submission of new or additional evidence on reconsideration. *See generally* CR 59; *see*

also Martini v. Post, 178 Wn. App. at 162 ("nothing in CR 59 prohibits the submission of new or additional materials on reconsideration").

Additionally, *JDFJ* is distinguishable. That dispute did not arise in the context of a motion for summary judgment but, instead, was a post-trial attempt to recover under a novel and additional theory. JDFJ had litigated an entire trial under one theory of recovery and was awarded damages under that theory but later retained new counsel and asked Division I, **post-trial**, to reconsider its claims under an entirely different statute. *JDFJ*, 97 Wn. App. at 7. Division I understandably characterized this motion for reconsideration as a pretense that was intended to disguise an "untimely attempt to amend its complaint in general" and "refuse[d] to permit such a perversion of the rules." *Id.*

JDFJ is bounded by its facts. It applies to post-trial motions for reconsideration, especially where such motions are mere pretext for bad-faith attempts to circumvent timeliness rules.

Here, Graham properly and timely moved for reconsideration and submitted new evidence. This was not a post-trial motion for reconsideration but one filed in relation to a motion for summary judgment. Instead this the new evidence was presented in the context of a summary judgement like the situations in *Martini*, *Roe*, and *Keck*, *supra*.

Whether an appellate court of this state may freely choose to ignore materials considered by the trial court in its grant or denial of summary judgment is a matter of significant public concern. Graham respectfully requests that the Court grant review of this issue.

C. THE AWARD OF ATTORNEY FEES WAS PREMATURE.

RCW 39.04.240 provides the only possible legal mechanism for the recovery of reasonable attorney fees by the City. RCW 39.04.240 provides that "[t]he 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…is a party…." Here, the Court found that the City was the prevailing

party because "[t]he defendant . . . shall be deemed the prevailing party . . . if the plaintiff . . . in an action for damages . . . recovers nothing." Op. at 13 (*quoting* RCW 4.84.270).

The award of attorney fees is premature and inappropriate because Graham has not yet "recover[ed] nothing" in this action. It remains to be seen whether and how much Graham will recover in this action. The City admitted that six discrete claims by Graham were not dismissed by the City's motion for summary judgment and still remain viable in the trial court. CP 1936-39.

In granting in part and denying in part Graham's motion for reconsideration, the trial court reinstated all six of these claims. CP 2039-41. The total amount currently claimed for these items by Graham is at least $2,229,449.00. Graham's remaining claims must be fully litigated in the trial court before the prevailing party can be determined under RCW 39.04.240.

In Washington, the identity of the prevailing party under an applicable statute or contract cannot be decided until "the conclusion of the entire case." *Tribble v. Allstate Prop. & Cas.*

Ins. Co., 134 Wn.App. 163, 174-75, 139 P.3d 373 (2006) (emphasis added). See also *Hudson v. Hapner.* 170 Wn.2d 22, 33, 239 P.3d 579, 585 (2010) (fee award determination "must abide by the outcome of retrial").

For the foregoing reasons, Graham respectfully requests that the Court grant review of the Court of Appeals' decision to award attorney fees.

VI. CONCLUSION

For the reasons stated above, Graham respectfully requests that the Court grant this Petition for Review.

I certify that this brief contains 4,954 words, in compliance with the RAP 18.7.

DATED this 31st day of August, 2023.

ASHBAUGH BEAL, LLP

By: *s/Richard H. Skalbania*___
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Attorneys for Graham Contracting, Ltd.

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 *GRAHAM CONTRACTING LTD.'S PETITION FOR REVIEW* in the below described manner:

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Court of Appeals, Division I

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Attorneys for Respondent/Defendant City of Federal Way

Dated August 31, 2023 in Seattle, Washington.

s/ Susan Thomas
Susan Thomas, *Legal Assistant*
sthomas@ashbaughbeal.com

VII. APPENDIX

- Court of Appeals decision filed on May 30, 2023, A-1 through A-13;

- Court of Appeals order denying the motion for reconsideration was entered on August 1, 2023, A-14.

FILED
5/30/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GRAHAM CONTRACTING, LTD., a Washington corporation, Appellant, v. CITY OF FEDERAL WAY, a Washington municipal corporation, Respondent.	No. 83494-1-I DIVISION ONE UNPUBLISHED OPINION

BOWMAN, J. — Graham Contracting Ltd. appeals the trial court's order dismissing its claims for additional compensation relating to a "Public Works Contract" with the city of Federal Way (City). Because Graham did not follow the disputes and claims procedures in the contract, Graham waived its ability to bring a claim for additional compensation. We affirm and remand for further proceedings.

FACTS

In June 2016, the City requested bids for "Phase V" of the Pacific Highway South improvement project. The project involved placing utilities underground, improving drainage, installing and modifying traffic signals and lighting, landscaping, laying new pavement, and building curbs, gutters, sidewalks, medians, and retaining walls. The City assigned its "Street Systems Project

Engineer" John Mulkey to oversee the bidding process. Graham submitted the lowest bid for the project at $16,701,329.60.

On August 23, 2016, the City executed a "Construction Management Services" contract with KPG PS.[1] The services KPG specified in the contract included design support, project management, documentation control, inspection, materials testing, public involvement, and "contract administration during the construction of the [Phase V] project." KPG named Ken Gunther as the "Project Engineer," or "Resident Engineer," of the Phase V project.

On August 25, 2016, the City awarded Graham the project and the parties executed a Public Works Contract. The contract allocated Graham "350 working days" to complete the project. It defined the scope of the work and incorporated into the contract the 2016 edition of Washington State Department of Transportation's STANDARD SPECIFICATIONS FOR ROAD, BRIDGE, AND MUNICIPAL CONSTRUCTION (Standard Specifications).

Graham began work on September 12, 2016.[2] On November 3, 2016, Graham sent Mulkey and Gunther a "Notice of Delay," explaining that the joint utility trench (JUT) unexpectedly needed to be complete before workers could remove or relocate the existing utility lines from overhead poles. Graham believed the issue would "significantly impact the project schedule," but it would have to later advise the City and KPG "regarding the actual extension of time and impact costs when we are better able to assess the effect of the occurrence."

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[1] Now KPG Psomas.

[2] September 12, 2016 plus 350 working days results in an end date around February 9, 2018.

On November 8, 2016, Gunther e-mailed Graham a letter in response. He explained that under the contract, "power and communication distribution lines will remain on these poles until the entire underground distribution system is in place," and that

> [t]he Contractor [(Graham)] is responsible for coordinating and planning adjacent work with the appropriate utility to avoid impacts and delays to the project schedule. . . . [T]herefore; the City of Federal Way is denying Graham Contracting's [Notice of Delay] dated 11/03/16.

On December 2, 2016, Graham replied to Gunther and Mulkey. Graham disagreed with KPG's interpretation of the contract, explained its position in more detail, and requested a meeting to discuss the issue. Two weeks later, Gunther responded that the City "maintains its position as per [his letter] dated November 8, 2016." Meanwhile, Graham kept working on the project.

On December 22, 2016, Graham met with the City to discuss the delay and added expense related to the JUT work. On January 20, 2017, Marwan Salloum, the director of the Public Works Department for the City, sent Graham a letter stating that "the City's position remains unchanged." Salloum explained that Graham "is not entitled to any additional working days to complete the Project," and as much as Graham is claiming a "changed condition" under the contract, it "failed to properly protest the City's determination in accordance with" the Standard Specifications, "waiv[ing] any claims related thereto by failing to follow the protest and claim requirements of the Contract."

On February 3, 2017, Graham sent Mulkey a "Supplemental to Notice of Protest re: Joint Utility Trench (JUT) Construction Delays Pursuant to Standard

Specification Section 1-04.5,"[3] arguing that the City "incorrectly determined" that Graham has no right to any additional working days to complete the project and that it waived any claims related to changed conditions under the contract. It notified the City that "Graham protests both determinations" and that it estimated the extra work would delay the project around 110 days, amounting to $973,101.80 in additional costs.

Over the next several months, Graham continued to send the City notices of protest related to the JUT delay, requesting more time and money. On July 7, 2017, Gunther sent Graham a letter, saying the City "understand[s] that Graham is protesting the Engineer's denial of Graham's request to extend the Contract," but "[i]f Graham was unhappy with the City's determinations on this issue, it was required to protest those decisions and file a Claim in strict accordance with the Contract notice and claim procedures." The City explained that Graham should follow the "dispute and claim procedures" under the contract for those issues and claims "that have not already been waived or previously determined by the City or its Engineer."

A week later, Graham responded. It claimed that it need not follow the disputes and claims procedures under the contract to contest Gunther's November 8, 2016 decision because the procedures apply to only determinations made by the "Project Engineer."[4] And, according to Graham, "the City identified

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[3] The letter appears to be a supplement to a notice of protest Graham submitted on January 27, 2017 for an unrelated issue.

[4] The Standard Specifications define "Engineer" as the "Contracting Agency's representative who directly supervises the engineering and administration of a construction Contract." The contract clarifies that "Project Engineer" is the "[s]ame as Engineer."

John Mulkey in the contract documents as the Project Engineer for this Project," not Gunther. Graham told the City it "intends to file a Claim against the City of Federal Way for recovery of all current and future losses incurred by Graham resulting from the impacts and issues noted in this and [earlier] letters."

On December 22, 2017, Graham filed a claim for damages with the City, seeking $10,777,440.22 for the "cumulative impact" of "extensive and ongoing changes required on the Project, including but not limited to differing site conditions, design conflicts/omissions, untimely third-party utility performance, and undisclosed utility conflicts." The City denied the claim. It noted the claim amounts to "a conglomerate of various issues" that it already rejected. It determined that Graham did not follow the proper disputes and claims procedures or timely provide the minimum information required to accompany a claim under the contract. Still, the City reviewed the "limited material" Graham provided and found the claim "is without merit."

In February 2020, Graham supplemented its claim, seeking a total of $11,974,791 in compensation.[5] The City denied most of the second claim because Graham had again not followed proper notice procedures and much of the claim lacked merit.

Graham sued the City in October 2020, alleging breach of contract, unjust enrichment, and violation of the Prompt Payment Act, chapter 39.76 RCW. In April 2021, the City moved for partial summary judgment, arguing that Graham waived its right to claim additional compensation related to the JUT delays

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[5] It appears Graham finished the project around this time.

because it failed to "properly or timely" meet the contract's notice provisions. Graham also moved for partial summary judgment, arguing that it had no duty to provide notice for claims related to the JUT issue because Gunther denied its request for more time and compensation, and he was not the "contractually designated 'Project Engineer.' "

On June 25, 2021, the trial court granted the City's motion for partial summary judgment and denied Graham's motion. The court concluded that genuine issues of material fact remained about who served the role of Project Engineer under the contract, but that this issue was not material because Graham must follow the contract's disputes and claims procedures to file any claim for additional compensation, which it did not do.

Graham moved for reconsideration. In support of its motion, Graham submitted over 800 pages of new evidence. It claimed for the first time that Graham properly protested several unilateral change orders unrelated to the JUT issue and that the City improperly withheld liquidated damages.

On September 21, 2021, the trial court granted the motion for reconsideration in part. It clarified that it was dismissing only those claims related to the delays and costs stemming from the JUT issue. Then, on November 3, 2021, the court granted the parties' stipulated order for final judgment under CR 54(b), issued findings in support of its order, and stayed the parties' remaining claims.

Graham appeals.

ANALYSIS

Graham argues the trial court erred by granting partial summary judgment for the City. We disagree.

We review rulings on summary judgment de novo, performing the same inquiry as the trial court. Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). Summary judgment is appropriate only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). A "material fact" is one that affects the outcome of the litigation. Owen v. Burlington N. & Santa Fe R.R., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). We view all facts and reasonable inferences in the light most favorable to the nonmoving party. Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012).

We interpret contracts as a question of law. Renfro v. Kaur, 156 Wn. App. 655, 661, 235 P.3d 800 (2010). If the contract language is clear and unambiguous, we will enforce the contract as written. RDS AAP, LLC v. Alyseka Ocean, Inc., 190 Wn. App. 305, 316, 358 P.3d 483 (2015). The primary objective in contract interpretation is to determine the mutual intent of the parties at the time they execute the contract. Thomas Center Owners Ass'n v. Robert E. Thomas Tr., 20 Wn. App. 2d 690, 699, 501 P.3d 608, review denied, 199 Wn.2d 1014, 508 P.3d 679 (2022). Washington follows the objective manifestation theory of contract interpretation, under which we try to arrive at the intent of the parties by focusing on the objective manifestations of the agreement rather than on the unexpressed subjective intent of the parties. Id. at 700. We interpret

contracts in a manner that will not render provisions of the contract meaningless. GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 135, 317 P.3d 1074 (2014). And we read the contract as a whole, avoiding interpretations that lead to absurd results. Kelley v. Tonda, 198 Wn. App. 303, 316, 393 P.3d 824 (2017).

Disputes and Claims Procedures

Graham argues it did not need to follow the disputes and claims process under the contract to request additional compensation for work related to the JUT delays.[6] We disagree.

Washington law generally requires that contractors follow contractual notice provisions unless a party unequivocally waives those procedures. Mike M. Johnson, Inc. v. County of Spokane, 150 Wn.2d 375, 386, 78 P.3d 161 (2003). Here, several "Sections" of the Standard Specifications describe the disputes and claims requirements. Under Standard Specifications Section 1-09.11, "Disputes and Claims," 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." Section 1-04.5, "Procedure and Protest by the Contractor," provides, in pertinent part:

> 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:

[6] Graham also argues that the trial court erred by dismissing its claims for several unilateral change orders and its claim to recover inappropriately withheld liquidated damages because it complied with the contractual notice requirements for those claims. But Graham raised those issues for the first time on reconsideration. And a party may not raise for the first time on reconsideration new theories that it could have raised before the trial court issued an adverse ruling. JDFJ Corp. v. Int'l Raceway, Inc., 97 Wn. App. 1, 7, 970 P.2d 343 (1999); see CR 59. As a result, we do not consider them.

> 1. Immediately give a signed written notice of protest to the Project Engineer or the Project Engineer's field Inspectors before doing the Work; [and]
> 2. Supplement the written protest within 14 calendar days with a written statement and supporting documents . . . [.]
>
> . . . .
>
> . . . .
>
> The Engineer will evaluate all protests provided the procedures in this section are followed. . . .
>
> . . . .
>
> If the Contractor does not accept the Engineer's determination then the Contractor shall pursue the dispute and claims procedures set forth in Section 1-09.11. . . .
>
> By failing to follow the procedures of Sections 1-04.5 and 1-09.11, the Contractor completely waives any claims for protested Work.

Section 1-09.11 states that if dispute negotiations using the procedures outlined in Section 1-04.5 fail to provide satisfactory resolution of protests, "then the Contractor shall provide the Project Engineer with written notification that the Contractor will continue to pursue the dispute in accordance with the provisions of Section 1-09.11." The written notification "shall be provided within [seven] calendar days after receipt of the Engineer's written determination that the Contractor's protest is invalid pursuant to Section 1-04.5."

Standard Specifications Section 1-09.11(2) provides, "If the Contractor claims that additional payment is due and the Contractor has pursued and exhausted all the means provided in Sections 1-04.5 and 1-09.11(1)[7] to resolve a dispute," the contractor may file a claim. Section 1-09.11(2) also states that the contractor "agrees to waive any claim for additional payment" if it does not provide the written notifications under Section 1-04.5, and that all claims "shall be submitted to the Project Engineer."

[7] Section 1-09.11(1) outlines the role of the "Disputes Review Board."

The plain language of the contract requires the contractor to comply with the protest procedures outlined under Standard Specifications Section 1-04.5 before it may bring a claim for additional compensation under Section 1-09.11. And here, Graham did not immediately provide Gunther or Mulkey a written notice of protest related to Gunther's November 8, 2016 denial of its request for additional time and compensation before it completed the JUT work. Instead, almost a month after Gunther denied the request, Graham sent Gunther and Mulkey a letter explaining why it disagreed with the decision. Then, Graham pursued resolution through the director of the City's Public Works Department. Finally, on February 3, 2017, almost three months after Gunther denied Graham's request, Graham filed its Supplemental to Notice of Protest re: Joint Utility Trench (JUT) Construction Delays Pursuant to Standard Specification Section 1-04.5. As much as that document amounts to a notice of protest, it was untimely under Sections 1-04.5 and 1-09.11.

Graham argues, "The trigger for [its] obligation to protest (and otherwise comply with Sections 1-04.5 and 1-09.11) is an action by a specific contractually defined person — 'the Engineer.' " It points to the language in Section 1-04.5 that states the contractor must follow the proscribed procedures 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." According to Graham, this language limits compliance with the procedural requirements of Section 1-09.11 to those orders issued by only the Engineer. So, a jury must determine whether

Gunther was "the Engineer" before it can conclude that Graham failed to properly protest his decision.

Graham is correct that it must comply with the procedures of Section 1-04.5 to protest an order or decision by the Project Engineer. But under Section 1-09.11, it must also pursue "resolution through the Project Engineer" and "follow the procedures outlined in Section 1-04.5" before filing any claim for additional compensation. Only if "the negotiations using the procedures outlined in Section 1-04.5 fail" to resolve the dispute can the contractor pursue a claim. Similarly, Section 1-09.11(2) provides that the contractor must pursue and exhaust "all the means provided in Sections 1-04.5 and 1-09.11(1)" to resolve a dispute before it may file a claim for additional payment. Nothing in these sections narrow the procedural requirement to claims arising only from orders or decisions of the Project Engineer. Instead, the provisions as a whole reflect an intent for the parties to seek resolution of all disputes through the Project Engineer before filing a claim for additional compensation. See Realm, Inc. v. City of Olympia, 168 Wn. App. 1, 5, 277 P.3d 679 (2012) (when contract provisions seem to conflict, we will harmonize them to give effect to all provisions).

Because Graham did not follow the contractual disputes and claims requirements through either Gunther or Mulkey related to the JUT delays, it waived any claim for additional payment. The trial court did not err by granting partial summary judgment for the City.

Waiver

Graham argues that even if it failed to follow the disputes and claims procedures, the City's conduct waived its right to notice of Graham's claims for unexpected site and forced account issues because it created an alternative process to resolve those disputes. Again, we disagree.

A party to a contract may expressly or through its conduct waive a contract provision that is meant for its benefit. Johnson, Inc., 150 Wn.2d at 386. Waiver by conduct, however, " 'requires unequivocal acts of conduct evidencing an intent to waive.' " Id. (quoting Absher Constr. Co. v. Kent Sch. Dist. No. 415, 77 Wn. App. 137, 143, 890 P.2d 1071 (1995)). Attempting to negotiate resolution of issues does not amount to an unequivocal waiver. Am. Safety Cas. Ins. Co. v. City of Olympia, 162 Wn.2d 762, 771, 174 P.3d 54 (2007).

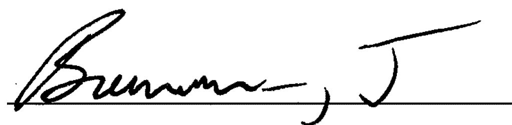
Graham says the City waived contractual disputes and claims requirements for unexpected site and force account issues because the parties had a process by which they met weekly to try to resolve those issues. But those meetings clearly aimed to resolve conflicts short of the contractual claims process. Graham offers no evidence that the City intended the meetings to replace the contractual disputes and claims requirements.[8] Graham fails to show waiver by conduct.

[8] Graham also argues that the disputes and claims requirements do not bar its claims for cumulative impact, breach of implied warranty, and unjust enrichment. But its "cumulative impact" claim amounts to merely a series of claims subject to the disputes and claims procedures. And under Standard Specifications Section 1-09.13(1), "Claims Resolution," Graham must "proceed under the administrative procedures in Sections 1-04.5 and 1-09.11" before seeking litigation. Graham offers no compelling argument about why Section 1-09.13 does not apply to its breach of implied warranty and unjust enrichment claims.

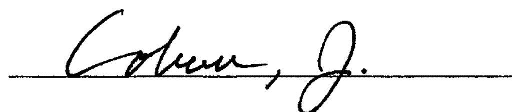
Attorney Fees

The City requests attorney fees and expenses on appeal. We may award attorney fees and costs on appeal if applicable law grants a party the right to recover such expenses. RAP 18.1(a). In an action arising out of a Public Works Contract in which a public body is a party, "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 attorney fees. RCW 39.04.240(1); RCW 4.84.250. "The defendant . . . shall be deemed the prevailing party . . . if the plaintiff . . . in an action for damages . . . recovers nothing." RCW 4.84.270. Because the City is the prevailing party on appeal, we grant the City's request for attorney fees and costs subject to compliance with RAP 18.1.

We affirm the trial court's order granting the City's motion for partial summary judgment and its order on reconsideration and remand for further proceedings.



WE CONCUR:



FILED
8/1/2023
Court of Appeals
Division I
State of Washington

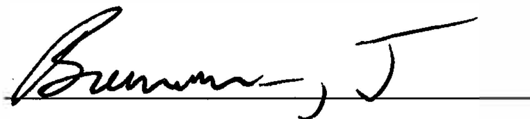
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

GRAHAM CONTRACTING, LTD., a Washington corporation, Appellant, v. CITY OF FEDERAL WAY, a Washington municipal corporation, Respondent.	No. 83494-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Graham Contracting Ltd. filed a motion for reconsideration of the opinion filed on May 30, 2023 in the above case. Respondent City of Federal Way filed an answer to the motion. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



Judge

ASHBAUGH BEAL

August 31, 2023 - 11:37 AM

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