

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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OFFICER

No. 41563-1-II

IN THE COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

Realm, Inc.

Appellant,

vs.

City of Olympia

Respondent.

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APPELLANT REALM, INC.'S REPLY BRIEF

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## I. COUNTER RESTATEMENT OF THE CASE

Does the WSDOT Standard Specification require a contractor to file a written notice of protest of the Engineer's decision of the amount owed for its costs associated with the termination for public convenience as a condition precedent to seeking claim resolution through litigation? No.

This appeal is not about the dismissal of the contractors claim for additional payment as the City asserts as Realm has not filed any claim for additional compensation.

## II. ARGUMENT

### A. The Engineers Only Decision at Issue Occurred **After** Realm Submitted Its Claim for Costs Associated with the Termination for Public Convenience.

The City acknowledges the decision of the Engineer at issue in this appeal was after submission of Realm's claim for payment of its costs associated with the termination. **The City argues that the purpose of Section 1-04.5 is to encourage negotiations of disputes before they develop into formal claims. Br. Respondent, 20.** Realm could not agree more. The City by this argument acknowledges that Section 1-04.5 only applies to the resolution of disputes before a contractor may resort to a formal claim. The City in its termination letter directed Realm to submit a request for payment of its costs associated with the termination in compliance with Section 1-08.10(3). This City directive imposes no conditions precedent (i.e. "notice of

protest”) before submitting a request for payment of costs associated with the termination of its contract for public convenience. Section 1-08.10(3) Termination for Public Convenience Payment Request requires the payment request be prepared in accordance with the claim procedures in Sections 1-09.11 and 1-09.12.

**Section 1-09.11(1) Disputes** requires a contractor to try and resolve a dispute during a contract with the Engineer following the procedures outlined in Section 1-04.5. This section goes on to state that if negotiation fails to accomplish a resolution while using Section 1-04.5 then a contractor may pursue a resolution using a more formalized method outlined in Section 1-09.11(2) for submitting a claim. The City and Realm are in agreement.

Here, Realm was directed by the City to submit a “request for payment” of costs associated with the termination. The request shall be prepared in accordance with the claim procedures outlined in Sections 1-09.11 and 1-09.12. Section 1-09.11(2) beginning with the second paragraph outlines the content of the formal claim and its format for submission to the public agency. (CP 224-226). The directive from the City and the contract specification for requesting payment does not impose any precondition to have filed a “notice of protest” or complied with Section 1-04.5 in order to file a claim. Since even the City acknowledges they have the unilateral right to terminate for public convenience, it is hard to even logically comprehend what kind

of protest the City contemplates Realm should have made before submitting its claim for costs associated with the termination.

The City may reject some of the costs Realm submitted in its claim as being associated with the termination, but compliance with Section 1-04.5 is not logically or practically a condition precedent to filing the claim for the costs associated with a termination for public convenience under the WSDOT Standard Specification.

B. Realm has Complied with City Directive and WSDOT Standard Specification.

The City argues Realm misreads and mischaracterizes the Claim Resolution Process of the Std. Spec. 1-09.13 and 1-09.11. Br. Respondent, 17. The fallacy of the City's argument is best highlighted with the following from the City's response brief:

Thus all disputes relating to the contract must first be submitted to the Engineer. Only after meeting the requirement of 1-04.5 i.e. timely protesting the engineer's decision, can they be submitted as a claim under 1-09.11(2).

Br. Respondent, 18.

There was no dispute to be submitted to the Engineer for resolution when the City terminated Realm's contract. The City had the unilateral right to terminate the contract for public convenience. Realm does not dispute the City's right to issue a termination based upon public convenience. The City issued a Termination for Public Convenience on September 30, 2008 via letter to Realm. (CP 41-42). The termination letter makes clear that Realm is to "submit a

Termination for Convenience Payment Request that complies with Standard Specification Section 1-08.10(3) which provides “that the Request must be prepared in accordance with the claim procedures outlined in Standard Specification Sections 1-09.11 and 1-09.12” ... (CP 42). Realm prepared its Payment Request in accord with the City directive.

The City then inserts an argument that Realm waives a claim for additional payment if the written notifications provided in Section 1-04.5 are not given. Again, Realm is not seeking additional compensation only to be paid for its costs associated with the termination. Realm agrees that *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161, (2003), imposes a requirement to follow the contract notice provisions in Section 1-04.5 when the contractor is seeking additional compensation. *Johnson* is a case involving Section 1-04.4 Changes in the work, not a Request for Payment for the costs associated with a Termination for Convenience. *Johnson v. County of Spokane*, 150 Wn.2d 375, (2003). The fundamental difference between the parties on appeal is whether Realm is seeking additional compensation under 1) **Section 1-04.4 Changes** or 2) payment for costs associated with the termination under **Section 1-08.10(3) Termination for Public Convenience Payment Request**. Realm followed the directive of the City and complied with Section 1-08.10(3). The idea posed by the City that Realm has filed a

claim for additional compensation is a red herring to draw Realm under the *Johnson* case and impose notice requirements not required under the WSDOT Standard Specification when a contractor is terminated for public convenience.

C. WSDOT Specification Does Not Require Protest of an Engineers Decision as to Amount Owed for its Claim Associated with Costs for Termination for Convenience.

The City argues Realm did not follow any of the contract claim procedures, specifically for not protesting the City's unilateral change order for payment of the costs associated with the termination for public convenience. Br. Respondent, p 9. Realm admits in its interrogatory answers that it did not file a notice of protest pursuant to Section 1-04.5 for the City's issuance of the unilateral change order. Realm was not required to do so.

Since the City directed Realm to file a claim under Section 1-09.11, there was no precondition of a notice of protest required. Section 1-09.11 indicates prior to seeking claim resolution, the contractor shall proceed through Section 1-04.5. Logical reading of Section 1-09.11 is that if Section 1-04.5 was a necessary precondition of a claim, it is necessary to proceed to claim resolution through litigation. **The corollary is that if Section 1-04.5 is not necessary for filing a claim, it is not necessary for resolving a claim for litigation.** Unresolved claim issues can be litigated without Section 1-04.5.

The words used in a contract should be given their ordinary meaning. *Universal/Land Const. Co. v. City of Spokane*, 49 Wn. App. 634, 745 P.2d 53 (1987). Moreover, although standard dictionary definitions of words are not controlling, they are generally accepted as the common meaning. *Jack v. Standard Marine Ins. Co.*, 33 Wn.2d 265, 205 P.2d 351 (1949). The Washington Supreme Court set forth established rules used to interpret a contract:

"... where one construction would make a contract unreasonable, and another, equally consistent with its language, would make it reasonable, the interpretation which makes it a rational and probable agreement must be adopted...."

A contract should be interpreted as a whole, making the over-all meaning and purpose controlling. *Sibbald v. Chehalis Sav. & Loan Ass'n*, 6 Wn. (2d) 203, 107 P. (2d) 333 (1940). Every portion of a contract should be interpreted so as to carry out, if possible, the over-all purpose. *Jack v. Standard Marine Ins. Co.*, *supra*. The circumstances under which the contract was made may be considered so that the court may be able to place itself, as nearly as possible, in the position of the parties to the contract at the time of its execution. *Kelly v. Valley Constr. Co.*, 43 Wn. (2d) 679, 262 P. (2d) 970 (1953).

*Patterson v. Bixby*. 58 Wn.2d 454, 458-9, 364 P.2d 10 (1961).

The City's interpretation produces an illogical result, forcing a contractor to file a claim, protest the city's denial of the claim, file another claim based on the city's denial, then protest the newest denial, and so forth. The City's interpretation of Sections 1-09.11 and 1-09.12 invoking Section 1-04.5 does not provide a method to dispute the number without stepping off the track, forcing the contractor to

resubmit a protest and claim when crossing the finish line but in actuality making it the starting line for another lap.

D. Realm Does Not Seek Additional Compensation.

The City insinuates that Realm seeks additional compensation for a “changed conditions” situation. Br. Respondent, 10. Realm is not seeking additional compensation under Section 1-04.4 Changes. Realm did file notice of a possible changed conditions claim, but has not filed a claim related to any “changed conditions”.

Realm did not waive any and all claims related to the contract because it did not protest the Engineer’s denial of “changed conditions.” Again, Realm makes no claim for additional compensation related to a notice of a possible “changed conditions.” Realm agrees it did not protest the Engineer’s denial of “changed conditions.” Realm however has not filed a claim for additional compensation for the possible changed conditions, and therefore this issue is not appropriately before this Court and any argument regarding additional compensation is not relevant to the issue before the appellate court.

E. Mike M. Johnson Does Not Apply To Termination For Convenience.

*Johnson* is a case that involves a request for “additional compensation” under **Section 1-04. Scope of the Work.** (emphasis added). *Johnson*, 150 Wn.2d 375. Even the City agrees *Johnson* is a case for “additional compensation”. Br. Respondent, 23. *Johnson*

applies to additional compensation claims. If Ream had pursued a claim for additional compensation for a “changed condition” then *Johnson* would have applied.

Realm properly filed a claim under Sections 1-09.11 and 1-09.12 for its costs associated with the termination. The City misleads the court when they assert that Realm’s payment request for its costs associated with the termination for public convenience is “additional compensation”. Any “additional compensation” claims would arise under Section 1-04.4 Changes as is the fact pattern underlying *Johnson. Id.*

Additional compensation would mean to the ordinary person something above what has been agreed upon. The specification sets out at Section 1-09.5 the method for calculating the amount to be paid for the work performed to date.

The City’s additional compensation is for payment above and beyond the original contract scope.

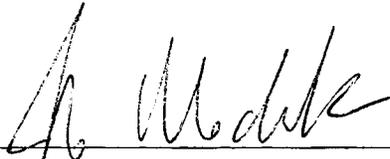
F. Realm Rejected Unilateral Change Order.

Per Carrie Follett, the check issued by City contained “Pay Est.” language. (CP 108). Any language providing an estimate creates an issue of material fact to be determined by a trier of fact and eliminates any “subjective intent” of the party theory put forth by the City.

**III. CONCLUSION**

This Court should dismiss the trial court's judgment in all particulars and remand to the lower court for trial.

RESPECTFULLY Submitted this 24<sup>th</sup> day of June, 2011



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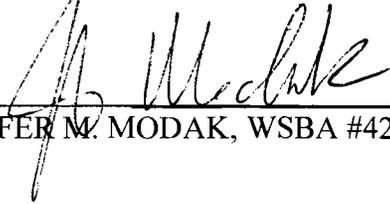
CERTIFICATE OF MAILING

I certify that on the 24th day of June, 2011, I placed in the mails of the United States a duly addressed, stamped envelope containing a copy of the Appellant's Reply Brief to the individuals and parties at the addresses listed below:

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