No. 1023324

SUPREME COURT
OF THE STATE OF WASHINGTON

GRAHAM CONTRACTING, LTD.

Petitioner,

v.

CITY OF FEDERAL WAY

Respondent.

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION I

ANSWER TO *AMICUS CURIAE* MEMORANDUM

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I. INTRODUCTION

Amici Associated General Contractors of Washington and National Utility Contractors Association of Washington offer no good reasons why this Court should grant review. *Amici* fail to meaningfully distinguish *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 277 P.3d 679 (2012), and, in any event, they cannot identify a conflict between the unpublished decision in this case and any opinion of this Court or the court of appeals, including *Realm*. Beyond that, *amici* simply repeat Graham's stinted and erroneous interpretation of the parties' Contract—one that was correctly rejected by the trial court and court of appeals.

This Court should see AGC's and NUCA's memorandum for what it is—a self-interested effort to get this Court to narrow the *Mike M. Johnson* line of cases in the public works context. This Court should reject that invitation—especially here, given this case's unique facts and non-precedential value. Indeed, even if it were published, the court of appeals' opinion would impose no new burdens on contractors. The opinion simply upholds our

State's established rule that contractors must strictly comply with contractual notice and claim provisions as a prerequisite to suit.

III. BACKGROUND

The relevant background is set forth in the City's answer to the petition and the court of appeals' opinion. The City adds the following, however, to address several misleading statements in *Amici*'s memorandum. *Amici* suggest the City adopted its interpretation of the contract "after the fact" to deny Graham compensation. *Amici* don't know the record. The record shows that the City asserted its rights under the contract's notice and claim provisions from the beginning. It was Graham who later tried to avoid its failure to comply with those provisions "after the fact" by feigning confusion over the identity of the project's Engineer. CP 88-89 (¶17), 179-87, 346 (¶33), 280-84, 575-78.

It was that concocted confusion—Graham's claim that the City's employee John Mulkey was the project's Engineer, not the City's engineering firm (KPG) that had served in that capacity for months—that Graham hoped would excuse its waiver of

claims. As *Amici* note, the court of appeals did not need to address that argument because, regardless of who was Engineer, the Contract required Graham to timely protest all disputes. Suffice it to say, though, *Amici* are wrong to suggest that strong evidence supported Graham's argument. The record showed that Graham dutifully followed KPG's orders—orders that only the Engineer was authorized to issue—for nearly a year before questioning KPG's role or authority as Engineer.

And that fact raises a final relevant point. The Contract specifies that "[a]ssistants … are not authorized to accept Work, to accept materials, to issue instructions, or to give advice that is contrary to the Contract. Work done … which does not meet the Contract requirements shall be at the Contractor's risk and shall not be a basis for a claim even if the … assistants purport to change the Contract." CP 143 (§1-05.2). To the same effect, the Contract provides that the City "will not pay for unauthorized … work," which includes "extra Work and materials furnished without the Engineer's written approval." CP 626 (§1-05.7).

Together, these sections mean that Graham had no right to be paid for work or delays approved by anyone other than the Engineer. That fact alone is fatal to Graham's "Engineer" gambit. After all, why would Graham obey KPG's orders month after month if KPG lacked authority to issue them? As explained below, the same fallacy refutes *Amici*'s argument that the court of appeals' opinion will force contractors to protest "every single action by any person or entity employed by the Owner." Amici Br. at 12. Contractors do not need to protest "every single action"; they only need to protest actions or events that entitle them to claim additional compensation under the Contract—*i.e.*, extra work ordered by the Engineer or unexpected costs caused by third-party delays or differing site conditions.

III. ARGUMENT

A. The Court Of Appeals' Opinion Follows *Realm*'s Holding That Sections 1-09.11 and 1-09.13 Of The WSDOT Standard Specifications Incorporate Section 1-04.5's Notice Procedures For All Claims.

Amici's primary aim is to undermine the City's reliance on Division Two's decision in *Realm*. *Amici* fail in that regard but it

is important to point out two things at the outset. One, while it certainly could have, the court of appeals did not rely on *Realm* when interpreting the Contract. The court did not quote from the case and cited it only once for the generic proposition that courts should harmonize contractual provisions. Opinion at 11. Two, no matter how one reads *Realm*, there is no conflict between it and the court of appeals' unpublished opinion—and *Amici* don't argue otherwise. Neither Graham nor *Amici* identify any conflict with any prior decision. *See* RAP 13.4(b)(1) & (2).

Indeed, *Realm* is on all-fours with the court of appeals' opinion. Quoting from the respondents' brief (rather than the opinion itself), *Amici* argue that all the disputes at issue in *Realm* emanated from the Engineer and, thus, the case can't be read more broadly to support the City's (or the court of appeals') interpretation of the WSDOT Standard Specifications—*i.e.*, that Sections 1-09.11 and 1-09.13 required Graham to comply with Section 1-04.5 as a prerequisite to making a claim or filing suit

even if it disputed KPG's status as Engineer. *Amici* ignores the facts in *Realm* and, more importantly, its reasoning.

In *Realm*, after the city terminated the contract for convenience, two separate things happened. The city rejected Realm's claim for compensation based on a determination by the city's auditing firm and, several months later, the city issued a unilateral change order in the amount the auditor determined was owed. *Realm*, 168 Wn. App. at 3; *also* Amici Br. at A-5. The court's opinion addresses Realm's duty to follow the contract's notice and claim provisions for each event separately. *Id.* at ¶¶10-15 & ¶¶16-22. Unquestionably, the second event—issuance of a change order—is an action by the Engineer that triggers notice under Section 1-04.5. But the City never relied upon that portion of *Realm*. Rather, it is *Realm*'s discussion of the first event that directly supports the court of appeals' opinion here.

As the City pointed out in its answer to Graham's petition, the WSDOT Standard Specifications at issue in *Realm*, Sections 1-08.10(3) & (4), provide that the contractor must submit its

request for costs to the "Contracting Agency," not the Engineer, "in accordance with the claim procedures outlined in Sections 1-09.11," and "[i]f the Contracting Agency and the Contractor cannot agree as to the proper amount of payment, then the matter will be resolved as outlined in Section 1-09.13." Answer to Pet. at 19-21. Notably, neither section contemplates any action by or dispute with the "Engineer" and neither section specifically incorporates Section 1-04.5—only Sections 1-09.11 and 1-09.13.

Not only do *Amici* simply ignore the contract provisions at issue in *Realm*, they ignore the court's holding—for obvious reasons. The court held that Realm was required to comply with the notice procedures set forth in Section 1-04.5 because both Sections 1-09.11 and 1-09.13 "refer back" to Section 1-04.5. *Realm*, 168 Wn. App. at 6-7. The court did not rely on, or even mention, actions of the "Engineer" in this analysis. Indeed, if Realm's duty to protest arose because it involved an Engineer's order, as *Amici* claim, the court would have had no need to

analyze the operation of Sections 1-09.11 and 1-09.13; the analysis would have started and ended with 1-04.5.[1]

In the end, *Amici*'s effort to trivialize *Realm* as a garden variety application of Section 1-04.5 fails. The key aspect of *Realm*, one that *Amici* cannot escape, is its interpretation of the same provisions of the WSDOT Standard Specifications at issue here—specifically, that Sections 1-09.11 and 1-09.13 separately require contractors to follow Section 1-04.5's notice procedures as a prerequisite to any and all allowable claims—regardless of whether they arose from an Engineer's order or some other provision in the Contract. The court of appeals correctly

[1] The briefing in *Realm* reflects that the city made its determination based on its auditor's report dated March 26, and informed Realm of its determination in a March 31 letter by the city's Engineer. Amici Br. at A-7, A-8. The fact that the city communicated its determination through the Engineer changes nothing. It was the city's determination, not the Engineer's. A-8 ("Navigant completed the audit and the city had determined that …"). Moreover, as explained, the Engineer's involvement was irrelevant to the court's analysis. Had the city sent the March 31 letter itself, the result would have been precisely the same.

interpreted the Contract the same way as *Realm*. This Court denied review in *Realm*, and it should do so here as well.

B. The WSDOT Standard Specifications Unambiguously Required Graham To Comply With Section 1-04.5 As A Prerequisite To Filing Any Claim Or Lawsuit.

Amici's interpretation of the Contract parrots Graham's—and is wrong for all the same reasons. *Amici* argue "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." Amici Br. at 13 (emphasis in original). This articulation nakedly shows that it is *Amici*, not Graham, who wants to insert language into the Contract and change its meaning. *See McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 891, 167 P.3d 610 (2007) (courts do not have the power, under the guise of interpretation, to rewrite contracts).

The court of appeals gave the Contract its plain and ordinary meaning. Given that Graham initiated suit, the starting point is Section 1-09.13, which specifically addresses litigation:

> Prior to seeking claim resolution through … litigation, the Contractor shall proceed under the administrative procedures in Sections 1-04.5 and 1-09.11, and any Special Provision provided in the Contract 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 … litigation.

CP 860. By its terms, Section 1-09.13 required Graham to comply with Section 1-04.5's "administrative procedures" as a prerequisite to filing suit. "Section 1-09.13 requires compliance with section 1-04.5 twice—it directly requires compliance with 1-04.5, and it requires compliance with section 1-09.11 which … itself requires compliance with section 1-04.5." *Realm*, 168 Wn. App. at 6. Sections 1-09.11 and 1-09.11(2) likewise incorporate Section 1-04.5 as a prerequisite to filing a claim. CP 155, 158.

Amici not only gloss over Sections 1-09.11 and 1-09.13, they ignore other parts of the Contract that refute their argument that "under 1-04.5 a Contractor's obligation to protest is only triggered by the action of the Engineer." Amici Br. at 12. For example, and triggered by Graham's claims in this case, Section 1-08.6 states that if the contractor "believes that the performance

of the Work is suspended, delayed, or interrupted … and such suspension, delay or interruption is the responsibility of the *Contracting Agency*," the contractor must provide written notice "as provided in Section 1-04.5." CP 859 (emphasis added). Like the provisions at issue in *Realm*, this and other sections require compliance with Section 1-04.5 without any predicate action by the Engineer.[2] For this reason too, *Amici*'s interpretation cannot be squared with the Contract's plain meaning.

C. The Court Of Appeals' Unpublished Opinion Will Impose No Additional Burdens On Contractors In The Public Construction Industry.

Finding no mistake of law or conflict with prior decisions, *Amici* resort to urging review based on vague assertions of harm to the public construction industry—apparently hoping that its one-sided view of public policy could justify a judicial re-write

[2] *See, e.g.*, CP 142 (§1-04.7: if the contractor encounters a "differing site condition" "[n]o claim" will be "allowed unless the Contractor has followed the procedures … in Sections 1-04.5 and 1-09.11."); CP 145-46 (§1-07.17: "[w]hen others delay the Work through late performance of utility work," the contractor must "adhere to the requirements of Section 1-04.5.").

of WSDOT's Standard Specifications. (It can't.) According to *Amici*, because the court of appeals' opinion requires contractors to comply with the Contract's notice procedures before filing any claim, they will be forced to protest the actions of "any employee or consultant of the Owner," "any person or organization acting on behalf of the Owner"—indeed, "anyone" and "*everyone*." Amici Br. at 2-3, 7, 14 (emphasis in original).

It is all nonsense. Even if the opinion were precedential, it would impose no new burdens on contractors. *Amici* imagines a non-existent construction industry where contractors blithely undertake extra work or incur extra costs based on the orders of meddling employees, consultants or "anyone." The reality is, however, that contractors don't do extra work unless they can be paid for it. And, as explained above, under the WSDOT Standard Specifications, contractors will not be paid for "unauthorized" work—that is, extra work or costs not approved by the Engineer or allowed by the Contract. CP 143, 626 (§§1-05.2 & 1-05.7).

So, the court of appeals' opinion simply confirms what contractors have known since this Court's decision in *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003): they must comply with the Contract's notice procedures as a prerequisite to filing a claim for additional compensation. In some cases, it will be because of extra work or delays ordered by the Engineer (as it was here); in others, as discussed above, it will be because the Contract expressly allows the contractor to file a claim without an Engineer's order. *See* CP 142 (§1-04.7); CP 146 (§1-07.17(2)); CP 859 (§1-08.6). In no case will it be because of some random order by the Owner's employees or consultants; such an order can never give rise to an authorized claim for additional compensation—whether or not the contractor protests.

That is precisely why the Contract's provisions regarding claims (§1-09.11) and litigation (§1-09.13) require contractors to give notice under Section 1-04.5 as a condition precedent to filing any claim or lawsuit. The duty to protest goes hand-in-hand with the right to seek additional compensation. And that's the

point of *Mike M. Johnson* and its progeny; strict compliance with contractual notice provisions give owners "the benefit of advance notice and the opportunity to resolve disputes before they devolve into litigation …." *Realm*, 168 Wn. App. at 11. This Court should reject Graham's and *Amici*'s effort to inject ambiguity into this well-founded and commonsense rule.

V. CONCLUSION

The court of appeals' unpublished opinion is correct on the law, consistent with prior cases, and will have no effect on the public construction industry. The petition should be denied.

I certify that this answer to Amici's memorandum contains 2,455 *words in compliance with RAP 18.17.*

Respectfully submitted November 21, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2023, I electronically filed the foregoing **ANSWER TO AMICUS CURIAE MEMORANDUM** with the Clerk of the Court using the CM/ECF system, as well as by electronic mail, which will send notification of such filing to the following:

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