

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES ON APPEAL.....1

 1. Realm Failed To Meet Contractual Notice Requirements.1

III. RESTATEMENT OF THE CASE2

IV. LEGAL ARGUMENT7

 1. Standard Of Review.....7

 2. Failure To Follow The Contract Claim Provisions Invalidated Realm’s Claims.....8

 3. Realm Misreads And Mischaracterizes The Claim Resolution Process Of Std. Spec. 1-09.13 And 1-09.1117

 4. The Contract Claim Procedures Apply To All Claims For Additional Compensation.....23

 5. Realm Received The City’s Unilateral Change Order And Failed To Protest.24

 6. Claim For Attorney Fees On Appeal.27

V. CONCLUSION30

TABLE OF AUTHORITIES

CASES

<i>Absher Constr. Co. v. Kent Sch. Dist. No. 415</i> , 77 Wn. App. 137, 142, 890 P.2d 1071 (1995)	9
<i>Allen v. State</i> , 118 Wn.2d 753, 760, 826 P.2d 200 (1992).....	26
<i>Am. Safety Cas. Ins. Co. v. City of Olympia</i> , 162 Wn.2d 762, 773 (2007)	28
<i>Bremerton Pub. Safety Ass'n v. City of Bremerton</i> , 104 Wn. App. 226, 230, 15 P.3d 688 (2001)	8
<i>Frank Coluccio Constr. Co. v. King County</i> , 136 Wn. App. 751, 780 (2007)	27
<i>Hearst Commc'ns, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 503, 115 P.3d 262 (2005).....	26
<i>Jones v. Allstate Ins. Co.</i> , 146 Wn.2d 291, 300-301 (2002).....	8
<i>M.A. Mortenson Co. v. Timberline Software Corp.</i> , 140 Wn.2d 568, 579 (2000)	26
<i>McGuire v. Bates</i> , 169 Wn.2d 185, 188-189 (2010).....	26
<i>Mike M. Johnson, Inc. v. County of Spokane</i> , 150 Wn.2d 375, 386 (2003)	9, 22
<i>Mut. of Enumclaw Ins. Co. v. USF Ins. Co.</i> , 164 Wn.2d 411, 424 n.9, 191 P.3d 866 (2008).....	26
<i>Reid v. Pierce County</i> , 136 Wn.2d 195, 201, 961 P.2d 333 (1998).....	8

Reynolds Metal Co. v. Elec. Smith Constr. & Equip. Co.,
4 Wn. App. 695, 700, 483 P.2d 880 (1971).....9

STATUTES

RCW § 39.04.240 28, 29
RCW 4.84.250 28, 29, 30
RCW § 4.84.270 29, 30
RCW 4.84.280 29, 30

RULES

RAP 18.1 28

APPENDICES

Appendix A,

2006 Standard Specification

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,

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

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

² Id.

³ Eide Decl., ¶4, [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.

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

⁵ See, eg. Eide Decl, ¶5, [CP 92.]

⁶ Id.

⁷ Id.

⁸ Eide Decl., ¶6, [CP 92.]

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

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.]

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

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.”), ¶ 11, [CP 112.]

¹⁷ Follett Decl., ¶12, [CP 112.]

¹⁸ Eide Decl., ¶11, [CP 93.]

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

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.]

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

²⁶ City SJ, [CP 28-40.]

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.*

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

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 Interrogatory [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.

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].

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.

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

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.

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

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.

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

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.]

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

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.]

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

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.

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.

⁴⁸ Std. Spec. 1-09.13, App. A, p.38.

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

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

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

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

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.

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

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 Denial⁵⁶ 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**

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.]

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

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

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**

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

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.]

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

⁶¹ Id.

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

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.

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

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.]

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

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).

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

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

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

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

⁷¹ RCW § 39.04.240.

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.

⁷² RCW § 4.84.270.

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

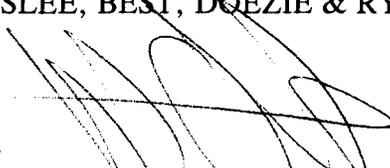
It must also be noted that Realm has not appealed the trial court's order awarding attorney fees and should not now be allowed to contest award of fees and costs as allowed by statute.

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.

DATED this 25th of May, 2011.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By 

William A. Linton, WSBA #19975
Attorneys for Respondent

APPENDIX A

1-04 SCOPE OF THE WORK**1-04.1 Intent of the Contract**

The intent of the contract is to prescribe a complete work. Omissions from the contract of details of work that are necessary to carry out the intent of the contract shall not relieve the Contractor from performing the omitted work.

1-04.1(1) Bid Items Included in the Proposal

The Contractor shall provide all labor, materials, tools, equipment, transportation, supplies, and incidentals required to complete all work for the items included in the proposal.

1-04.1(2) Bid Items Not Included in the Proposal

When the contract specifies work that has no bid item, and the work is not specified as being included with or incidental to other bid items, an equitable adjustment will be made in accordance with Section 1-04.4 unless that work is customarily considered as incidental to other items.

1-04.2 Coordination of Contract Documents, Plans, Special Provisions Specifications, and Addenda

The complete contract includes these parts: the contract form, bidder's completed proposal form, contract plans, contract provisions, standard specifications, standard plans, addenda, various certifications and affidavits, supplemental agreements, change orders, and subsurface boring logs (if any). These parts complement each other in describing a complete work. Any requirement in one part binds as if stated in all parts. The Contractor shall provide any work or materials clearly implied in the contract even if the contract does not mention it specifically.

Any inconsistency in the parts of the contract shall be resolved by following this order of precedence (e.g., 1 presiding over 2, 3, 4, 5, 6, and 7; 2 presiding over 3, 4, 5, 6, and 7; and so forth):

1. Addenda,
2. Proposal Form,
3. Special Provisions,
4. Contract Plans,
5. Amendments to the Standard Specifications,
6. Standard Specifications, and
7. Standard Plans.

On the contract plans, working drawings, and standard plans, figured dimensions shall take precedence over scaled dimensions.

This order of precedence shall not apply when work is required by one part of the contract but omitted from another part or parts of the contract. The work required in one part must be furnished even if not mentioned in other parts of the contract.

If any part of the contract requires work that does not include a description for how the work is to be performed, the work shall be performed in accordance with standard trade practice(s). For purposes of the contract, a standard trade practice is one having such regularity of observance in the trade as to justify an expectation that it will be observed by the Contractor in doing the work.

In case of any ambiguity or dispute over interpreting the contract, the Engineer's decision will be final as provided in Section 1-05.1.

1-04.3 Vacant

1-04.4 Changes

The Engineer reserves the right to make, at any time during the work, such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project. Such changes in quantities and alterations shall not invalidate the contract nor release the surety, and the Contractor agrees to perform the work as altered. Among others, these changes and alterations may include:

1. Deleting any part of the work,
2. Increasing or decreasing quantities,
3. Altering specifications, designs, or both,
4. Altering the way the work is to be done,
5. Adding new work,
6. Altering facilities, equipment, materials, services, or sites, provided by the Contracting Agency.
7. Ordering the Contractor to speed up or delay the work.

The Engineer will issue a written change order for any change unless the remainder of this section provides otherwise.

If the alterations or changes in quantities significantly change the character of the work under the contract, whether or not changed by any such different quantities or alterations, an adjustment, excluding loss of anticipated profits, will be made to the contract. The basis for the adjustment shall be agreed upon prior to the performance of the work. If a basis cannot be agreed upon, then an adjustment will be made either for or against the Contractor in such amount as the Engineer may determine to be fair and equitable. If the alterations or changes in quantities do not significantly change the character of the work to be performed under the contract, the altered work will be paid for as provided elsewhere in the contract. The term *significant change* shall be construed to apply only to the following circumstances:

- A. When the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction or
- B. When an item of work, as defined elsewhere in the contract, is increased in excess of 125 percent or decreased below 75 percent of the original contract quantity. For the purpose of this section, an item of work will be defined as any item that qualifies for adjustment under the provisions of Section 1-04.6.

For Item 1, an equitable adjustment for deleted work will be made as provided in Section 1-09.5.

For Item 2, if the actual quantity of any item, exclusive of added or deleted amounts included in agreed change orders, increases or decreases by more than 25 percent from the original plan quantity, the unit contract prices for that item may be adjusted in accordance with Section 1-04.6.

For any changes except Item 1 (deleted work) or Item 2 (increasing or decreasing quantities), the Engineer will determine if the change should be paid for at unit contract price(s). If the Engineer determines that the change increased or decreased the Contractor's costs or time to do any of the work including unchanged work, the Engineer

will make an equitable adjustment to the contract. The equitable adjustment will be by agreement with the Contractor. However, if the parties are unable to agree, the Engineer will determine the amount of the equitable adjustment in accordance with Section 1-09.4 and adjust the time as the Engineer deems appropriate. Extensions of time will be evaluated in accordance with Section 1-08.8. The Engineer's decision concerning equitable adjustment and extension of time shall be final as provided in Section 1-05.1.

The Contractor shall proceed with the work upon receiving:

1. A written change order approved by the Engineer, or
2. An oral order from the Project Engineer before actually receiving the written change order.

Changes normally noted on field stakes or variations from estimated quantities, except as provided in subparagraph A or B above, will not require a written change order. These changes shall be made at the unit prices that apply. The Contractor shall respond immediately to changes shown on field stakes without waiting for further notice.

The Contractor shall obtain written consent of the surety or sureties if the Engineer requests such consent.

The Contracting Agency has a policy for the administration of cost reduction alternatives proposed by the Contractor. The Contractor may submit proposals for changing the Plans, Specifications, or other requirements of the Contract. These proposals must reduce the cost or time required for construction of the project. When determined appropriate by the Contracting Agency, the Contractor will be allowed to share the savings.

Guidelines for submitting Cost Reduction Incentive Proposals are available at the Project Engineer's office. The actions and requirements described in the guidelines are not part of the Contract. The guidelines requirements and the Contracting Agency's decision to accept or reject the Contractor's proposal are not subject to arbitration under the arbitration clause or otherwise subject to litigation.

1-04.4(1) Minor Changes

Payments or credits for changes amounting to \$5,000 or less may be made under the bid item "Minor Change". At the discretion of the Contracting Agency, this procedure for Minor Changes may be used in lieu of the more formal procedure as outlined in Section 1-04.4, Changes.

The Contractor will be provided a copy of the completed order for Minor Change. The agreement for the Minor Change will be documented by signature of the Contractor, or notation of verbal agreement. If the Contractor is in disagreement with anything required by the order for Minor Change, the Contractor may protest the order as provided in Section 1-04.5.

Payments or credits will be determined in accordance with Section 1-09.4. For the purpose of providing a common proposal for all bidders, the Contracting Agency has entered an amount for "Minor Change" in the Proposal to become a part of the total bid by the Contractor.

1-04.5 Procedure and Protest by the Contractor

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 or the Project Engineer's field inspectors before doing the work;
2. 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 that 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;
and
3. If the protest is continuing, the information required above, shall be supplemented as requested by the Project Engineer. In addition, the Contractor shall provide the Project Engineer, before final payment, a written statement of the actual adjustment requested.

Throughout any protested work, the Contractor shall keep complete records of extra costs and time incurred. The Contractor shall permit the Engineer access to these and any other records needed for evaluating the protest as determined by the Engineer.

The Engineer will evaluate all protests provided the procedures in this section are followed. If the Engineer determines that a protest is valid, the Engineer will adjust payment for work or time by an equitable adjustment in accordance with Section 1-09.4. Extensions of time will be evaluated in accordance with Section 1-08.8. No adjustment will be made for an invalid protest.

In spite of any protest, the Contractor shall proceed promptly with the work as the Engineer orders.

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).

By failing to follow the procedures of this section and Section 1-09.11, the Contractor completely waives any claims for protested work.

1-04.6 Variation in Estimated Quantities

Payment to the Contractor will be made only for the actual quantities of work performed and accepted in conformance with the contract. When the accepted quantity of work performed under a unit item varies from the original proposal quantity, payment will be at the unit contract price for all work unless the total accepted quantity of any contract item, adjusted to exclude added or deleted amounts included in change orders accepted by both parties, increases or decreases by more than 25 percent from the original proposal quantity. In that case, payment for contract work may be adjusted as described herein:

The adjusted final quantity shall be determined by starting with the final accepted quantity measured after all work under an item has been completed. From this amount, subtract any quantities included in additive change orders accepted by both parties. Then, to the resulting amount, add any quantities included in deductive change orders accepted by both parties. The final result of this calculation shall become the adjusted final quantity and the basis for comparison to the original proposal quantity.

1. Increased Quantities.

Either party to the contract will be entitled to renegotiate the price for that portion of the adjusted final quantity in excess of 1.25 times the original proposal quantity. The price for excessive increased quantities will be determined by agreement of the parties, or, where the parties cannot agree, the price will be determined by the Engineer based upon the actual costs to perform the work, including reasonable markup for overhead and profit.

2. Decreased Quantities.

Either party to the contract will be entitled to an equitable adjustment if the adjusted final quantity of work performed is less than 75 percent of the original bid quantity. The equitable adjustment shall be based upon and limited to three factors:

- a. Any increase or decrease in unit costs of labor, materials or equipment, utilized for work actually performed, resulting solely from the reduction in quantity;
- b. Changes in production rates or methods of performing work actually done to the extent that the nature of the work actually performed differs from the nature of the work included in the original plan; and
- c. An adjustment for the anticipated contribution to unavoidable fixed cost and overhead from the units representing the difference between the adjusted final quantity and 75% of the original plan quantity.

The following limitations shall apply to renegotiated prices for increases and/or equitable adjustments for decreases:

1. The equipment rates shall be actual cost but shall not exceed the rates set forth in the AGC/WSDOT Equipment Rental Agreement (referred to in Section 1-09.6) that is in effect at the time the work is performed.
2. No payment will be made for extended or unabsorbed home office overhead and field overhead expenses to the extent that there is an unbalanced allocation of such expenses among the contract bid items.
3. No payment for consequential damages or loss of anticipated profits will be allowed because of any variance in quantities from those originally shown in the proposal form, contract provisions, and contract plans.
4. The total payment (including the adjustment amount and unit prices for work performed) for any item that experiences an equitable adjustment for decreased quantity shall not exceed 75% of the amount originally bid for the item.

If the adjusted final quantity of any item does not vary from the quantity shown in the proposal by more than 25%, then the Contractor and the Contracting Agency agree that all work under that item will be performed at the original contract unit price and within the original time for completion.

When ordered by the Engineer, the Contractor shall proceed with the work pending determination of the cost or time adjustment for the variation in quantities.

The Contractor and the Contracting Agency agree that there will be no cost adjustment for decreases if the Contracting Agency has entered the amount for the item in the proposal form only to provide a common proposal for bidders.

1-04.7 Differing Site Conditions (Changed Conditions)

During the progress of the work, if preexisting subsurface or latent physical conditions are encountered at the site, differing materially from those indicated in the contract, or if preexisting unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract, are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing site conditions before they are disturbed and before the affected work is performed.

Upon written notification, the Engineer will investigate the conditions and if he/she determines that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the contract, an adjustment, excluding loss of anticipated profits, will be made and the contract modified in writing accordingly. The Engineer will notify the Contractor of his/her determination whether or not an adjustment of the contract is warranted.

No contract adjustment which results in a benefit to the Contractor will be allowed unless the Contractor has provided the required written notice.

The equitable adjustment will be by agreement with the Contractor. However, if the parties are unable to agree, the Engineer will determine the amount of the equitable adjustment in accordance with Section 1-09.4. Extensions of time will be evaluated in accordance with Section 1-08.8.

If the Engineer determines that different site conditions do not exist and no adjustment in costs or time is warranted, such determination shall be final as provided in Section 1-05.1.

If there is a decrease in the costs or time required to perform the work, failure of the Contractor to notify the Engineer of the differing site conditions shall not affect the Contracting Agency's right to make an adjustment in the costs or time.

No claim by the Contractor shall be allowed unless the Contractor has followed the procedures provided in Section 1-04.5 and 1-09.11.

1-04.8 Progress Estimates and Payments

Engineer-issued progress estimates or payments for any part of the work shall not be used as evidence of performance or quantities. Progress estimates serve only as basis for partial payments. The Engineer may revise progress estimates any time before final acceptance. If the Engineer deems it proper to do so, changes may be made in progress estimates and in the final estimate.

1-04.9 Use of Buildings or Structures

The Engineer will decide whether any building or structure on the right of way may remain during the work and whether the Contractor may use such a building or structure.

1-08 PROSECUTION AND PROGRESS

1-08.1 Subcontracting

Work done by the Contractor's own organization shall account for at least 30 percent of the awarded contract price. Before computing this percentage, however, the Contractor may subtract (from the awarded contract price) the costs of any subcontracted work on items the contract designates as specialty items.

The Contractor shall not subcontract work unless the Engineer approves in writing. Each request to subcontract shall be on the form the Engineer provides. If the Engineer requests, the Contractor shall provide proof that the subcontractor has the experience, ability, and equipment the work requires. The Contractor shall require each subcontractor to comply with Section 1-07.9 and to furnish all certificates and statements required by the contract.

Along with the request to sublet, the Contractor shall submit the names of any contracting firms the subcontractor proposes to use as lower tier subcontractors. Collectively, these lower tier subcontractors shall not do work that exceeds 25 percent of the total amount subcontracted to a subcontractor. When a subcontractor is responsible for construction of a specific structure or structures, the following work may be performed by lower tier subcontractors without being subject to the 25 percent limitation:

1. Furnishing and driving of piling, or
2. Furnishing and installing concrete reinforcing and post-tensioning steel.

Except for the 25 percent limit, lower tier subcontractors shall meet the same requirements as subcontractors.

The Engineer will approve the request only if satisfied with the proposed subcontractor's record, equipment, experience, and ability. Approval to subcontract shall not:

1. Relieve the Contractor of any responsibility to carry out the contract,
2. Relieve the Contractor of any obligations or liability under the contract and the Contractor's bond,
3. Create any contract between the Contracting Agency and the subcontractor, or
4. Convey to the subcontractor any rights against the Contracting Agency.

The Contracting Agency will not consider as subcontracting: (1) purchase of sand, gravel, crushed stone, crushed slag, batched concrete aggregates, ready mix concrete, off-site fabricated structural steel, other off-site fabricated items, and any other materials supplied by established and recognized commercial plants; or (2) delivery of these materials to the work site in vehicles owned or operated by such plants or by recognized independent or commercial hauling companies. However, the Washington State Department of Labor and Industries may determine that RCW 39.12 applies to the employees of such firms identified in 1 and 2 above in accordance with WAC 296-127. If this should occur, the provisions of Section 1-07.9, as modified or supplemented, shall apply.

On all projects funded with Contracting Agency funds only, the Contractor shall certify to the actual amounts paid Disadvantaged, Minority, or Women's Business Enterprise firms that were used as subcontractors, lower tier subcontractors, manufacturers, regular dealers, or service providers on the contract. This Certification shall be submitted to the Project Engineer on WSDOT form 421-023, "Annual Report of Amounts Paid as MBE/WBE Participants", annually for the State fiscal year July 1 through June 30, or through physical completion of the contract, whichever occurs

earliest. The report is due July 20th following the fiscal year end or 20 calendar days after physical completion of the contract.

On all projects funded with both Contracting Agency funds and Federal assistance the Contractor shall submit a "Quarterly Report of Amounts Credited as DBE Participation" on a quarterly basis for every quarter in which the contract is active (work is accomplished) or upon completion of the project, as appropriate. The quarterly reports are due on the 20th of April, July, October, and January for the four respective quarters. When required, this "Quarterly Report of Amounts Credited as DBE Participation" is in lieu of WSDOT form 421-023, "Annual Report of Amounts Paid as MBE/WBE Participants".

If dissatisfied with any part of the subcontracted work, the Engineer may request in writing that the subcontractor be removed. The Contractor shall comply with this request at once and shall not employ the subcontractor for any further work under the contract.

1-08.1(1) Subcontract Completion and Return of Retainage Withheld

The following procedure shall apply to all subcontracts entered into as a part of this Contract:

Requirements

1. The subcontractor shall make a written request to the Contractor for the release of the subcontractor's retainage or retainage bond.
2. Within ten (10) working days of the request, the Contractor shall determine if the subcontract has been satisfactorily completed and shall inform the subcontractor, in writing, of the Contractor's determination.
3. If the Contractor determines that the subcontract has been satisfactorily completed, the subcontractor's retainage or retainage bond shall be released by the Contractor within ten (10) working days from the date of the written notice.
4. If the Contractor determines that the subcontractor has not achieved satisfactory completion of the subcontract, the Contractor must provide the subcontractor with written notice, stating specifically why the subcontract work is not satisfactorily completed and what has to be done to achieve completion. The Contractor shall release the subcontractor's retainage or retainage bond within eight (8) working days after the subcontractor has satisfactorily completed the work identified in the notice.
5. In determining whether satisfactory completion has been achieved, the Contractor may require the subcontractor to provide documentation such as certifications and releases, showing that all laborers, lower-tiered subcontractors, suppliers of material and equipment, and others involved in the subcontractor's work have been paid in full. The Contractor may also require any documentation from the subcontractor that is required by the subcontract or by the Contract between the Contractor and Contracting Agency or by law such as affidavits of wages paid, material acceptance certifications and releases from applicable governmental agencies to the extent that they relate to the subcontractor's work.
6. If the Contractor fails to comply with the requirements of the specification and the subcontractor's retainage or retainage bond is wrongfully withheld, the subcontractor may seek recovery against the Contractor under applicable prompt pay statutes in addition to any other remedies provided for by the subcontract or by law.

Conditions

1. This clause does not create a contractual relationship between the Contracting Agency and any subcontractor as stated in Section 1-08.1. Also, it is not intended to bestow upon any subcontractor, the status of a third-party beneficiary to the Contract between the Contracting Agency and the Contractor.
2. This section of the Contract does not apply to retainage withheld by the Contracting Agency from monies earned by the Contractor. The Contracting Agency shall continue to process the release of that retainage based upon the completion date of the project as defined in Section 1-08.5 Time for Completion and in accordance with the requirements and procedures set forth in chapter 60.28 RCW.

Payment

The Contractor will be solely responsible for any additional costs involved in paying retainage to the subcontractors prior to total project completion. Those costs shall be incidental to the respective bid items.

1-08.2 Assignment

The Contractor shall not assign all or any part of the work unless the Engineer approves in writing. The Engineer will not approve any proposed assignment that would relieve the original Contractor or Surety of responsibility under the contract.

Money due (or that will become due) to the Contractor may be assigned. If given written notice, the Contracting Agency will honor such an assignment to the extent the law permits. But the assignment shall be subject to all setoffs, withholdings, and deductions required by law and the contract.

1-08.3 Progress Schedule

The Contractor shall submit a preliminary progress schedule (first 60 working days) to the Engineer no later than five calendar days after the date the contract is executed. This preliminary schedule shall show work to be performed during the first 60 working days of the contract.

The Contractor shall submit five copies of the progress schedule (total working days) to the Engineer no later than 30 calendar days after the date the contract is executed. This schedule and any supplemental schedule shall show: (1) physical completion of all work within the specified contract time, (2) the proposed order of work, and (3) projected starting and completion times for major phases of the work and for the total project. The schedule shall be developed by a critical path method. The Contractor shall provide sufficient material, equipment, and labor to meet the completion times in this schedule.

The Contracting Agency allocates its resources to a contract based on the total time allowed in the contract. The Contracting Agency will accept a progress schedule indicating an early physical completion date but cannot guarantee the Contracting Agency's resources will be available to meet the accelerated schedule. No additional compensation will be allowed if the Contractor is not able to meet their accelerated schedule due to the unavailability of Contracting Agency's resources or for other reasons beyond the Contracting Agency's control.

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MAY 04 2011

INSLEE, BEST, ET AL.

Realm Inc,

Plaintiff(s),

vs.

City of Olympia,

Defendant(s).

COURT OF APPEALS NO. 41563-1-II

SUPERIOR COURT NO. 09-2-02902-1

PAGES 201-286

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

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The Contractor shall submit supplemental progress schedules when requested by the Project Engineer or as required by any provision of the contract. These supplemental schedules shall reflect any changes in the proposed order of the work, any construction delays, or other conditions that may affect the progress of the work. The Contractor shall provide the Project Engineer with the supplemental progress schedules within ten calendar days of receiving written notice of the request.

The original and all supplemental progress schedules shall not conflict with any time and order-of-work requirement in the contract.

If the Engineer deems that the original or any necessary supplemental progress schedule does not provide the information required in this section, the Contracting Agency may withhold progress payments until a schedule containing the required information has been submitted by the Contractor and approved by the Engineer.

The Engineer's approval of any schedule shall not transfer any of the Contractor's responsibilities to the Contracting Agency. The Contractor alone shall remain responsible for adjusting forces, equipment, and work schedules to ensure completion of the work within the time(s) specified in the contract.

1-08.4 Prosecution of Work

The Contractor shall begin work within 10 calendar days from the date of execution of the contract by the Contracting Agency, unless otherwise approved in writing. The Contractor shall diligently pursue the work to the physical completion date within the time specified in the contract. Voluntary shutdown or slowing of operations by the Contractor shall not relieve the Contractor of the responsibility to complete the work within the time(s) specified in the contract.

1-08.5 Time for Completion

The Contractor shall complete all physical contract work within the number of "working days" stated in the Contract Provisions or as extended by the Engineer in accordance with Section 1-08.8. Every day will be counted as a "working day" unless it is a nonworking day or an Engineer determined unworkable day. A nonworking day is defined as a Saturday, a Sunday, a day on which the contract specifically suspends work, or one of these holidays: January 1, the third Monday of January, the third Monday of February, Memorial Day, July 4, Labor Day, November 11, Thanksgiving Day, the day after Thanksgiving, and Christmas Day. When any of these holidays fall on a Sunday, the following Monday shall be counted a nonworking day. When the holiday falls on a Saturday, the preceding Friday shall be counted a nonworking day.

The days between December 25 and January 1 will be classified as nonworking days, provided that, the Contractor actually suspends work on the project.

An unworkable day is defined as a partial or whole day the Engineer declares to be unworkable because of weather, conditions caused by the weather, or such other conditions beyond the control of the Contractor that prevents satisfactory and timely performance of the work, and such performance, if not hindered, would have otherwise progressed toward physical completion of the work.

Contract time shall begin on the first working day following the 10th calendar day after the date the Contracting Agency executes the contract. The contract provisions may specify another starting date for contract time, in which case, time will begin on the starting date specified.

Each working day shall be charged to the contract as it occurs, until the contract work is physically complete. If substantial completion has been granted and all the authorized working days have been used, charging of working days will cease. Each week the Engineer will provide the Contractor a statement that shows the number of working days: (1) charged to the contract the week before; (2) specified for the physical completion of the contract; and (3) remaining for the physical completion of the contract. The statement will also show the nonworking days and any partial or whole day the Engineer declares as unworkable. Within 10 calendar days after the date of each statement, the Contractor shall file a written protest of any alleged discrepancies in it. To be considered by the Engineer, the protest shall be in sufficient detail to enable the Engineer to ascertain the basis and amount of time disputed. By not filing such detailed protest in that period, the Contractor shall be deemed as having accepted the statement as correct.

The Engineer will give the Contractor written notice of the physical completion date for all work the contract requires. That date shall constitute the physical completion date of the contract, but shall not imply the Secretary's acceptance of the work or the contract.

The Engineer will give the Contractor written notice of the completion date of the contract after all the Contractor's obligations under the contract have been performed by the Contractor. The following events must occur before the Completion Date can be established:

1. The physical work on the project must be complete; and
2. The Contractor must furnish all documentation required by the contract and required by law, to allow the Contracting Agency to process final acceptance of the contract. The following documents must be received by the Project Engineer prior to establishing a completion date:
 - a. Certified Payrolls (Federal-aid Projects)
 - b. Material Acceptance Certification Documents
 - c. Annual Report of Amounts Paid as MBE/WBE Participants or Quarterly Report of Amounts Credited as DBE Participation, as required by the Contract Provisions.
 - d. FHWA 47 (Federal-aid Projects)
 - e. Final Contract Voucher Certification

1-08.6 Suspension of Work

The Engineer may order suspension of all or any part of the work if:

1. Unsuitable weather and such other conditions beyond the control of the Contractor that prevent satisfactory and timely performance of the work; or
2. The Contractor does not comply with the contract or the Engineer's orders.

When ordered by the Engineer to suspend or resume work, the Contractor shall do so immediately.

If the work is suspended for reason (1) above, the period of work stoppage will be counted as unworkable days. But if the Engineer believes the Contractor should have completed the suspended work before the suspension, all or part of the suspension period may be counted as working days. The Engineer will set the number of unworkable days (or parts of days) by deciding how long the suspension delayed the entire project.

If the work is suspended for reason (2) above, the period of work stoppage will be counted as working days. The lost work time, however, shall not relieve the Contractor from any contract responsibility.

If the performance of all or any part of the work is suspended, delayed, or interrupted for an unreasonable period of time by an act of the Contracting Agency in the administration of the contract, or by failure to act within the time specified in the contract (or if no time is specified, within a reasonable time), the Engineer will make an adjustment for any increase in the cost or time for the performance of the contract (excluding profit) necessarily caused by the suspension, delay, or interruption. However, no adjustment will be made for any suspension, delay, or interruption if (1) the performance would have been suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or (2) an equitable adjustment is provided for or excluded under any other provision of the contract.

If the Contractor believes that the performance of the work is suspended, delayed, or interrupted for an unreasonable period of time and such suspension, delay, or interruption is the responsibility of the Contracting Agency, the Contractor shall immediately submit a written notice of protest to the Engineer as provided in Section 1-04.5. No adjustment shall be allowed for any costs incurred more than 10 calendar days before the date the Engineer receives the Contractor's written notice of protest. If the Contractor contends damages have been suffered as a result of such suspension, delay, or interruption, the protest shall not be allowed unless the protest (stating the amount of damages) is asserted in writing as soon as practicable, but no later than the date of the Contractor's signature on the Final Contract Voucher Certification. The Contractor shall keep full and complete records of the costs and additional time of such suspension, delay, or interruption and shall permit the Engineer to have access to those records and any other records as may be deemed necessary by the Engineer to assist in evaluating the protest.

The Engineer will determine if an equitable adjustment in cost or time is due as provided in this section. The equitable adjustment for increase in costs, if due, shall be subject to the limitations provided in Section 1-09.4, provided that no profit of any kind will be allowed on any increase in cost necessarily caused by the suspension, delay, or interruption.

Request for extensions of time will be evaluated in accordance with Section 1-08.8.

The Engineer's determination as to whether an adjustment should be made will be final as provided in Section 1-05.1.

No claim by the Contractor under this clause shall be allowed unless the Contractor has followed the procedures provided in this Section and in Sections 1-04.5 and 1-09.11.

1-08.7 Maintenance During Suspension

Before and during any suspension (as described in Section 1-08.6) the Contractor shall protect the work from damage or deterioration. Suspension shall not relieve the Contractor from anything the contract requires unless this section states otherwise.

At no expense to the Contracting Agency, the Contractor shall provide through the construction area a safe, smooth, and unobstructed roadway for public use during suspension (as required in Section 1-07.23 or the special provisions). This may include a temporary road or detour.

If the Engineer determines that the Contractor failed to pursue the work diligently before the suspension, or failed to comply with the contract or orders, then the Contractor shall maintain the temporary roadway in use during suspension. In this case, the Contractor shall bear the maintenance costs. If the Contractor fails to maintain the temporary roadway, the Contracting Agency will do the work and deduct all resulting costs from payments due to the Contractor.

If the Engineer determines that the Contractor has pursued the work diligently before the suspension, then the Contracting Agency will do the routine maintenance work (and bear its cost). This Contracting Agency-provided maintenance work will include only routine maintenance of:

1. The traveled way, auxiliary lanes, shoulders, and detour surface,
2. Roadway drainage along and under the traveled roadway or detour, and
3. All barricades, signs, and lights needed for directing traffic through the temporary roadway or detour in the construction area.

The Contractor shall protect and maintain (and bear the costs of doing so) all other work in areas not used by traffic.

After any suspension during which the Contracting Agency has done the routine maintenance, the Contractor shall accept the traveled roadway or detour as is when work resumes. The Contractor shall make no claim against the Contracting Agency for the condition of the roadway or detour.

After any suspension, the Contractor shall retain all responsibilities the contract assigns for repairing or restoring the roadway, its slopes, and its drainage system to the requirements of the plans.

1-08.8 Extensions of Time

The Contractor shall submit any requests for time extensions to the Engineer in writing no later than 10 working days after the delay occurs. The request shall be limited to the change in the critical path of the Contractor's schedule attributable to the change or event giving rise to the request. To be considered by the Engineer, the request shall be in sufficient detail (as determined by the Engineer) to enable the Engineer to ascertain the basis and amount of the time requested. The Contractor shall be responsible for showing on the progress schedule that the change or event: (1) had a specific impact on the critical path, and except in cases of concurrent delay, was the sole cause of such impact, and (2) could not have been avoided by resequencing of the work or other reasonable alternatives. If a request, combined with previous extension requests, equals 20 percent or more of the original contract time, the Contractor's letter of request must bear consent of Surety. In evaluating any request, the Engineer will consider how well the Contractor used the time from contract execution up to the point of the delay and the effect the delay has on any completion times included in the special provisions.

The contract's time for physical completion will be extended for a period equal to the time the Engineer determines the work was delayed because of:

1. Unsuitable weather, provided that:
 - a. The Engineer had not already allowed it as an unworkable day under Section 1-08.5, and
 - b. The Contractor had timely filed a written protest asserting that time the Engineer charged as a working day should have been allowed as an unworkable day.

2. Any action, neglect, or default of the Contracting Agency, its officers, or employees, or of any other contractor employed by the Contracting Agency;
3. Fire or other casualty for which the Contractor is not responsible;
4. Strikes;
5. Any other conditions for which these Specifications permit time extensions such as:
 - a. In Section 1-04.4 if a change increases the time to do any of the work including unchanged work;
 - b. In Section 1-04.5 if increased time is part of a protest that is found to be a valid protest;
 - c. In Section 1-04.6 if increases exceed 25 percent and these increases caused a delay in completing the contract;
 - d. In Section 1-04.7 if a changed condition is determined to exist which caused a delay in completing the contract;
 - e. In Section 1-05.3 if the Contracting Agency does not approve properly prepared and acceptable drawings within 30 calendar days;
 - f. In Section 1-07.13 if the performance of the work is delayed as a result of damage by others;
 - g. In Section 1-07.17 if the removal or the relocation of any utility by forces other than the Contractor caused a delay;
 - h. In Section 1-07.24 if a delay results from all the right of way necessary for the construction not being purchased and the special provisions does not make specific provisions regarding unpurchased right of way;
 - i. In Section 1-08.6 if the performance of the work is suspended, delayed, or interrupted for an unreasonable period of time that proves to be the responsibility of the Contracting Agency; or
 - j. In Section 1-09.11 if a dispute or claim also involves a delay in completing the contract and the dispute or claim proves to be valid.
6. Exceptional causes not specifically identified in items 1 through 5, provided the request letter proves the Contractor had no control over the cause of the delay and could have done nothing to avoid or shorten it.

Working days added to the contract by time extensions, when time has overran, shall only apply to days on which liquidated damages or direct engineering have been charged, such as the following:

If substantial completion has been granted prior to all of the authorized working days being used, then the number of days in the time extension will eliminate an equal number of days on which direct engineering charges have accrued. If the substantial completion date is established after all of the authorized working days have been used, then the number of days in the time extension will eliminate an equal number of days on which liquidated damages or direct engineering charges have accrued.

The Engineer will not allow a time extension for any cause listed above if it resulted from the Contractor's default, collusion, action or inaction, or failure to comply with the contract.

The Contracting Agency considers the time specified in the special provisions as sufficient to do all the work. For this reason, the Contracting Agency will not grant a time extension for:

- Failure to obtain all materials and workers;
- Changes, protest, increased quantities, or changed conditions (Section 1-04) that do not delay the completion of the contract or prove to be an invalid or inappropriate time extension request;
- Delays caused by nonapproval of drawings or plans as provided in Section 1-05.3;
- Rejection of faulty or inappropriate equipment as provided in Section 1-05.9;
- Correction of thickness deficiency as provided in Section 5-05.5(1)B.

The reasons for and times of extensions shall be determined by the Engineer, and such determination will be final as provided in Section 1-05.1.

1-08.9 Liquidated Damages

Time is of the essence of the contract. Delays inconvenience the traveling public, obstruct traffic, interfere with and delay commerce, and increase risk to highway users. Delays also cost tax payers undue sums of money, adding time needed for administration, engineering, inspection, and supervision.

Because the Contracting Agency finds it impractical to calculate the actual cost of delays, it has adopted the following formula to calculate liquidated damages for failure to complete the physical work of a contract on time.

Accordingly, the Contractor agrees:

1. To pay (according to the following formula) liquidated damages for each working day beyond the number of working days established for physical completion, and
2. To authorize the Engineer to deduct these liquidated damages from any money due or coming due to the Contractor.

LIQUIDATED DAMAGES FORMULA

$$LD = \frac{0.15C}{T}$$

where: LD = liquidated damages per working day
(rounded to the nearest dollar)

C = original contract amount

T = original time for physical completion

When the contract work has progressed to the extent that the Contracting Agency has full use and benefit of the facilities, both from the operational and safety standpoint, and only minor incidental work, replacement of temporary substitute facilities, or correction or repair remains to physically complete the total contract, the Engineer may determine the contract work is substantially complete. The Engineer will notify the Contractor in writing of the substantial completion date. For overruns in contract time occurring after the date so established, the formula for liquidated damages shown above will not apply. For overruns in contract time occurring after the substantial completion date, liquidated damages shall be assessed on the basis of direct engineering and related costs assignable to the project until the actual physical completion date of all the contract

work. The Contractor shall complete the remaining work as promptly as possible. Upon request by the Project Engineer, the Contractor shall furnish a written schedule for completing the physical work on the contract.

Liquidated damages will not be assessed for any days for which an extension of time is granted. No deduction or payment of liquidated damages will, in any degree, release the Contractor from further obligations and liabilities to complete the entire contract.

1-08.10 Termination of Contract

1-08.10(1) Termination for Default

The Contracting Agency may terminate the contract upon the occurrence of any one or more of the following events:

1. If the Contractor fails to supply sufficient skilled workers or suitable materials or equipment;
2. If the Contractor refuses or fails to prosecute the work with such diligence as will ensure its physical completion within the original physical completion time and any extensions of time which may have been granted to the Contractor by change order or otherwise;
3. If the Contractor is adjudged bankrupt or insolvent, or makes a general assignment for the benefit of creditors, or if the Contractor or a third party files a petition to take advantage of any debtor's act or to reorganize under the bankruptcy or similar laws concerning the Contractor, or if a trustee or receiver is appointed for the Contractor or for any of the Contractor's property on account of the Contractor's insolvency, and the Contractor or its successor in interest does not provide adequate assurance of future performance in accordance with the contract within 15 calendar days of receipt of a request for assurance from the Contracting Agency;
4. If the Contractor disregards laws, ordinances, rules, codes, regulations, orders or similar requirements of any public entity having jurisdiction;
5. If the Contractor disregards the authority of the Contracting Agency;
6. If the Contractor performs work which deviates from the contract, and neglects or refuses to correct rejected work; or
7. If the Contractor otherwise violates in any material way any provisions or requirements of the contract.

Once the Contracting Agency determines that sufficient cause exists to terminate the contract, written notice shall be given to the Contractor and its Surety indicating that the Contractor is in breach of the contract and that the Contractor is to remedy the breach within 15 calendar days after the notice is sent. In case of an emergency such as potential damage to life or property, the response time to remedy the breach after the notice may be shortened. If the remedy does not take place to the satisfaction of the Contracting Agency, the Engineer may, by serving written notice to the Contractor and Surety either:

1. Transfer the performance of the work from the Contractor to the Surety; or
2. Terminate the contract and at the Contracting Agency's option prosecute it to completion by contract or otherwise. Any extra costs or damages to the Contracting Agency shall be deducted from any money due or coming due to the Contractor under the contract.

If the Engineer elects to pursue one remedy, it will not bar the Engineer from pursuing other remedies on the same or subsequent breaches.

Upon receipt of a notice that the work is being transferred to the Surety, the Surety shall enter upon the premises and take possession of all materials, tools, and appliances for the purpose of completing the work included under the contract and employ by contract or otherwise any person or persons satisfactory to the Engineer to finish the work and provide the materials without termination of the contract. Such employment shall not relieve the Surety of its obligations under the contract and the bond. If there is a transfer to the Surety, payments on estimates covering work subsequent to the transfer shall be made to the extent permitted under law to the Surety or its agent without any right of the Contractor to make any claim.

If the Engineer terminates the contract or provides such sufficiency of labor or materials as required to complete the work, the Contractor shall not be entitled to receive any further payments on the contract until all the work contemplated by the contract has been fully performed. The Contractor shall bear any extra expenses incurred by the Contracting Agency in completing the work, including all increased costs for completing the work, and all damages sustained, or which may be sustained, by the Contracting Agency by reason of such refusal, neglect, failure, or discontinuance of work by the Contractor. If liquidated damages are provided in the contract, the Contractor shall be liable for such liquidated damages until such reasonable time as may be required for physical completion of the work. After all the work contemplated by the contract has been completed, the Engineer will calculate the total expenses and damages for the completed work. If the total expenses and damages are less than any unpaid balance due the Contractor, the excess will be paid by the Contracting Agency to the Contractor. If the total expenses and damages exceed the unpaid balance, the Contractor and the Surety shall be jointly and severally liable to the Contracting Agency and shall pay the difference to the State of Washington, Department of Transportation on demand.

In exercising the Contracting Agency's right to prosecute the physical completion of the work, the Contracting Agency shall have the right to exercise its sole discretion as to the manner, method, and reasonableness of the costs of completing the work. In the event that the Contracting Agency takes bids for remedial work or physical completion of the project, the Contractor shall not be eligible for the award of such contracts.

In the event the contract is terminated, the termination shall not affect any rights of the Contracting Agency against the Contractor. The rights and remedies of the Contracting Agency under the Termination Clause are in addition to any other rights and remedies provided by law or under this contract. Any retention or payment of monies to the Contractor by the Contracting Agency will not release the Contractor from liability.

If a notice of termination for default has been issued and it is later determined for any reason that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to Termination for Public Convenience in Section 1-08.10(2). This shall include termination for default because of failure to prosecute the work, and the delay was found to be excusable under the provisions of Section 1-08.8.

1-08.10(2) Termination for Public Convenience

The Engineer may terminate the contract in whole, or from time to time in part, whenever:

1. The Contractor is prevented from proceeding with the work as a direct result of an Executive Order of the President with respect to the prosecution of war or in the interest of national defense; or an Executive Order of the President or Governor of the State with respect to the preservation of energy resources;
2. The Contractor is prevented from proceeding with the work by reason of a preliminary, special, or permanent restraining order of a court of competent jurisdiction where the issuance of such restraining order is primarily caused by acts or omissions of persons or agencies other than the Contractor; or
3. The Engineer determines that such termination is in the best interests of the Contracting Agency.

1-08.10(3) Termination for Public Convenience Payment Request

After receipt of Termination for Public Convenience as provided in Section 1-08.10(2), the Contractor shall submit to the Contracting Agency a request for 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. The request shall be submitted promptly but in no event later than 90 calendar days from the effective date of termination.

The Contractor agrees to make all records available to the extent deemed necessary by the Engineer to verify the costs in the Contractor's payment request.

1-08.10(4) Payment for Termination for Public Convenience

Whenever the contract is terminated in accordance with Section 1-08.10(2), payment will be made in accordance with Section 1-09.5 for the actual work performed.

If 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 except that, if the termination occurs because of the issuance of a restraining order as provided in Section 1-08.10(2), the matter will be resolved through mandatory and binding arbitration as described in Sections 1-09.13(3) A and B, regardless of the amount of the claim.

1-08.10(5) Responsibility of the Contractor and Surety

Termination of a contract shall not relieve the Contractor of any responsibilities under the contract for work performed. Nor shall termination of the contract relieve the Surety or Sureties of obligations under the contract bond or retainage bond for work performed.

1-09 MEASUREMENT AND PAYMENT

1-09.1 Measurement of Quantities

In measuring all acceptably completed bid items of work, the Engineer will:

1. Use United States standard measure,
2. Make all measurements as described in this section, unless individual specifications require otherwise,
3. Follow methods generally recognized as conforming to good engineering practice,
4. Conform to the usual practice of the Contracting Agency by carrying measurements and computations to the proper significant figure or fraction of units for each item, and
5. Measure horizontally or vertically (unless otherwise specified).

The terms listed below shall be defined as follows in all measurements under this section:

"Lump Sum" (when used as an item of payment): complete payment for the work described for that item in the contract.

"Gage" (in measurement of plates): the U.S. Standard Gage.

"Gage" (in measurement of galvanized sheets used to manufacture corrugated metal pipe, metal plate pipe culverts and arches, and metal cribbing): that specified in AASHTO M 36, M 167, M 196, M 197, or M 219.

"Gage" (in measurement of wire): that specified in AASHTO M 32.

"Ton": 2,000 pounds of avoirdupois weight.

For each basis of measurement listed below, the Engineer will use the method of measurement described. For bid items or materials measured on the basis of:

Hour - measured for each hour that work is actually performed. Portions of an hour will be rounded up to a half hour.

Square Yard or Square Foot — the measurement shall be a calculation from the neat dimensions shown in the Plans or as altered by the Engineer. If there is an exception within the measured area where the item of work is not performed (such as a drainage vault within a measured sidewalk) and if the exception area is greater than 9 square feet, then the area of the exception will be subtracted from the payment area calculated from the neat dimensions.

Linear Foot (pipe culverts, guard rail, underdrains, etc.) — measured parallel to the structure's base or foundation, unless the plans require otherwise.

Weight — weighed as required in Section 1-09.2.

Volume (of excavation and embankment) — measured by the average-end-area method or by the finite element analysis method utilizing digital terrain modeling techniques. All or some computations may be based on ground elevations and other data derived photogrammetrically. The Engineer may correct for curvature.

Volume (in the hauling vehicle) — measured at the point of delivery. Hauling vehicles may be of any size or type the Engineer approves provided that the body is of such shape that the actual contents may be readily and accurately determined. If the Engineer requires, the Contractor shall level loads at the delivery point to facilitate measurement.

For each item listed below, the Engineer will use the method of measurement described.

Structures — measured on the neat lines shown in the plans or as altered by the Engineer. When a complete structure or structural unit is specified as the unit of measurement, the unit shall include all fittings and accessories.

Timber — measured by the thousand board feet (MBM) actually used in the structure. Measurements will be based on nominal widths and thicknesses and the extreme length of each piece.

Standard Manufactured Items (fence, wire, plates, rolled shapes, pipe conduit, etc., when specified) — measured by the manufacturer's identification of gage, unit weight, section dimension, etc. The Engineer will accept manufacturing tolerances set by each industry unless cited specifications require more stringent tolerances.

Cement — measured by the pound, ton, or sack. A sack shall be 94 pounds.

Asphalt — measured by the gallon or ton. If measured by gallon, measurement will be made at 60 F (or will be corrected to the volume at 60 F in keeping with ASTM D 1250). If shipped by rail, truck, or transport, measurement will be by net certified scale masses or certified volumes (corrected for material lost en route or not actually incorporated into the work).

No measurement will be made for:

1. Work performed or materials placed outside lines shown in the plans or set by the Engineer;
2. Materials wasted, used, or disposed of in a manner contrary to the contract;
3. Rejected materials (including those rejected after placement if the rejection resulted from the Contractor's failure to comply with the contract);
4. Hauling and disposing of rejected materials;
5. Material remaining on hand after the work is completed, except as provided in Sections 1-09.5 and 1-09.10; or
6. Any other work or material contrary to any contract provision.

1-09.2 Weighing Equipment

1-09.2(1) General Requirements for Weighing Equipment

Any highway or bridge construction materials to be proportioned or measured and paid for by weight shall be weighed on a scale. These materials include natural, manufactured or processed materials obtained from natural deposits, stockpiles, or bunkers.

Scales

Scales shall:

1. Be accurate to within one-half of 1 percent throughout the range of use;
2. Not include spring balances;
3. Include beams, dials, or other reliable readout equipment;
4. Be arranged so that operators and inspectors can safely and easily see the dials, beams, rods, and operating scale mechanisms;
5. Be built to prevent scale parts from binding, vibrating, or being displaced and to protect all working parts from falling material, wind, and weather; and
6. Be carefully maintained, with bunkers and platforms kept clear of accumulated materials that could cause errors and with knife edges given extra care and protection.

Weighers

The Contractor shall provide, set up, and maintain the scales necessary to perform this work. "Contractor provided scale operations" are defined as operations where a scale is set up specifically for the project and most, if not all, material weighed on the scale is utilized for contract work. In this situation, the contracting agency will provide a person to operate the scale, write tickets, perform scale checks and prepare reports.

The Contractor may also utilize permanently installed, certified, commercial scales. "Commercial scale operations" include the use of established scales used to sell materials to the public on a regular basis. In addition, for the purposes of this specification, all batch, hopper, and belt scales are considered to be commercial scales. Commercial scales shall meet the same requirements as Contractor-provided scales. When a commercial scale is used, the Contractor may utilize a commercial scale operator provided it is at no additional cost to the contracting agency. In addition, the Contractor shall ensure that:

1. the Engineer is allowed to observe the weighing operation and check the daily scale weight record;
2. scale verification checks are performed at the direction of the contracting agency (see "1-09.2(5) Measurement");
3. several times each day, the commercial scale operator records and makes certain the platform scale balances and returns to zero when the load is removed; and
4. test results and scale weight records for each day's hauling operations are provided to the Engineer daily. Unless otherwise approved, reporting shall utilize form 422-027, Scaleman's Daily Report.

Trucks and Tickets

Each truck to be weighed shall bear a unique identification number. This number shall be legible and in plain view of the scale operator. Each vehicle operator shall obtain a weigh or load ticket from the scale operator. The Contractor shall provide tickets for self-printing scales. All tickets shall, at a minimum, contain the following information:

1. date of haul;
2. contract number;
3. contract unit bid item;
4. unit of measure;
5. identification of hauling vehicle; and
6. weight delivered
 - a. net weight in the case of batch and hopper scales
 - b. gross weight, tare and net weight in the case of platform scales (tare may be omitted if a tare beam is used)
 - c. approximate load out weight in the case of belt conveyor scales

The vehicle operator shall deliver the ticket in legible condition to the material receiver at the material delivery point.

1-09.2(2) Specific Requirements for Batching Scales

Each batching scale shall be designed to support a weighing container. The arrangement shall make it convenient for the operator to remove material from the weighing container while watching readout devices. Any weighing container mounted on a platform scale shall have its center of gravity directly over the platform centerline. Batching scales used for Portland or asphalt cement shall not be used for batching other materials.

Readout devices used for batching or hopper scales shall be marked at intervals evenly spaced throughout and shall be based on the scale's nominal rated capacity. These intervals shall not exceed one-tenth of 1 percent of the nominal rated capacity. Before use at a new site and then at 6-month intervals, all batching and hopper scales shall be: approved under rules of the Weights and Measures Section of the Washington State Department of Agriculture, or serviced and tested with at least 10,000 pounds by an agent of its manufacturer. In either case, the Contractor shall provide the Engineer with a copy of the final test results.

1-09.2(3) Specific Requirements for Platform Scales

Each platform scale shall be able to weigh the entire hauling vehicle or combination of connected vehicles at one time. No part of the vehicle or vehicle combination will be permitted off the platform as it is weighed. A tare weight shall be taken of each hauling vehicle at least twice daily.

Any platform scale shall be installed and maintained with the platform level and with rigid bulkheads at either end to prevent binding or shifting. The readout device shall be marked at intervals of no more than 40 pounds. Test records shall show results to the nearest 20 pounds. During weighing operations, weights shall be read and recorded to the nearest 100 pounds. Before use at a new site and then at 6-month intervals, any platform scale shall be: approved under rules of the Washington State Department of Agriculture's Weights and Measures Section, or serviced and tested with at least 10,000 pounds by an agent of its manufacturer. In either case, the Contractor shall provide the Engineer with a copy of the final test results.

Any Contractor-supplied scale shall include a scale house with a floor space of at least 6 by 10-feet. The scale house shall be wind and weather tight, shall have windows for light and ventilation, shall include a door, and shall be lockable. It shall include a table, a chair, electrical power, and a space heater. The Contractor shall provide a rest room near the scale house.

1-09.2(4) Specific Requirements for Belt Conveyor Scales

The Engineer may approve conveyor-belt weighing of untreated materials if the method and device meet all general requirements for weighing equipment. The recording tape, odometer, totalizer, calibration adjustment, and clock-time imprinter shall be kept locked and the Engineer shall retain all keys. All belt-conveyor scales shall comply with the requirements for Belt-Conveyor Scales in the National Institute of Standards and Technology (NIST) Handbook No. 44, except where these specifications modify those requirements.

A static load test shall be made: each day after the belt-conveyor has run continuously for about 30 minutes, and again, immediately after the air temperature changes significantly. If the static load test reveals a need for adjustment, the Contractor shall perform a chain test. The Contractor shall make the computation of the test chain calibration, the calibration procedures and results, and related records available for the engineer's review. The test chain shall be clearly marked with its calibration, carried in a suitable container, and kept immediately available for testing.

1-09.2(5) Measurement

Scale Verification Checks

Regardless of the type of scale used, a scale verification test shall be performed daily. The Contractor shall designate a separate, certified, platform scale or a separate commercial platform scale, independent of the scale used for weighing construction materials, to be used for scale verification checks. Each batch, hopper or platform scale will be tested by routing a loaded truck onto a separate certified platform scale or a separate commercial platform scale and comparing the weights. If such a separate scale is not reasonably available, the Engineer may approve a Contractor request to use an alternate method of scale verification checks as described on Form 422-027, "Scaleman's Daily Report" and as appropriate for the type of scale.

To test the accuracy of a belt-conveyor scale, the Contractor shall weigh five or more payloads from sequential hauling units and compare these weights with weights of the same payloads taken on a separate certified platform scale. If the test results fluctuate, the engineer may require more than five check loads. Conveyor weights will be based on tonnage values taken from the sealed odometer at the beginning and end of each check period.

If scale verification checks shows the scale has been under weighing, it shall be adjusted immediately. The Contractor shall not be compensated for any loss from under weighing.

If scale verification checks show the scale has been overweighing, its operation will cease immediately until adjusted. The contracting agency will calculate the combined weight of all materials weighed after the last verification check showing accurate results. This combined weight will then be reduced for payment by the percentage of scale error that exceeds one-half of 1 percent.

Minor Construction Items

If the specifications and plans require weight measurement for minor construction items, the Contractor may request permission to convert volume to weight. If the Engineer approves, an agreed factor may be used to make this conversion and volume may be used to calculate the corresponding weight for payment.

1-09.2(6) Payment

The Contracting Agency will pay for no materials received by weight unless they have been weighed as required in this section or as required by another method the Engineer has approved in writing.

Unit contract prices for the various pay items of the project cover all costs related to weighing and proportioning materials for payment. These costs include but are not limited to:

- furnishing, installing, certifying, and maintaining scales
- furnishing a scale house
- providing a weigher with a commercial scale, if necessary
- providing self-printing tickets, if necessary
- rerouting a truck for verification weighing
- assisting the engineer with scale verification checks
- any other related costs associated with meeting the requirements of this section.

1-09.3 Scope of Payment

The payment provided for in the contract shall be full payment to the Contractor for:

1. Furnishing all materials and performing all work under the contract (including changes in the work, materials, or plans) in a complete and acceptable manner;
2. All risk, loss, damage, or expense of whatever character arising out of the nature or prosecution of the work; and
3. All expense incurred resulting from a suspension or discontinuance of the work as specified under the contract.

The payment of any estimate or retained percentage shall not relieve the Contractor of the obligation to make good any defective work or materials.

Unless the plans and special provisions provide otherwise, the unit contract prices for the various bids items shall be full payment for all labor, materials, supplies, equipment, tools, and all other things required to completely incorporate the item into the work as though the item were to read "In Place."

If the "Payment" clause in the specifications, for an item included in the proposal, covers and considers all work and material essential to that item, then the work or materials will not be measured or paid for under any other item that may appear elsewhere in the proposal or specifications.

Certain payment items appearing in these Specifications may be modified in the plans and proposal to include:

1. The words "For Structure," "For Concrete Barrier," "For Bridge," etc. with the intent of clarifying specific use of the item; or
2. The words "Site (Site Designation)," with the intent of clarifying where a specific item of work is to be performed.

Modification of payment items in this manner shall in no way change the intent of the specifications relating to these items.

1-09.4 Equitable Adjustment

The equitable adjustment provided for elsewhere in the contract shall be determined in one or more of the following ways:

1. If the parties are able to agree, the price will be determined by using:
 - a. Unit prices, or
 - b. Other agreed upon prices;
2. If the parties cannot agree, the price will be determined by the Engineer using:
 - a. Unit prices, or
 - b. Other means to establish costs.

The following limitations shall apply in determining the amount of the equitable adjustment:

1. The equipment rates shall be actual cost but shall not exceed the rates set forth in the AGC/WSDOT Equipment Rental Agreement in effect at the time the work is performed as referred to in Section 1-09.6, and
2. To the extent any delay or failure of performance was concurrently caused by the Contracting Agency and the Contractor, the Contractor shall be entitled to a time extension for the portion of the delay or failure of performance concurrently caused, provided it make such a request pursuant to Section 1-08.8; however, the Contractor shall not be entitled to any adjustment in contract price.
3. No claim for anticipated profits on deleted, terminated, or uncompleted work will be allowed.
4. No claim for consequential damages of any kind will be allowed.

1-09.5 Deleted or Terminated Work

The Engineer may delete work by change order as provided in Section 1-04.4 or may terminate the contract in whole or part as provided in Section 1-08.10(2). When the contract is terminated in part, the partial termination shall be treated as a deletion change order for payment purposes under this section.

Payment for completed items will be at unit contract prices.

When any item is deleted in whole or in part by change order or when the contract is terminated in whole or in part, payment for deleted or terminated work will be made as follows:

1. Payment will be made for the actual number of units of work completed at the unit contract prices unless the Engineer determines the unit prices are inappropriate for the work actually performed. When that determination is made by the Engineer, payment for work performed will be as mutually agreed. If the parties cannot agree the Engineer will determine the amount of the equitable adjustment in accordance with Section 1-09.4;
2. Payment for partially completed lump sum items will be as mutually agreed. If the parties cannot agree, the Engineer will determine the amount of the equitable adjustment in accordance with Section 1-09.4;
3. To the extent not paid for by the contract prices for the completed units of work, the Contracting Agency will pay as part of the equitable adjustment those direct costs necessarily and actually incurred by the Contractor in anticipation of performing the work that has been deleted or terminated;
4. The total payment for any one item in the case of a deletion or partial termination shall not exceed the bid price as modified by approved change orders less the estimated cost (including overhead and profit) to complete the work and less any amount paid to the Contractor for the item;
5. The total payment where the contract is terminated in its entirety shall not exceed the total contract price as modified by approved change orders less those amounts paid to the Contractor before the effective date of the termination; and
6. No claim for damages of any kind or for loss of anticipated profits on deleted or terminated work will be allowed because of the termination or change order.

Contract time shall be adjusted as the parties agree. If the parties cannot agree, the Engineer will determine the equitable adjustment for contract time.

Acceptable materials ordered by the Contractor prior to the date the work was terminated as provided in Section 1-08.10(2) or deleted as provided in Section 1-04.4 by the Engineer, will either be purchased from the Contractor by the Contracting Agency at the actual cost and shall become the property of the Contracting Agency, or the Contracting Agency will reimburse the Contractor for the actual costs connected with returning these materials to the suppliers.

1-09.6 Force Account

The terms of the contract or of a change order may call for work or material to be paid for by force account. If so, then the objective of this specification is to reimburse the Contractor for all costs associated with the work, including costs of labor, small tools, supplies, equipment, specialized services, materials, applicable taxes and overhead and to include a profit commensurate with those costs. The amount to be paid shall be determined as shown below:

1. **For Labor:** Labor reimbursement calculations shall be based on a "Project Labor List" (List,) prepared and submitted by the Contractor and by any subcontractor before that firm commences force account work. Once a List is approved by the Engineer, it shall be used to calculate force account labor payment until a new List is submitted and approved. The Engineer may compare the List to payrolls and other documents and may, at any time, require the Contractor to submit a new List. The Contractor may submit a new List at any time without such a requirement. Prior payment calculations shall not be adjusted as a result of a new List.

To be approved, the List must be accurate and meet the requirements of this section. It shall include regular time and overtime rates for all employees (or work classifications) expected to participate in force account work. The rates shall include the basic wage and fringe benefits, the current rates for Federal Insurance Compensation Act (FICA), Federal Unemployment Tax Act (FUTA) and State Unemployment Tax Act (SUTA), the company's present rates for Medical Aid and Industrial Insurance premiums and the planned payments for travel and per diem compensation.

In the event that an acceptable initial List or requested revised List is not received by the time that force account calculations are begun, the Engineer will develop a List unilaterally, utilizing the best data available, that will be used until a Contractor's List is received and approved. Again, prior calculations, prepared using the Engineer's List, will not be revised as a result of differences with the Contractor's List.

In addition to compensation for direct labor costs defined above, the Contracting Agency will pay Contractor 29 percent of the sum of the costs calculated for labor reimbursement to cover project overhead, general company overhead, profit, bonding, insurance, Business & Occupation tax, and any other costs incurred. This amount will include any costs of safety training and health tests, but will not include such costs for unique force account work that is different from typical work and which could not have been anticipated at time of bid.

2. **For Materials:** The Contracting Agency will reimburse invoice cost for Contractor-supplied materials. For the purpose of this provision, "Materials" shall include those items incorporated into the work, supplies used during the work and items consumed. This cost shall include freight and handling charges and applicable taxes. Before work is started, the Engineer may require the Contractor to obtain multiple quotations for the materials to be utilized and select the vendor with prices and terms most advantageous to the Contracting Agency.

The Contracting Agency will provide a list of the types and quantities of Contractor-supplied materials witnessed by the Contracting Agency as being utilized in force account work. The list will be furnished promptly after the material is incorporated, on a daily basis unless agreed otherwise. The Contractor may propose corrections to the list and will supply prices for the materials and other costs and return the list to the Contracting Agency. To support the prices, the Contractor shall attach valid copies of vendor invoices. If invoices are not available for materials from the Contractor's stocks, the Contractor shall certify actual costs (at a reasonable level) by affidavit. The Engineer will review the prices and any Contractor-proposed corrections and, if reasonable, approve the completed list. Once approved, the prices will be utilized in the calculation of force account reimbursement for materials.

If, in the case of non-invoiced materials supported by Contractor affidavit, the price appears to be unreasonable, the Engineer will determine the cost for all or part of those materials, utilizing the best data available.

The Contracting Agency reserves the right to provide materials. In this case, the Contractor will receive no payment for any costs, overhead, or profit arising from the value of the materials themselves. Additional costs to handle and place the Agency-furnished material shall be compensated as described in this specification.

In addition to compensation for direct materials cost, the Contracting Agency will pay the Contractor 21 percent of the sum of the costs calculated for materials reimbursement to cover project overhead, general company overhead, profit, bonding, insurance, Business & Occupation tax, and any other costs incurred.

3. **For Equipment:** The Contracting Agency will reimburse the Contractor for the cost of equipment utilized in the work. The equipment provided by the Contractor shall be of modern design and in good working condition. For the purpose of this provision, "provided" shall mean that the equipment is owned (either through outright ownership or through a long-term lease) and operated by the Contractor or Subcontractor or that the equipment is rented and operated by the Contractor or Subcontractor. Equipment that is rented with operator shall not be included here, but shall be considered a service and addressed according to section 4 of this provision.

The amount of payment for any Contractor-owned equipment that is utilized shall be determined according to the version of the AGC/WSDOT Equipment Rental Agreement which is in effect at the time the force account

is authorized. The rates listed in the Rental Rate Blue Book (as modified by the current AGC/WSDOT Equipment Rental Agreement) shall be full compensation for all fuel, oil, lubrication, ordinary repairs, maintenance, and all other costs incidental to furnishing and operating the equipment except labor for operation.

Payment for rented equipment will be made on the basis of a valid invoice, covering the time period of the work. Before work is started, the Engineer may require the Contractor to obtain multiple quotations for the rental of equipment to be utilized and select the vendor with prices and terms most advantageous to the Contracting Agency. In the event that prior quotations are not obtained and the vendor is not a firm independent from the Contractor or subcontractor, then after-the-fact quotations may be obtained by the Engineer from the open market in the vicinity and the lowest such quotation may be used in place of submitted invoice.

In addition to the payments for Contractor-owned and rented equipment, one or more lump-sum payments may be made for small tools. The amount to be paid shall be determined as outlined in the AGC/WSDOT Equipment Rental Agreement.

The Contracting Agency will add 21 percent to equipment costs to cover project overhead, general company overhead, profit, bonding, insurance, Business & Occupation tax, and any other costs incurred. This markup will be over and above those equipment costs and will not be adjusted for any equipment overhead amounts included in the Blue Book rates.

Current copies of the Rental Rate Blue Book and the AGC/WSDOT Equipment Rental Agreement will be maintained at each Region office of the Department of Transportation (Compact Disk Version) and at each of the offices of the Associated General Contractors of America (in Seattle, Spokane, Tacoma, and Wilsonville, Oregon) where they are available for inspection.

4. **For Services:** Compensation under force account for specialized services shall be made on the basis of an invoice from the providing entity. A "specialized service" shall be one that is typically billed through invoice in standard industry practice. Before work is started, the Engineer may require the Contractor to obtain multiple quotations for the service to be utilized and select the provider with prices and terms most advantageous to the Contracting Agency. In the event that prior quotations are not obtained and the service invoice is submitted by a subcontractor, then after-the-fact quotations may be obtained by the Engineer from the open market in the vicinity and the lowest such quotation may be used in place of the submitted invoice.

Except as noted below, the Contracting Agency will pay the Contractor an additional 21 percent of the sum of the costs included on invoices for specialized services to cover project overhead, general company overhead, profit, bonding, insurance, Business & Occupation tax, and any other costs incurred.

When a supplier of services is compensated through invoice, but acts in the manner of a subcontractor, as described in Section 6 of this provision, then markup for that invoice shall be according to Section 6. "Contractor Markup on Subcontractors' Work".

5. **For Mobilization:** Force account mobilization is defined as the preparatory work performed by the Contractor including procurement, loading and transportation of tools and equipment, and personal travel time (when such travel time is a contractual obligation of the Contractor or a customary payment for the Contractor to all employees). Mobilization also includes the costs incurred during demobilization. Pro-rata adjustments may be made when the mobilization applies to both force account and other contract work. The Contracting Agency will pay for mobilization for off-site preparatory work for force account items provided that notice has been provided sufficiently in advance to allow the Engineer to witness the activity, if desired.

Any costs experienced during mobilization activities for labor, equipment, materials or services shall be listed in those sections of the force account summary and paid accordingly.

6. **For Contractor Markup on Subcontractor's Work:** When work is performed on a force account basis by one or more approved subcontractors, by lower-tier subcontractors or suppliers, or through invoice by firm(s) acting in the manner of a subcontractor, the Contractor will be allowed an additional markup, from the table below, applied to the costs computed for work done by each subcontractor through Sections 1, 2, 3, and 4, to compensate for all administrative costs, including project overhead, general company overhead, profit, bonding, insurance, Business & Occupation tax, and any other costs incurred.

A firm may be considered to be acting as a subcontractor when the Engineer observes one or more of the following characteristics:

- a. The person in charge of the firm's activities takes an active role in managing the overall project, including extensive coordination, interpretation of plans, interaction with the Contracting Agency or management of a complex and interrelated operation.
- b. Rented equipment is provided fueled, operated and maintained by the firm. Operators of rented equipment are supervised directly by the firm's representative. There is little interaction between the Contractor and the employees of the firm.
- c. The firm appears to be holding the risk of performance and quality of the work.
- d. The firm appears to be responsible for liability arising from the work.

Markups on Work Performed by Subcontractor(s):

- | | |
|--|-----|
| (1) On amounts paid for work performed by each Subcontractor on each force account and calculated through Sections 1-4, up to \$25,000 | 12% |
| (2) On amounts greater than \$25,000 up to \$100,000 | 10% |
| (3) On amounts greater than \$100,000 | 7% |

The amounts and markup rates shall be calculated separately for each subcontractor on each force account item established.

The payments provided above shall be full payment for all work done on a force account basis. The calculated payment shall cover all expenses of every nature, kind, and description, including those listed above and any others incurred on the work being paid through force account. Nothing in this provision shall preclude the Contractor from

seeking an extension of time or time-related damages to unchanged work arising as a result of the force account work. The amount and costs of any work to be paid by force account shall be computed by the Engineer, and the result shall be final as provided in Section 1-05.1.

An item that has been bid at a unit price or lump sum in the Proposal will not be paid as force account unless a change as defined in Section 1-04.4 has occurred and the provisions require a payment adjustment. Items which are included in the Proposal as Force Account or which are added by change order as Force Account may, by agreement of the parties at any time, be converted to agreed unit prices or lump sums applicable to the remaining work.

1-09.7 Mobilization

Mobilization consists of preconstruction expenses and the costs of preparatory work and operations performed by the Contractor which occur before 10 percent of the total original contract amount is earned from other contract items. Items which are not to be included in the item of Mobilization include but are not limited to:

1. Any portion of the work covered by the specific contract item or incidental work which is to be included in a contract item or items.
2. Profit, interest on borrowed money, overhead, or management costs.
3. Any costs of mobilizing equipment for force account work.

Based on the lump sum contract price for "Mobilization," partial payments will be made as follows:

1. When 5 percent of the total original contract amount is earned from other contract items, excluding amounts paid for materials on hand, 50 percent of the amount bid for mobilization, or 5 percent of the total original contract amount, whichever is the least, will be paid.
2. When 10 percent of the total original contract amount is earned from other contract items, excluding amounts paid for materials on hand, 100 percent of the amount bid for mobilization, or 10 percent of the total original contract amount, whichever is the least, will be paid.
3. When the substantial completion date has been established for the project, payment of any amount bid for mobilization in excess of 10 percent of the total original contract amount will be paid.

Nothing herein shall be construed to limit or preclude partial payments otherwise provided by the contract.

1-09.8 Payment for Material on Hand

The Contracting Agency may reimburse the Contractor for materials purchased before their use in the work if they:

1. Meet the requirements of the plans and specifications;
2. Are delivered to or stockpiled near the project or other Engineer-approved storage sites; and
3. Consist of: sand, gravel, surfacing materials, aggregates, reinforcing steel, bronze plates, structural steel, machinery, piling, timber and lumber (not including forms or falsework), large signs unique to the project, prestressed concrete beams or girders, or other materials the Engineer may approve.

The Contracting Agency may reimburse the Contractor for traffic signal controllers as follows:

1. Fifty percent when the traffic signal controller and all components are received and assembled into a complete unit at the State Materials Laboratory.
2. One hundred percent when the traffic signal controller is approved for shipment to the project by the State Materials Laboratory.

The Contractor shall provide sufficient written evidence of production costs to enable the Engineer to compute the cost of Contractor-produced materials (such as sand, gravel, surfacing material, or aggregates). For other materials, the Contractor shall provide invoices from material suppliers. Each invoice shall be detailed sufficiently to enable the Engineer to determine the actual costs. Payment for materials on hand shall not exceed the total contract cost for the contract item.

If payment is based upon an unpaid invoice, the Contractor shall provide the Engineer with a paid invoice within 60 calendar days after the Contracting Agency's initial payment for materials on hand. If the paid invoice is not furnished in this time, any payment the Contracting Agency had made will be deducted from the next progress estimate and withheld until the paid invoice is supplied.

The Contracting Agency will not pay for material on hand when the invoice cost is less than \$2,000. As materials are used in the work, credits equaling the partial payments for them will be taken on future estimates. Partial payment for materials on hand shall not constitute acceptance. Any material will be rejected if found to be faulty even if partial payment for it has been made.

1-09.9 Payments

The basis of payment will be the actual quantities of work performed according to the contract and as specified for payment.

Payments will be made for work and labor performed and materials furnished under the contract according to the price in the proposal unless otherwise provided.

Partial payments will be made once each month, based upon partial estimates prepared by the Engineer. Unless otherwise provided, payments will be made from the Motor Vehicle Fund.

Failure to perform any of the obligations under the contract by the Contractor may be decreed by the Contracting Agency to be adequate reason for withholding any payments until compliance is achieved.

Upon completion of all work and after final inspection (Section 1-05.11), the amount due the Contractor under the contract will be paid based upon the final estimate made by the Engineer and presentation of a Final Contract Voucher Certification signed by the Contractor. Such voucher shall be deemed a release of all claims of the Contractor unless a claim is filed in accordance with the requirements of Section 1-09.11 and is expressly excepted from the Contractor's certification on the Final Contract Voucher Certification. The date the Secretary signs the Final Contract Voucher Certification constitutes the final acceptance date (Section 1-05.12).

If the Contractor fails, refuses, or is unable to sign and return the Final Contract Voucher Certification or any other documentation required for completion and final acceptance of the contract, the Contracting Agency reserves the right to establish a completion date (for the purpose of meeting the requirements of RCW 60.28) and unilaterally accept the contract. Unilateral final acceptance will occur only after the

Contractor has been provided the opportunity, by written request from the Engineer, to voluntarily submit such documents. If voluntary compliance is not achieved, formal notification of the impending establishment of a completion date and unilateral final acceptance will be provided by certified letter from the Secretary to the Contractor, which will provide 30 calendar days for the Contractor to submit the necessary documents. The 30 calendar day period will begin on the date the certified letter is received by the Contractor. The date the Secretary unilaterally signs the Final Contract Voucher Certification shall constitute the completion date and the final acceptance date (Section 1-05.12). The reservation by the Contracting Agency to unilaterally accept the contract will apply to contracts that are physically completed in accordance with Section 1-08.5, or for contracts that are terminated in accordance with Section 1-08.10. Unilateral final acceptance of the contract by the Contracting Agency does not in any way relieve the Contractor of their responsibility to comply with all Federal, State, tribal, or local laws, ordinances, and regulations that affect the work under the contract.

Payment to the Contractor of partial estimates, final estimates, and retained percentages shall be subject to controlling laws.

1-09.9(1) Retainage

Pursuant to RCW 60.28, a sum of 5 percent of the monies earned by the Contractor will be retained from progress estimates. Such retainage shall be used as a trust fund for the protection and payment (1) to the State with respect to taxes imposed pursuant to Title 82, RCW, and (2) the claims of any person arising under the Contract.

Monies retained under the provisions of RCW 60.28 shall, at the option of the Contractor, be:

1. Retained in a fund by the Contracting Agency, or
2. Deposited by the Contracting Agency in an escrow (interest-bearing) account in a bank, mutual saving bank, or savings and loan association (interest on monies so retained shall be paid to the Contractor). Deposits are to be in the name of the Contracting Agency and are not to be allowed to be withdrawn without the Contracting Agency's written authorization. The Contracting Agency will issue a check representing the sum of the monies reserved, payable to the bank or trust company. Such check shall be converted into bonds and securities chosen by the Contractor as the interest accrues.

At the time the Contract is executed the Contractor shall designate the option desired. The Contractor in choosing option (2) agrees to assume full responsibility to pay all costs that may accrue from escrow services, brokerage charges or both, and further agrees to assume all risks in connection with the investment of the retained percentages in securities. The Contracting Agency may also, at its option, accept a bond in lieu of retainage.

Release of the retainage will be made 60 days following the Completion Date (pursuant to RCW 39.12, and RCW 60.28) provided the following conditions are met:

1. On contracts totaling more than \$20,000, a release has been obtained from the Washington State Department of Revenue.
2. Affidavits of Wages Paid for the Contractor and all Subcontractors are on file with the Contracting Agency (RCW 39.12.040).

3. A release has been obtained from the Washington State Department of Labor & Industries (per Section 1-07.10) and the Washington State Employment Security Department.
4. All claims, as provided by law, filed against the retainage have been resolved.
In the event claims are filed and provided the conditions of 1, 2, and 3 are met, the Contractor will be paid such retained percentage less an amount sufficient to pay any such claims together with a sum determined by the Contracting Agency sufficient to pay the cost of foreclosing on claims and to cover attorney's fees.

1-09.10 Payment for Surplus Processed Materials

After the Contract is completed, the Contractor will be reimbursed actual production costs for surplus processed material produced by the Contractor from Contracting Agency-provided sources if its value is \$3,000 or more (determined by actual production costs).

The quantity of surplus material eligible for reimbursement of production costs shall be the quantity produced (but an amount not greater than 110 percent of plan quantity or as specified by the Engineer), less the actual quantity used. The Contracting Agency will determine the actual amount of surplus material for reimbursement.

The Contractor shall not dispose of any surplus material without permission of the Engineer. Surplus material shall remain the property of the Contracting Agency without reimbursement to the Contractor if it is not eligible for reimbursement.

1-09.11 Disputes and Claims

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) for submitting a claim.

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. The fact that the Contractor has provided a proper notification, provided a properly filed claim, or provided the Engineer access to records of actual cost, shall not in any way be construed as proving or substantiating the validity of the claim. If the claim, after consideration by the Engineer, is found to have merit, the Engineer will make an equitable adjustment either in the amount of costs to be paid or in the time required for the work, or both. If the Engineer finds the claim to be without merit, no adjustment will be made.

All claims filed by the Contractor shall be in writing and in sufficient detail to enable the Engineer to ascertain the basis and amount of the claim. All claims shall be submitted to the Project Engineer as provided in Section 1-05.15. As a minimum, the following information must accompany each claim submitted:

1. A detailed factual statement of the claim for additional compensation and time, if any, providing all necessary dates, locations, and items of work affected by the claim.
2. The date on which facts arose which gave rise to the claim.
3. The name of each Contracting Agency individual, official, or employee involved in or knowledgeable about the claim.
4. The specific provisions of the contract which support the claim and a statement of the reasons why such provisions support the claim.
5. If the claim relates to a decision of the Engineer which the contract leaves to the Engineer's discretion or as to which the contract provides that the Engineer's decision is final, the Contractor shall set out in detail all facts supporting its position relating to the decision of the Engineer.
6. The identification of any documents and the substance of any oral communications that support the claim.
7. Copies of any identified documents, other than Contracting Agency documents and documents previously furnished to the Contracting Agency by the Contractor, that support the claim (manuals which are standard to the industry, used by the Contractor, may be included by reference).
8. If an extension of time is sought:
 - a. The specific days and dates for which it is sought,
 - b. The specific reasons the Contractor believes a time extension should be granted,
 - c. The specific provisions of Section 1-08.8 under which it is sought, and
 - d. The Contractor's analysis of its progress schedule to demonstrate the reason for a time extension.
9. If additional compensation is sought, the exact amount sought and a breakdown of that amount into the following categories:
 - a. Labor;
 - b. Materials;
 - c. Direct equipment. The actual cost for each piece of equipment for which a claim is made or in the absence of actual cost, the rates established by the AGC/WSDOT Equipment Rental Agreement which was in effect when the work was performed. In no case shall the amounts claimed for each piece of equipment exceed the rates established by that Equipment Rental Agreement even if the actual cost for such equipment is higher. The Contracting Agency may audit the Contractor's cost records as provided in Section 1-09.12 to determine actual equipment cost. The following information shall be provided for each piece of equipment:
 - (1) Detailed description (e.g., Motor Grader Diesel Powered Caterpillar 12 "G," Tractor Crawler ROPS & Dozer Included Diesel, etc.);
 - (2) The hours of use or standby; and
 - (3) The specific day and dates of use or standby;
 - d. Job overhead;
 - e. Overhead (general and administrative);
 - f. Subcontractor's claims (in the same level of detail as specified herein is required for any subcontractor's claims); and

- g. Other categories as specified by the Contractor or the Contracting Agency.
- 10. A notarized statement shall be submitted to the Project Engineer containing the following language:

Under the penalty of law for perjury or falsification, the undersigned,

_____ (name) _____ (title)

of _____ (company)

hereby certifies that the claim for extra compensation and time, if any, made herein for work on this contract is a true statement of the actual costs incurred and time sought, and is fully documented and supported under the contract between the parties.

Dated _____ /s/ _____

Subscribed and sworn before me this _____ day of _____

Notary Public

My Commission Expires: _____

It will be the responsibility of the Contractor to keep full and complete records of the costs and additional time incurred for any alleged claim. The Contractor shall permit the Engineer to have access to those records and any other records as may be required by the Engineer to determine the facts or contentions involved in the claim. The Contractor shall retain those records for a period of not less than three years after final acceptance.

The Contractor shall pursue administrative resolution of any claim with the Engineer or the designee of the Engineer.

Failure to submit with the Final Contract Voucher Certification such information and details as described in this section for any claim shall operate as a waiver of the claims by the Contractor as provided in Section 1-09.9.

Provided that the Contractor is in full compliance with all the provisions of this section and after the formal claim document has been submitted, the Contracting Agency will respond, in writing, to the Contractor as follows:

1. Within 45 calendar days from the date the claim is received by the Contracting Agency if the claim amount is less than \$100,000;
2. Within 90 calendar days from the date the claim is received by the Contracting Agency if the claim amount is equal to or greater than \$100,000; or
3. If the above restraints are unreasonable due to the complexity of the claim under consideration, the Contractor will be notified within 15 calendar days from the date the claim is received by the Contracting Agency as to the amount of time which will be necessary for the Contracting Agency to prepare its response.

Full compliance by the Contractor with the provisions of this section is a contractual condition precedent to the Contractor's right to seek judicial relief.

1-09.11(3) Time Limitation and Jurisdiction

For the convenience of the parties to the contract it is mutually agreed by the parties that any claims or causes of action which the Contractor has against the State of Washington arising from the contract shall be brought within 180 calendar days from the date of final acceptance (Section 1-05.12) of the contract by the State of Washington; and it is further agreed that any such claims or causes of action shall be brought only in the Superior Court of Thurston County. The parties understand and agree that the Contractor's failure to bring suit within the time period provided, shall be a complete bar to any such claims or causes of action. It is further mutually agreed by the parties that when any claims or causes of action which the Contractor asserts against the State of Washington arising from the contract are filed with the State or initiated in court, the Contractor shall permit the State to have timely access to any records deemed necessary by the State to assist in evaluating the claims or action.

1-09.12 Audits

1-09.12(1) General

The Contractor's wage, payroll, and cost records on this contract shall be open to inspection or audit by representatives of the Contracting Agency during the life of the contract and for a period of not less than three years after the date of final acceptance of the contract. The Contractor shall retain these records for that period. The Contractor shall also guarantee that the wage, payroll, and cost records of all subcontractors and all lower tier subcontractors shall be retained and open to similar inspection or audit for the same period of time. The audit may be performed by employees of the Contracting Agency or by an auditor under contract with the Contracting Agency. The Contractor, subcontractors, or lower tier subcontractors shall provide adequate facilities, acceptable to the Engineer, for the audit during normal business hours. The Contractor, subcontractors, or lower tier subcontractors shall make a good faith effort to cooperate with the auditors. If an audit is to be commenced more than 60 calendar days after the final acceptance date of the contract, the Contractor will be given 20 calendar days notice of the time when the audit is to begin. If any litigation, claim, or audit arising out of, in connection with, or related to this contract is initiated, the wage, payroll, and cost records shall be retained until such litigation, claim, or audit involving the records is completed.

1-09.12(2) Claims

All claims filed against the Contracting Agency shall be subject to audit at any time following the filing of the claim. Failure of the Contractor, subcontractors, or lower tier subcontractors to maintain and retain sufficient records to allow the auditors to verify all or a portion of the claim or to permit the auditor access to the books and records of the Contractor, subcontractors, or lower tier subcontractors shall constitute a waiver of a claim and shall bar any recovery thereunder.

1-09.12(3) Required Documents for Audits

As a minimum, the auditors shall have available to them the following documents:

1. Daily time sheets and supervisor's daily reports.
2. Collective Bargaining Agreements.
3. Insurance, welfare, and benefits records.

4. Payroll registers.
5. Earnings records.
6. Payroll tax forms.
7. Material invoices and requisitions.
8. Material cost distribution worksheet.
9. Equipment records (list of company equipment, rates, etc.).
10. Vendors', rental agencies', subcontractors', and lower tier subcontractors' invoices.
11. Contracts between the Contractor and each of its subcontractors, and all lower-tier subcontractor contracts and supplier contracts.
12. Subcontractors' and lower tier subcontractors' payment certificates.
13. Canceled checks (payroll and vendors).
14. Job cost reports, including monthly totals.
15. Job payroll ledger.
16. General ledger.
17. Cash disbursements journal.
18. Financial statements for all years reflecting the operations on this contract. In addition, the contracting Agency may require, if it deems appropriate, additional financial statements for 3 years preceding execution of the contract and 3 years following final acceptance of the contract.
19. Depreciation records on all company equipment whether these records are maintained by the company involved, its accountant, or others.
20. If a source other than depreciation records is used to develop costs for the Contractor's internal purposes in establishing the actual cost of owning and operating equipment, all such other source documents.
21. All documents which relate to each and every claim together with all documents which support the amount of damages as to each claim.
22. Worksheets or software used to prepare the claim establishing the cost components for items of the claim including but not limited to labor, benefits and insurance, materials, equipment, subcontractors, all documents which establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals.
23. Worksheets, software, and all other documents used by the Contractor to prepare its bid.

An audit may be performed by employees of the Contracting Agency or a representative of the Contracting Agency. The Contractor and its subcontractors shall provide adequate facilities acceptable to the Contracting Agency for the audit during normal business hours. The Contractor and all subcontractors shall cooperate with the Contracting Agency's auditors.

1-09.13 Claims Resolution**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 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 any nonbinding alternative dispute resolution process, binding arbitration or litigation.

1-09.13(2) Nonbinding Alternative Disputes Resolution (ADR)

Nonbinding ADR processes are encouraged and available upon mutual agreement of the Contractor and the Contracting Agency for all claims submitted in accordance with Section 1-09.11, provided that:

1. All the administrative remedies provided for in the contract have been exhausted;
2. The Contracting Agency has been given the time and opportunity to respond to the Contractor as provided in Section 1-09.11(2); and
3. The Contracting Agency has determined that it has sufficient information concerning the Contractor's claims to participate in a nonbinding ADR process.

The Contracting Agency and the Contractor mutually agree that the cost of the nonbinding ADR process shall be shared equally by both parties with each party bearing its own preparation costs.

The type of nonbinding ADR process shall be agreed upon by the parties and shall be conducted within the State of Washington at a location mutually acceptable to the parties.

The Contractor agrees that the participation in a nonbinding ADR process does not in any way waive the requirement that binding arbitration or litigation proceedings must commence within 180 calendar days of final acceptance of the contract, the same as any other claim or causes of action as provided in Section 1-09.11(3).

1-09.13(3) Claims \$250,000 or Less

The Contractor and the Contracting Agency mutually agree that those claims which total \$250,000 or less, submitted in accordance with Section 1-09.11 and not resolved by nonbinding ADR processes, shall be resolved through mandatory and binding arbitration as described herein.

1-09.13(3)A Administration of Arbitration

Arbitration shall be as agreed by the parties or, if the parties cannot agree, arbitration shall be administered through the American Arbitration Association (AAA) using the following arbitration methods:

1. The current version of the Northwest Region Expedited Commercial Arbitration Rules shall be used for claims with an amount less than \$25,000.
2. The current version of the Expedited Procedures of the Construction Industry Arbitration Rules shall be used for claims with an amount equal to or greater than \$25,000 and less than \$50,000.

3. The current version of the standard procedures of the Construction Industry Arbitration Rules shall be used for claims with an amount equal to or greater than \$50,000 and not greater than \$250,000.

The Contracting Agency and the Contractor mutually agree the venue of any arbitration hearing shall be within the State of Washington and any such hearing shall be conducted within the State of Washington.

The Contracting Agency and the Contractor mutually agree to be bound by the decision of the arbitrator, and judgment upon the award rendered by the arbitrator may be entered in the Superior Court of Thurston County. The decision of the arbitrator and the specific basis for the decision shall be in writing. The arbitrator shall use the contract as a basis for decisions.

1-09.13(3)B Procedures to Pursue Arbitration

If the dispute cannot be resolved through administrative procedures provided in Sections 1-04.5, 1-09.11, and any special provision provided in the contract for resolution of disputes or through a mutually agreed upon nonbinding ADR process, the Contractor shall advise the Engineer, in writing, that mandatory and binding arbitration is desired. The parties may agree on an arbitration process, or, if the parties cannot agree a demand for arbitration shall be filed by the Contractor, in accordance with the AAA rules, with the Contracting Agency, and with the AAA. Selection of the arbitrator and the administration of the arbitration shall proceed in accordance with AAA rules using arbitrators from the list developed by the AAA, except that: for claims under \$25,000 using the Northwest Region Expedited Commercial Arbitration Rules, arbitration selection shall proceed pursuant to Section 55 of the Expedited Procedure of the Construction Industry Arbitration Rules. Arbitration shall proceed utilizing the appropriate rule of the AAA as determined by the dollar amount of the claim as provided in Section 1-09.13(3)A.

Unresolved disputes which do not involve delays or impacts to unchanged work may be brought to binding arbitration prior to physical completion of the project, provided that:

1. All the administrative remedies provided for in the contract have been exhausted;
2. The dispute has been pursued to the claim status as provided in Section 1-09.11(2); and
3. The Contractor certifies in writing that claims for delays or impacts to the work will not result from the dispute.

Unless the Contracting Agency and the Contractor agree otherwise, all other unresolved claims (disputes which have been pursued to the claim status) which arise from a contract must be brought in a single arbitration hearing and only after physical completion of the contract. The total of those unresolved claims cannot be greater than \$250,000 to be eligible for arbitration.

In addition, the Contractor agrees arbitration proceedings must commence, by filing of the aforementioned demand for arbitration, within 180 calendar days of final acceptance of the contract, the same as any other claim or causes of action as provided in Section 1-09.11(3).

The scope and extent of discovery shall be determined by the arbitrator in accordance with AAA rules. In addition, each party for claims greater than \$25,000 shall serve upon the other party a "statement of proof." The statement of proof shall be served, with a copy to the AAA, no less than 20 calendar days prior to the arbitration hearing and shall include:

1. The identity, current business address, and residential address of each witness who will testify at the hearing,
2. The identity of a witness as an expert if an expert witness is to be called, a statement as to the subject matter and the substance of the facts and opinions on which the expert is expected to testify, a summary of the grounds for each opinion, and a resume of the expert's qualifications, and
3. A list of each document that the party intends to offer in evidence at the arbitration hearing. Either party may request from the other party a copy of any document listed. If such a request is made, a copy of the document shall be provided within five calendar days from the date the request is received.

The arbitrator may permit a party to call a witness or offer a document not shown or included in the statement of proof only upon a showing of good cause.

1-09.13(4) Claims in Excess of \$250,000

The Contractor and the Contracting Agency mutually agree that those claims in excess of \$250,000, submitted in accordance with Section 1-09.11 and not resolved by nonbinding ADR processes, shall be resolved through litigation unless the parties mutually agree to resolve the claim through binding arbitration.

COURT OF APPEALS
DIVISION II

No. 41563-1-II

11 MAY 25 PM 12:56

STATE OF WASHINGTON

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

CLERK
DEPUTY

REALM, INC.,

Appellant,

vs.

CITY OF OLYMPIA

Respondent.

CERTIFICATE OF SERVICE

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I HEREBY CERTIFY under penalty of perjury under the laws of the State of Washington that on this 25th day of March, 2011, I caused to be served a true and correct copy of the following document(s):

1. Brief of Respondent; and
2. Certificate of Service

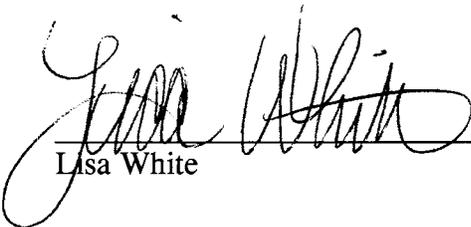
to the individual(s) named below in the specific manner indicated:

Attorney for Appellant

Thomas F. Miller
Miller Law Office, P.S.
2620 RW Johnson Blvd. SW, Ste. 212
Tumwater, WA 98512

- Personal Delivery
- U.S. Mail
- Certified Mail
- Overnight Mail
- Fax # 360-753-3335
- email:

DATED this 25th day of May, 2011, at Bellevue, Washington.



Lisa White