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NO. 94711-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NOVA CONTRACTING, INC.,

Respondent,

vs.

CITY OF OLYMPIA,

Petitioner.

BRIEF OF *AMICUS CURIAE*
WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS IN SUPPORT OF PETITIONER

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I. INTRODUCTION, IDENTITY & INTEREST OF *AMICUS CURIAE*

Amicus curiae Washington State Association of Municipal Attorneys (WSAMA) has already explained succinctly why the Court of Appeals impermissibly disregarded contractual language forbidding a “Contractor’s right to seek judicial relief” absent “[f]ull compliance” with the notice, protest, and claim requirements in the Standard Specifications. WSDOT Std. Specifications § 1-09.11(2), at 1-101 (2012), *available at* <http://www.wsdot.wa.gov/publications/manuals/fulltext/M41-10/SS2012.pdf> [hereinafter “WSDOT SS”]; *see* Memo. of *Amicus Curiae* in Supp. of Rvw. (filed Aug. 16, 2017). WSAMA incorporates that analysis, but does not repeat it.

WSAMA offers this brief to address two additional points that are implicitly advanced in the parties’ supplemental briefing. First, Respondent Nova Contracting devotes roughly half of its brief to argue why this Court should reconsider *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, 386-91, 78 P.3d 161 (2003). *See* Supp’l Br. of Resp’t at 3-9. Petitioner City of Olympia aptly explains why this Court should refuse that invitation. Supp’l Br. of Pet’r at 16-17. WSAMA adds to that analysis, highlighting how Nova’s request cannot be squared with this Court’s most recent application of *stare decisis*. *See Deggs v. Asbestos Corp.*, 186 Wn.2d 716, 727-32, 381 P.3d 32 (2016).

Second, WSAMA explains why Nova’s criticisms of the alleged “one-sided” nature of the Standard Specifications amounts to not only a

policy argument reserved for a different branch of government, but also why the legislature has refused to adopt that position. Specifically, public works contracts are fundamentally different from private contracting because the public body is mandated by law to accept a specific bid without any ability to negotiate. The Standard Specifications therefore serve as an important safeguard, ensuring that the public coffers are not unnecessarily targeted by contractors who, to the detriment of the taxpayer, realize mid-contract that they left dollars on the table when they submitted their bid.

WSAMA is a nonprofit Washington corporation whose membership is comprised of the attorneys who represent cities and towns in this state, and that provides education and training in the areas of municipal law to its members. This case concerns the meaning and effect of the Standard Specifications published by the Washington State Department of Transportation. WSDOT has declared that the Standard Specifications were “developed to serve as a baseline for the work that is delivered to the public by the Washington State Department of Transportation.” WSDOT SS, at p. i. Additionally, standard specifications (including the very ones at issue here) are often incorporated by municipalities in their public works contracts, as demonstrated in various appellate decisions. *See Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 764 n.3, 174 P.3d 54 (2007); *Mike M. Johnson*, 150 Wn.2d at 378; *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 5, 277 P.3d 679 (2012); *Diamaco, Inc. v. Aetna Cas. & Sur.*, 97 Wn.

App. 335, 343, 983 P.2d 707 (1999); *Carl T. Madsen v. Babler Bros.*, 25 Wn. App. 880, 881 n.2, 610 P.2d 958 (1980). *American Safety* and *MMJ* are two examples in which this Court enforced provisions from the very same Standard Specifications at issue here (albeit earlier versions, but still containing the same operative language) and held that the terms of the specifications barred suits in their entirety. *Am. Safety*, 162 Wn.2d at 771-72; *MMJ*, 150 Wn.2d at 392. Municipalities around the state represented by WSAMA members continue to incorporate WSDOT Standard Specifications into their public works contracts because of the certainty and clarity they provide.

This Court previously acknowledged WSAMA's interest in this case and granted it leave to file a memorandum under RAP 13.4(h) to support Olympia's petition for review. *See* Letter Dated 8/16/2017 from M. Johnston to D. Lloyd, on file in *Nova Contracting v. City of Olympia*, No. 94711-2 (Wash. S. Ct.). WSAMA's interest remains unchanged since that time.

II. STATEMENT OF THE CASE

This case arises out of a public works contract that adopted the Standard Specifications. CP at 72. The lawsuit surrounds the City of Olympia's response to submittals by Nova Contracting. CP at 103-14. The City rejected various submittals, and Nova did not immediately file a protest to the rejections nor supplement any protest within 15 days thereafter. CP at 479.

Nova sued Olympia based in large part on its contention the City wrongfully rejected the submittals, and the trial court granted summary judgment to the City. But the Court of Appeals reversed, holding that Nova could proceed on a theory of “expectancy and consequential damages” because the protest procedure in the Standard Specifications “does not apply” to those categories of relief. *Nova Contracting, Inc. v. City of Olympia*, No. 48644-0-II, available at 2017 Wash. App. LEXIS 913 & 2017 WL 1382883 (Wash. Ct. App. Apr. 18, 2017), ¶ 19 n.3,¹ review granted, 189 Wn.2d 1038 (2017). More specifically, the Court of Appeals allowed Nova to proceed on a theory that the City violated the duty of good faith and fair dealing as “applied to the City’s consideration of Nova’s submittals.” *Id.* ¶ 31. In the Court of Appeals’ view, the evidence was disputed as to whether the City properly exercised its discretionary authority to reject the submittals, making summary judgment improper. *Id.* ¶¶ 32-44.

III. ARGUMENT

For reasons explained in WSAMA’s Memorandum in Support of Olympia’s Petition for Review, the Court of Appeals’ analysis incorrectly overlooked both *American Safety*, 162 Wn.2d 762, and *Mike M. Johnson*, , 150 Wn.2d 375. WSAMA offers this brief to counter two additional points suggested by Nova in its supplemental brief.

¹ Consistent with the Reporter’s Style Sheet, WSAMA cites to the paragraph number.

A. The standard required to reconsider precedent is demanding for good reason, and Nova has fallen far short of satisfying its burden to justify it.

The first section of Nova’s supplemental brief is entitled, “*Mike M. Johnson* Requires Revision.” Supp’l Br. of Resp’t at 3. Nova continues by claiming the case “has ... created a system of perverse incentives,” *id.* at 5, creating what Nova describes as “a grossly unfair and lopsided set of contract performance and administration duties,” *id.* at 6. Wholly absent from Nova’s briefing, however, is any discussion of what burden must be overcome to reconsider precedent: the prior decision ““has been shown to be incorrect and harmful,”” or ““the legal underpinnings of our precedent have changed or disappeared altogether.”” *Deggs*, 186 Wn.2d at 730 (quoting *W.G. Clark Constr. Co. v. P. NW Reg’l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014)). *Deggs* is instructive. At issue there was whether the Court should abandon three decisions that barred wrongful death claims from proceeding “if the statute of limitations on the underlying injury had run before the decedent died.” *Id.* at 724. The Court acknowledged the petitioners’ “fairly persuasive argument that [the Court’s] precedents were incorrect at the time they were announced,” but refused to overrule them because the petitioner there did “not show[] that they [we]re harmful.” *Id.* at 728. The Court pointed to “the legislature’s lack of response” as “add[ing] weight to the conclusion that [the prior decisions] have not been harmful,” even if the prior cases were incorrectly decided. *Id.* at 729.

That same analysis applies to *Mike M. Johnson*. The legislature recently considered two bills that sought to overrule *Mike M. Johnson*. See HB 1574 (65th Legis., Read 1st Time 1/24/17); SB 5788 (65th Legis., Read 1st Time 2/10/17). Neither bill advanced to the floor for a vote. As *Deggs* correctly recognized, the lack of any legislative response undercuts Nova’s argument that *Mike M. Johnson* has been harmful, despite its nonspecific anecdotal criticisms how public works contracts are managed. *Deggs*, 186 Wn.2d at 729

Additionally, Nova had not made a “clear showing” that *Mike M. Johnson* was incorrectly decided, even if it could meet the harmfulness element. *Deggs*, 186 Wn.2d at 727-28 (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). The Court has recognized that “[w]ithout the stabilizing effect of [stare decisis], law could become subject to incautious action or the whims of current holders of judicial office.” *Stranger Creek*, 77 Wn.2d at 653. The most Nova has offered to justify a claim that *Mike M. Johnson* was wrongly decided is to advance an *ad hominem* attack on the Washington judiciary, claiming the judges of this state are ill-equipped to decide this specific body of law. See Supp’l Br. of Rep’t at 4 (“while Washington State cases are usually heard by judges and juries *without a deep background in public contracting*, the *Federal system is populated by experts* and the decisions reflect the benefit of that expertise”) (emphasis added). Strikingly, though belittling this Court’s ability to adjudicate disputes in this area of law,

Nova fails to identify a single federal case that suggests—even in *dicta*—that *Mike M. Johnson* was wrongly decided.

Nor has Nova argued, much less persuasively so, that *Mike M. Johnson*'s “legal underpinnings ... have changed or disappeared altogether.” *Deggs*, 186 Wn.2d at 730 (quoting *W.G. Clark Constr. Co.*, 180 Wn.2d at 66). *Mike M. Johnson* based its holding on the “historically upheld ... principle that procedural contract requirements must be enforced absent either a waiver by the benefiting party or an agreement between the parties to modify the contract.” *Mike M. Johnson*, 150 Wn.2d at 386-87 (citing *Bjerkeseeth v. Lysnes*, 173 Wash. 229, 22 P.2d 660 (1933), *Ellis-Mythroie Lumber Co. v. Bratt*, 119 Wash. 142, 153, 205 P. 398 (1922), *Wiley v. Hart*, 74 Wash. 142, 146-48, 132 P. 1015 (1913), *Sime Constr. Co. v. Wash. Pub. Power Supply Sys.*, 28 Wn. App. 10, 621 P.2d 1299 (1980), and *Swenson v. Lowe*, 5 Wn. App. 186, 188, 486 P.2d 1120 (1971)). This principle rests on the well-settled rule that courts will enforce contractual terms unless the term is unconscionable. *Puget Sound Fins., LLC v. Unisearch, Inc.*, 146 Wn.2d 428, 438, 47 P.3d 940 (2002). Whether a term is unconscionable is a question of law for the court, not the jury, and the party claiming unconscionability shoulders the burden to prove the clause or contract at issue should be invalidated. *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 262, 544 P.2d 20 (1975); *see also Puget Sound Fins.*, 146 Wn.2d at 439. There being nothing advanced to undercut these well settled principles, the inescapable conclusion is that

the legal underpinnings of *Mike M. Johnson* are as solidified today as they were 15 years ago when the case was decided.

Ironically, Nova admits in its brief that “this is not the proper case” to reconsider or overrule *Mike M. Johnson*. Supp’l Br. of Resp’t at 9. On this point, WSAMA agrees. But to be sure, the decision should not be reconsidered at all.

B. Developed by experts, the Standard Specifications protect the taxpayers to ensure that public works are completed on budget and without delay.

Significantly, the exact contract provisions that Nova criticizes as unfair to contractors were developed after

years of refinement through the literally hundreds of projects the Department delivers each year. In addition, the standards are the result of countless hours of development and review by both our internal WSDOT staff as well as our industry partners through the joint WSDOT/Associated General Contractors’ Standing Committees.

WSDOT SS at i (Foreward). In other words, the contractual provisions Nova claims to be so patently unfair to contractors were developed through a committee comprised of “the premier professional association of contractors in the State of Washington.” See Association of General Contractors, *About*, at <http://www.agcwa.com/about-us> (last visited Mar. 20, 2018). One cannot reasonably claim that contractual provisions are unfair to contractors when they are written in part by contractors.

Ignoring this fact, Nova complains that “[p]ublic contracts are ... contracts of adhesion,” and that contractors are deprived of “any bargaining power” because “they bid on and accept public contracts on a

‘take it or leave it basis.’” Supp’l Br. of Resp’t at 5, 6. Then, Nova writes that “public contracts serve the public good because they are contracts of adhesion,” but as a result “public contracts should be scrutinized and approached with judicial skepticism.” *Id.* at 6. Not true. There is no basis for “judicial skepticism” of contracts that “serve the public good,” and Nova points to no authority supporting such a proposition. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *De Heer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

More fundamentally, the “adhesion” nature of public works contracts benefits contractors too. Absent specific exemptions, a public agency is left with only two options when it receives a responsive bid from a responsible bidder lower than all other bids: award the contract as is or start all over. RCW 39.04.010, .280; *Platt Elec. Supply v. City of Seattle*, 16 Wn. App. 265, 275-76, 555 P.2d 421 (1976). As this Court recognized, public bidding “provide[s] a fair forum for those interested in undertaking public projects.” *Gostovich v. City of W. Richland*, 75 Wn.2d 583, 588, 452 P.2d 737 (1969). The bidding process governs regardless of whether the most reputable contractor in the country’s bid is only a dollar less than the lowest bid. In short, public bidders are provided a level playing field on which to compete against one another, enabling smaller partnerships to obtain contracts otherwise unattainable. The legislature has declared that this process best exemplifies Washington’s public policy.

See Rousso v. State, 170 Wn.2d 70, 92, 239 P.3d 1084 (2010) (“It is the role of the legislature, not the judiciary, to balance public policy interests and enact law.”). Thus, the “adhesion” nature of public works contracts enables all contractors to participate in the construction of Washington’s roads, parks, and bridges, which enables a more robust and free market.

The tradeoff, however, is that the public agency must be protected from contractors who obtain the contract by submitting the lowest bid, only to procure multiple amendments that drive up the contractually agreed price. *Gostovich*, 75 Wn.2d at 587 (noting “the primary purpose for the requirement of public bidding is for the protection of the general public”). Additionally, the procedure outlined by the Standard Specifications enables public works projects to be completed on time and on budget, while still enabling contractors dissatisfied with an owner’s or engineer’s directive to seek redress. Proper protests enable disputes to be resolved expeditiously while performance continues. *Accord Realm*, 168 Wn. App. at 11 (noting that the Standard Specifications provide “the benefit of advance notice and the opportunity to resolve disputes before they devolve into litigation,” and commenting that without the notice, protest, and claim procedure, “contractors could simply choose to litigate their disputes after termination without providing notice of disputes during the work”).

An examination of the Standard Specifications provisions illustrates this framework. The “[c]ontracting Agency” is the “[a]gency of Government that is responsible for the execution and administration of the

contract.” WSDOT SS § 1-01, at p. 1-4. The “[e]ngineer” is “[t]he Contracting Agency’s representative who administers the construction program for the Contracting Agency.” *Id.* § 1-01, at p. 1-5.) The “Project Engineer” is “[t]he Engineer’s representative who directly supervises the engineering and administration of a construction project.” (*Id.* § 1-01, at p. 1-6.) “Work” means “[t]he provision of all labor, materials, tools, equipment, and everything needed to successfully complete a project according to the Contract.” *Id.* And “[w]orking Drawings” are defined to mean:

Shop drawings, shop plans, erection plans, falsework plans, framework plans, cofferdam, cribbing and shoring plans, bending diagrams for reinforcing steel, or any other supplementary plans or similar data, including a schedule of submittal dates for Working Drawings where specified, which the Contractor must submit to the Engineer for approval.

Id. The contract is clear as to what the Contractor’s duties are when the Engineer gives an order. Section 1-05.1 states in relevant part:

The Engineer’s decisions will be final on all questions including, but not limited to, the following:

1. Quality and acceptability of materials and Work,
....
4. Interpretation of plans and specifications,
....
6. Fulfillment of the contract by the Contractor,
....

11. Approval of Working Drawings.

Id. § 1-05.1, at p. 1-25. Section 1-05.3 requires “[t]he Contractor [to] submit supplemental Working Drawings as required for the performance of the Work. *Id.* § 1-05.3, at p. 1-26.

In regards to an Engineer’s order to remedy defective work, Section 1-05.7 provides that a “Contractor shall immediately *remedy, remove, replace or dispose of unauthorized or defective work* or materials and bear all costs of doing so.” *Id.* § 1-05.7, at p. 1-28. In regards to other orders,² the Contractor and Engineer are encouraged to come to a mutual agreement as to how much to adjust the contract price. *Id.* § 1-04.4, at pp. 1-22 *thru* 1-23.

But the Specifications contemplate those circumstances in which the parties cannot agree. Specifically, the Contractor is obligated to “give a signed written notice of protest” if it “disagree[s] 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.*” *Id.* § 1-04.5, at p. 1-21 (emphasis added). But regardless of whether the Contractor “disagree[s] with anything required” by the Engineer, the contract is clear on what his duties are: “In

² Only when the changes ordered by the Engineer “significantly change the character of the work under the contract” is an adjustment to the Contractor’s compensation warranted. WSDOT SS § 1-04.4, at p. 1-20. Circumstances in which a “significant change” exists include “[w]hen the character of the work as altered *differs materially in kind or nature* from that involved or included in the original proposed construction.” *Id.* (emphasis added).

spite of any protest, *the Contractor shall proceed promptly with the work as the Engineer orders.*” *Id.* § 1-04.5, at p. 1-22 (emphasis added).

The protest procedure requires the contractor to “[i]mmediately give a signed written notice of protest to the Project Engineer” and then “[s]upplement the written protest within 15 calendar days.” WSDOT SS § 1-04.5, at 1-21 *thru* 1-22.) The same section, 1-04.5, further provides that “[b]y 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.*” *Id.* § 1-04.5, at p. 1-21 (emphasis added). Section 1-04.5 further provides that “[b]y failing to follow the procedures of this section *and* Section 1-09.11, the Contractor *completely waives any claims for protested work.*” *Id.* § 1-04-5, at p.1-22 (emphasis added).

That referenced section (1-09.11) provides:

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.

WSDOT SS § 1.09.11(2), at p. 1-99.

What this means is that a contractor is obligated to perform the work as it is ordered to do. If the contractor believes it is entitled to additional compensation, it must perform the work under protest and file a claim after the fact. What the contractor cannot do is simply disregard a

directive or interpretation with which it disagrees and bring the public work to a halt. Yet the record in this case reveals Nova did exactly that.

And as argued in WSAMA's previously filed memorandum, the Court of Appeals' opinion permitting Nova to pursue consequential damages cannot be squared with the plain language of Section 1-09.4: "No claim for consequential damages of any kind will be allowed." *Id.* § 1-09.4, at p.1-89. In sum, the Standard Specifications provide the taxpayer with a procedure that assures the completion of public works on time and on budget. The Court of Appeals disregarded that assurance and should be reversed.

IV. CONCLUSION

For the reasons advanced above, in WSAMA's RAP 13.4(h) Memorandum, and by Olympia, this Court should reverse the Court of Appeals and reinstate the trial court's summary judgment order.

RESPECTFULLY SUBMITTED on March 20, 2018.



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