

FILED
SUPREME COURT
STATE OF WASHINGTON
1/2/2018 2:26 PM
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CLERK

Supreme Court No. 94711-2
Court of Appeals No. 48644-0-II
Thurston County Superior Court Case No. 14-2-02223-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF OLYMPIA,

Petitioner,

vs.

NOVA CONTRACTING, INC.,

Respondent.

**SUPPLEMENTAL BRIEF OF PETITIONER – CITY OF
OLYMPIA**

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I. ASSIGNMENTS OF ERROR

A. ASSIGNMENT OF ERROR

1. Conflict with Supreme Court and Court of Appeals Precedent

The Court of Appeals erred in reversing the trial court because its decision directly conflicts with the Supreme Court's decision in *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 386-87, 78 P.3d 161 (2003)¹ and related cases that require compliance with contract claim provisions in public works contracts as a condition precedent to litigation, regardless of the type of damages or relief requested.

B. ISSUES PRESENTED FOR REVIEW

1. Failure to Exhaust Administrative Remedies

Can a contractor ignore contractually-mandated claim resolution procedures because it is asking for expectancy and consequential damages?

¹ *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 386-87, 78 P.3d 161 (2003)

Answer: No

2. **Failure to Comply with Claim Notice Procedures**

Does a claim alleging violation of the duty of good faith and fair dealing override the contractor's noncompliance with a mandatory claim resolution procedure found in the same contract?

Answer: No

II. INTRODUCTION

The decision by the Court of Appeals that contract claim notice provisions are inapplicable to expectancy and consequential damages lacks any recognized legal basis in Washington.

This decision by the Court of Appeals is directly contrary to the holding in *Mike Johnson* and subsequent cases. The vast majority of public works contracts in Washington incorporate the Washington State Department of Transportation Standard Specifications. Allowing such a ruling to stand uncorrected would have consequences far beyond the contract at issue in this matter. The Court of Appeals should be reversed.

III. STATEMENT OF THE CASE

On May 21, 2014, the City of Olympia (“City”) awarded a public works project to Nova Contracting, Inc. (“Nova”) to re-build a culvert.² The work involved environmentally sensitive areas. The contract incorporated the Washington State Department of Transportation Standard Specifications for Road, Bridge, and Municipal Construction (2012).³ The City filed its Notice to Proceed on August 11, 2014. It was anticipated that the project would last approximately 45 days.⁴

Throughout August and early September 2014, several key contract submittals were rejected by the City engineer.⁵ Certain key submittals regarding erosion control measures were required to be approved before any construction could occur.⁶ Nova admits that it did not file a timely protest under 1-04.5.⁷ On September 4, 2017, Olympia issued a notice of default (“default letter”) because Nova had still not

² CP 70.

³ Std. Specs. CP 72, 88-97.

⁴ CP 79.

⁵ Clerk’s Papers [CP 74-75, 119-150.]

⁶ Thurston County Critical Areas Permit, p. 3, CP 466.

⁷ *See*, Deposition Excerpt of Dana Madsen, p. 34 ln. 20-25, p. 35 ln. 1-2 CP 479.

produced acceptable submittals required to start work.⁸ On September 9, 2014, Nova filed a formal protest under 1-04.5, protesting Olympia's issuance of the Default Letter.⁹ It wasn't until September 19, 2014 that Nova issued a letter complaining about the submittal process and admitting that it could not cure the default and could not complete the project with the time remaining.¹⁰

Nova is now arguing that regardless of its failure to timely protest the City's rejection of Nova's submittals, there is a question of fact concerning whether the City exercised good faith in rejecting submittals that formed the basis of the City's Default Letter. In addition, the Court of Appeals has ruled that any claims for "expectancy" or "consequential damages" are somehow exempted from the contract's claim notice requirements.¹¹ The Court of Appeals failed to cite any Washington law or contractual language that would support this conclusion.

⁸ Default Letter, CP 156-158.

⁹ Nova Letter, September 9, 2014, CP 301.

¹⁰ Nova Letter, September 19, 2014 CP 306-314.

¹¹ Court of Appeals Div. II, No. 48644-0-II, p.6, fn.3, "Although Nova may have waived claims for the cost of work performed under the contract, section 1-04.5 does not apply to expectancy and consequential damages."

Nova never protested the rejected submittals. Under the terms of the contract, Nova accepted the City's determinations thereby barring any subsequent litigation concerning the rejected submittals.¹²

It is undisputed that Nova did not lodge a protest in response to the rejected submittals before Olympia issued its Default Letter. The contract required Nova to submit a written notice protest and detailed protest information.¹³ Neither of these contract requirements for a valid protest were met. Nevertheless, Nova admitted in its original complaint that the basis of its claims are the rejected submittals:

3.3 The City failed to evaluate and approve submittals properly, rejecting proper submittals. This imposed substantial additional administration and document processing costs on Nova, as Nova had to reprepare and resubmit submittals which should have been approved in their original versions. Further, this refusal to approve

¹² WSDOT Standard Specification 1-04.5 states: "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, interpretation, and determinations)**. [emphasis added.] CP 90.

¹³ 1-04.5 further requires: "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 ...;
2. Supplement the written protest within 14 calendar days with a written statement and supporting documents providing the following: [list of five specific items]" [emphasis added] CP 90.

submittals ultimately made it impossible for Nova to perform the work. This is a total and material breach of contract entitling Nova to its full contractual expectancy and to reasonably foreseeable consequential damages.¹⁴

By its own admission, Nova's lawsuit is based upon the City's multiple determinations over a two month period to reject Nova's submittals.¹⁵

Division II of the Court of Appeals has previously ruled on the effects of failing to comply with the notice provisions of Std. Spec. 1-04.5:

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).¹⁶

This result is further supported by *Mike M. Johnson*, 150 Wn.2d at 375, 78 P.3d 161. There, the Supreme Court held that a contractor's failure to protest work under an older version of the Standard Specifications (which contained a version of section 1-04.5 that was identical in all pertinent respects) precluded a lawsuit claiming extra compensation for that work. 150 Wn.2d at 375, 379-80, 384, 390, 78 P.3d 161.¹⁷

¹⁴ Nova Complaint for Breach of Contract – p. 4, CP 4.

¹⁵ See, Nova Submittal Timeline listing each submittal and its acceptance or rejection between June 10, 2014 and September 8, 2014, CP 74-75.

¹⁶ *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 8, 277 P.3d 679, 683 (2012)

¹⁷ *Id.* at 10

In this case the wording of 1-04.5 is virtually identical to that found in *Mike Johnson* and *Realm*. In order to assert any claim for judicial relief the contractor must comply with the provisions of 1-04.5: “The Contractor agrees to waive any claim ... if a claim is not filed as provided in this Section.” It continues: “*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*” (emphasis added).¹⁸ Thus, Nova contractually agreed that it was prohibited from seeking judicial relief for any claim arising out of a dispute under the contract, unless it first exhausted the claim procedures. There are no exceptions for “expectancy” or “consequential” damages.

In Nova’s Response to the City’s Petition For Review, Nova now claims that the Court of Appeals “did not reach, and was silent on, the argument now raised by the City of Olympia – that Nova failed to follow

¹⁸ See, Memorandum of Amicus Curiae Washington State Association Of Municipal Attorneys, p. 1. Citing Std. Spec. 1-09.11 (which requires satisfaction of 1-04.5); See also, *Realm*, 168 Wn. App. at 3 (Compliance with Std. Spec. 1-04.5 is a “precondition to litigation . . . against the city); *Mike Johnson*, 150 Wn.2d 375, 384, 78 P.3d 161 (2003) (“the formal claim procedures under section 1-09.11 [are] a contractual condition precedent to [MMJ’s] right to seek judicial relief.”)

the required claim procedures . . .”¹⁹ This is a clear misstatement of the Court of Appeals decision. The Court of Appeals specifically (but errantly) addressed the claim notice issue.

Furthermore, this issue was heard by the trial court during summary judgment oral arguments:

Mr. Linton: “The contract also states that if the contractor has any problem with anything that the engineer does, the contractor has to give notice of those problems to the city ... At no time prior to September 4 did the contractor ever give any notice that it disagreed with what the city was doing in relation to the submittals ... there was no previous claim by the contractor or notice given as required by the contract that the city’s previous actions in rejecting those submittals were inappropriate.”²⁰

Mr. Cushman: “The city is now arguing - - I saw it basically, it may have been in the original brief, it was more highlighted in the reply - - that we had a duty to submit claims when we received the rejections of our submittals and when - - by not doing so we’ve waived our argument that the submittals were wrongly rejected.”²¹

Mr. Linton: “The contract specifically states if you disagree with any decision by the engineer, you have to immediately protest that in writing, and if you don’t protest it any related claims for compensation or extensions of time are waived. They waived any of the actions prior to

¹⁹ Response to Petition, p.2.

²⁰ Verbatim Report of Proceedings (RP) p. 5-7.

²¹ RP p. 17-18.

September 4th, any of the actions by the City in denying these submittals and disallowing them were waived based upon their failure to protest those decisions.”²²

Thus the issue of Nova’s failure to comply with the contract’s notice provisions and the Court of Appeals ruling on the matter are squarely before this Court. The decision by the Court of Appeals is contrary to established law and this Court’s decisions in *Mike Johnson* and *American Safety* and should be reversed.

IV. ARGUMENT

A. WASHINGTON LAW REQUIRES STRICT COMPLIANCE WITH MANDATORY CONTRACTUAL CLAIM NOTICE PROCEDURES AS A CONDITION PRECEDENT TO JUDICIAL RELIEF.

Under established Washington Supreme Court precedent, “procedural contract requirements must be enforced absent either a waiver by the benefiting party or an agreement between the parties to modify the contract.”²³ In *Mike Johnson*, Spokane County (“Spokane”) hired the contractor (“MMJ”) to complete two public works projects.²⁴ The contract

²² RP p. 23-24.

²³ *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 386-87 (2003).

²⁴ 150 Wn.2d, at 378.

incorporated the 1996 edition of the Std. Specs., including the same claim notice language as the 2012 edition used in this case. Problems arose during the project, but “MMJ failed to comply with the contractual protest procedures required under section 1-04.5 and, additionally, failed to follow the formal claim procedures under section 1-09.11, which were a ‘contractual condition precedent to [MMJ’s] right to seek judicial relief.’”²⁵ As with the present case, despite not filing contractual claims, MMJ sued Spokane for damages, and Spokane moved for partial summary judgement on grounds that MMJ’s failure to comply with the claim procedures barred judicial relief.²⁶

The trial court granted Spokane’s motion because “no genuine issue of material fact exists as to whether MMJ failed to comply with the contractual protest and claims procedures...” *Id.* at 385. The Court of Appeals reversed. This Court “reverse[d] the Court of Appeals and held that the contractor was not excused “from complying with the contractual requirements” regardless of Spokane’s actual notice of a dispute.²⁷ The

²⁵ *Id.* at 384 (*quoting* Std. Specs. (1996)).

²⁶ *Id.*

²⁷ *Id.* at 393.

dispositive facts on appeal were that, like here, the contractor failed to comply with the claim notice procedure.

In *American Safety Cas. Ins. Co. v. City of Olympia*,²⁸ the City of Olympia (“Olympia”) entered into a contract with Katspan, Inc. (“Katspan”) to construct a pipeline. The contract incorporated the Std. Specs. which required the contractor “to follow the contractual procedures if it wished to file a protest, formal claim, or lawsuit” and that, “failing to follow the procedures constituted a waiver of the claims.”²⁹ Katspan ultimately assigned its rights to its surety American Safety Casualty Insurance Co. (“American Safety”). The parties entered into protracted negotiations about the contractor’s claims for additional compensation and time, but at no time did Katspan or American Safety file a written protest in accord with the contract.

“The trial court granted summary judgment in favor of [Olympia], finding that American Safety did not comply with the contractual provisions and that [Olympia] had not waived its right to demand

²⁸ 162 Wn.2d 762 (2007).

²⁹ *Id.* at 765.

compliance with these agreed upon procedures.” The Court of Appeals reversed, holding there existed disputed material facts due to the “equivocal” negotiations and a possibility of a waiver by Olympia.

This Court disagreed and reversed the Court of Appeals: “Because American Safety admittedly did not comply with the contractual provisions, and because [Olympia] did not unequivocally waive its right to demand compliance with these provisions, we find that the trial court was correct in granting summary judgement.”³⁰ The dispositive fact was that the contractor filed a lawsuit based on conduct that should have been protested under the claim notice provisions of the contract.

In *Mike Johnson and American Safety*, this Court clearly stated that in the absence of waiver, contractual claims processes must be followed.

Washington law is clear: the mandatory contractual claims procedures promulgated in Std. Specs. 1-04.5 and 1-09.11 are conditions precedent to contractors seeking judicial relief. The decisions discussed above illustrate the clarity of this rule and its direct applicability to the present case. Under *Mike Johnson* and related cases, Nova’s lawsuit is

³⁰ *American Safety*, 162 Wn.2d at 771-72,

clearly barred by its failure to comply with the contract's claims resolution process.

B. THE COURT OF APPEALS EFFECTIVELY OVERRULED MIKE JOHNSON BY CREATING TWO EXCEPTIONS THAT SWALLOW THE RULE AND IMPLEMENT BAD PUBLIC POLICY.

The decision in this case conflicts with established Supreme Court precedent. This Court, the Court of Appeals, and numerous trial court judges have upheld mandatory claim notice procedures as conditions precedent to contractors seeking judicial relief. Yet, in this case, the Court of Appeals has allowed Nova's lawsuit to survive summary judgment despite the undisputed fact that Nova did not protest the submittal rejections under 1-04.5 or 1-09.11.

The Court of Appeals has created two entirely new exceptions to the well-established rule that public works contractors must follow claim notice procedures. The first exception created by the Court of Appeals states that if the contractor alleges that the public owner violated the duty of good faith and fair dealing, then claim notice procedures will not apply. The second exception is that if the contractor requests expectancy or consequential damages, then claim notice provisions will not apply.

These exceptions swallow the rule. In *Mike Johnson*, this Court discussed the slippery slope policy implications of weakening the contractual requirements:

“excus[ing] the contractor from complying with mandatory claim procedures would render contractual claim requirements meaningless. There would be no reason for compliance, as the contractor could merely assert a general grievance in order to secure a later claim.”³¹

In a prior decision, the Court of Appeals Div. II strictly followed this Court’s decisions in *Mike Johnson* and *American Safety*:

Realm attempts an end run around section 1-04.5 by claiming that it may hold any disputes in reserve until after the contract's termination, at which point notice is no longer required. But such an interpretation, in addition to being inconsistent with *Mike M. Johnson*, would render section 1-04.5 a nullity. **All contracting agencies using the Standard Specifications would be denied the benefit of advance notice and the opportunity to resolve disputes before they devolve into litigation because contractors could simply choose to litigate their disputes after termination without providing notice of disputes during the work.**³²

³¹ *Johnson*, 150 Wn.2d at 391.

³² *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 10-11, 277 P.3d 679 (2012) (Emphasis added.)

Allowing contractors to circumvent 1-04.5 and 1-09.11 by claiming certain kinds of damages and alleging violation of good faith and fair dealing would result in the same consequences discussed in *Realm*. Contracts employing claim notice procedures would be rendered meaningless, throwing countless public works contracts into jeopardy and denying all parties the opportunity to resolve conflicts before litigation.

This Court's rulings in *Mike Johnson* and *American Safety* encourage parties to first attempt to resolve their issues through negotiation before resorting to expensive and time consuming litigation. This is good policy that discourages litigation and encourages collaboration in public works projects. That is why this Court has consistently validated the same language at issue in this case.

The Court of Appeals is essentially holding that the parties to a contract cannot contractually agree to resolve their differences as a condition precedent to litigation -- it should be overruled.

C. NOVA HAS NOT MET ITS BURDEN TO OVERTURN PRECEDENT BY MAKING A CLEAR SHOWING THAT THE ESTABLISHED RULE IS INCORRECT AND HARMFUL.

By arguing that its claims against the City should survive summary judgment despite the undisputed fact that it did not comply with the contract claim notice requirements, Nova is asking the Court to overturn the precedential authority of *Mike Johnson* and related cases. This Court has recently held that it “will not overturn precedent unless there has been ‘a clear showing that an established rule is incorrect and harmful.’”³³

In *Deggs*, the plaintiff could not meet this burden, even though she “made a fairly persuasive argument that our precedents were incorrect at the time they were announced” because she did “not show that they are harmful.”³⁴ In other words, it is not enough that a rule rests on incorrectly decided cases – that reliance must also produce harmful results in order to be overturned.

³³ *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 727-28 (2016) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653 (1970)).

³⁴ *Id.* at 728.

Here, Nova is asking the Court to overturn the precedent set by *Mike Johnson* in requesting that it be allowed to litigate the issue of good faith and fair dealing despite having failed to comply with a condition precedent to any judicial relief, i.e. the contract's claim notice provisions.

The *Mike Johnson* and *Realm* courts explained the beneficial policy aspects of requiring contractors to comply with the claims procedures as a condition precedent to seeking judicial relief.³⁵ Because Nova has not met its burden to overturn established precedent, the Court of Appeals should be reversed.

D. THE CITY IS ENTITLED TO ITS ATTORNEY FEES AND COSTS ON APPEAL UNDER RCW 39.04.240

The Court of Appeals failed to enter judgment for the City and therefore referred any decision on attorney fees and costs back to the trial court. The City is entitled to its attorney fees and costs on appeal based upon RCW 39.04.240 because the City is the prevailing party as determined under RCW 4.84.250 *et seq.* The City's offer of settlement

³⁵ *Johnson*, 150 Wn.2d at 391; *Realm*, 168 Wn. App. at 11.

was more than the amount of liquidated damages awarded by the trial court. This request is made in accord with RAP 18.1.

V. CONCLUSION

The Court of Appeals should be reversed and the trial court upheld because Nova failed to comply with the protest claim procedures of the contract. The City repeatedly rejected Nova's submittals and Nova failed to protest the City's determinations. The City then terminated Nova due to its failure to provide acceptable submittals and the effect the defective submittals had on the work.

By failing to protest the City's determinations with regard to the submittals, Nova waived any objection to the City's termination decision based upon the rejected submittals. As a result, Nova was properly terminated for failure to provide acceptable submittals.

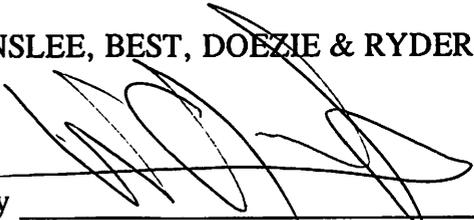
The City was properly awarded liquidated damages as found by both the Court of Appeals and the trial court. Nova has not contested any findings of the Court of Appeals.

The Court of Appeals decision utilizes a faulty distinction as to the nature of relief sought to circumvent the claim notice provisions of the

contract and is therefore in conflict with the Supreme Court's decision in *Mike Johnson*. The Court of Appeals should be reversed and the trial court's judgment in favor of the City reinstated. The City is entitled to its attorney fees and costs on appeal.

Respectfully submitted this 14 day of January, 2018.

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

By 

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DECLARATION OF SERVICE

I, Leslie Addis, under penalty of perjury under the laws of the State of Washington, hereby declare that on January 2nd, 2018, the following documents were served on the following individuals in the manner indicated:

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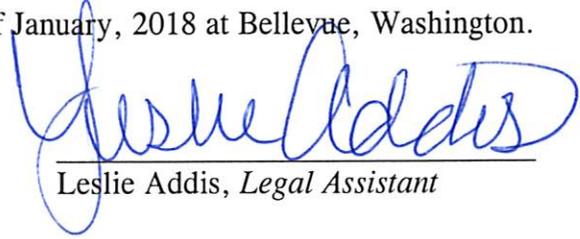
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APPENDIX 1

 KeyCite Yellow Flag - Negative Treatment

Declined to Extend by CRJ Kim, Inc. v. JKI Investments, Inc., Wash.App. Div. 2, March 14, 2017

150 Wash.2d 375
Supreme Court of Washington,
En Banc.

MIKE M. JOHNSON, INC., Respondent,

v.

The COUNTY OF SPOKANE, a Washington State Municipal Corporation, Petitioner,
US West Communications, Inc., Defendant.

No. 72900-0.

|
Argued June 10, 2003.

|
Decided Oct. 23, 2003.

Construction company brought action against county, alleging it breached sewer construction contracts by failing to pay fees for additional work that was not included in original contracts. The Superior Court, Spokane County, Richard Schroeder, J., granted summary judgment in favor of county. Construction company appealed. The Court of Appeals, 112 Wash.App. 462, 49 P.3d 916, reversed and remanded. After granting review, the Supreme Court, Madsen, J., held that: (1) county's actual notice of claims of company did not excuse company from complying with contractual claim procedures, and (2) county did not waive compliance with contractual claim procedures by its conduct.

Court of Appeals reversed.

Chambers, J., filed a dissenting opinion in which Johnson, Ireland, and Sanders, JJ., joined.

West Headnotes (8)

[1] **Appeal and Error** ⇌ Extent of Review Dependent on Nature of Decision Appealed from

In reviewing a summary judgment, the appellate court engages in the same inquiries as the trial court, determining whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law.

Cases that cite this headnote

[2] **Judgment** ⇌ Presumptions and Burden of Proof

Judgment ⇌ Existence or Non-Existence of Fact Issue

In ruling on a summary judgment motion, the trial court considers all facts and reasonable inferences from them in the light most favorable to the nonmoving party, and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.

Cases that cite this headnote

[3] **Judgment** ⇌ Weight and Sufficiency

Bare assertions that a genuine material issue exists will not defeat a summary judgment motion in the absences of actual evidence.

Cases that cite this headnote

[4] **Contracts** ⇌ Necessity for Notice of Claim and Delay in Making Claim

Generally contractors are required to follow contractual notice provisions unless those procedures are waived.

10 Cases that cite this headnote

[5] **Contracts** ⇌ Waiver

A party to a contract may waive a contract provision, which is meant for its benefit, and may imply waiver through its conduct; waiver by conduct, however, requires unequivocal acts of conduct evidencing an intent to waive.

15 Cases that cite this headnote

[6] **Counties** ⇌ Public Improvements

County's actual notice of claims of contractor on sewer construction contracts that it was owed additional compensation for work not included in the original contracts did not excuse contractor from complying with contractual claim procedures; letters submitted by contractor did not provide the information required by the contracts to support a protest or a formal claim, and county informed contractor throughout period of lengthy correspondence that contractor's references to problems were insufficient for county to deal with problems as claims.

13 Cases that cite this headnote

[7] **Counties** ⇌ Public Improvements

County's actual notice of claims of contractor on sewer construction contracts that it was owed additional compensation for work not included in the original contracts did not waive contractor's strict compliance with contractual claim procedures, as a waiver of a contract provision had to be made by the party benefiting from the provision, and contractor's notifying county it had problems did not evidence county's intent to waive the contracts' requirements.

24 Cases that cite this headnote

[8] **Counties** ⇌ Public Improvements

County did not waive contractual claim procedures in sewer construction contracts by its conduct in corresponding with contractor and in attending negotiations with contractor concerning problems contractor had with sewer projects, for purposes of contractor's action for additional compensation for work not included in the original contracts; in its correspondence with contractor county repeatedly informed contractor that it was not waiving any claim or defense or any other remedy or contract provision, and finding that negotiations evidenced a waiver would unrealistically halt all discussions when there were contract issues.

8 Cases that cite this headnote

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Opinion

MADSEN, J.

The trial court below granted summary judgment dismissal of Mike M. Johnson, Inc.'s (hereinafter MMJ) claims for additional compensation arising out of two separate sewer installation contracts with Spokane County. The Court of Appeals reversed, finding that issues of material fact exist regarding whether Spokane County's "actual notice" of MMJ's claims excused MMJ from complying with the contractual claim procedures, as well as whether the county waived compliance as evidenced by its conduct.

We hold that "actual notice" is not an exception to compliance with mandatory contractual protest and claim provisions. Further, since the record does not contain any conduct by Spokane County evidencing its intent to waive MMJ's compliance with the protest and claim procedures, ***378** we hold that no question of material fact exists regarding waiver. We reverse the Court of Appeals.

FACTS

In April 1998, Spokane County awarded MMJ bids to construct two sewer projects for the county: the Apple Valley Sewer project and the Wolfland project. MMJ and Spokane County entered into contracts for both projects, which incorporated the Washington State Department of Transportation's 1996 Standard Specification for Road, Bridge, and Municipal Construction, as modified by the special provisions contained in the project manuals for each project. Both the county and MMJ anticipated that MMJ would perform the projects in sequence. Construction on Apple Valley was to begin on May 27, 1998, and be completed in 88 working days; and construction on Wolfland was to begin on June 29, 1998, and last 70 working days. MMJ planned to utilize two crews, moving one crew to the Wolfland project once construction was underway on Apple Valley.

At the preconstruction conference on April 23, 1998, the county informed MMJ that a road improvement district project was in progress to redesign Seventh Avenue—a roadway in the Apple Valley project. The redesign would not affect the sewer installation but would widen the road and revise the storm drain system. MMJ began construction on the Apple Valley project, starting on Fourth Avenue with a plan to follow with Sixth Avenue and then Seventh Avenue.

The contracts authorized the county to change MMJ's work within the general scope of the contract at any time through a change order. On June 4, 1998, the county submitted the revised design of Seventh Avenue to ****163** MMJ and issued proposed change order number 3. Change order number 3 required MMJ to widen Seventh Avenue and change the elevation and grade, and the order included a proposal to increase MMJ's compensation by \$69,319 and ***379** add eight working days to the project.¹ MMJ made no objection or protest to the design change, proposed compensation, or altered schedule and began the work under change order number 3. Thereafter, it encountered buried U.S. West telephone lines during construction on Seventh Avenue.² MMJ's work on Seventh Avenue came to a halt while the county and U.S. West worked out the utility conflict.

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
- *380** 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 "[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.* 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"). *Id.* Under the contracts, MMJ's failure to submit the required information with a final contract voucher certification was "a waiver of the claims by the Contractor." *Id.* Furthermore, the contracts explicitly stated that "[f]ull compliance by the Contractor with the provisions of this section is a contractual condition precedent to the Contractor's right to seek judicial relief." CP at 122.

****164** Instead of following the contract requirements, MMJ sent the county a letter on June 26, 1998, addressing seven concerns in bullet point form, only one of which discussed the Seventh Avenue delay:

Our work on 7th Avenue is being delayed by U.S. West. Their phone lines are too shallow and must be relocated to ***381** accomodate [sic] the revised Change Order No. 3 plan. Their impacts

are causing additional delays and costs to our work, and we are finding it increasingly difficult to accommodate their deficiencies.

CP at 226. MMJ did not file a written protest statement as required under section 1-04.5 at this time or anytime thereafter.

In response to MMJ's letter, on July 16, 1998, the county advised MMJ by letter that "if you believe that you have a claim for additional compensation within this contract please submit this claim per section 1-09.11(2) of the standard specifications (a copy of this section is enclosed) and it will be evaluated." CP at 124-28. On July 24, 1998, MMJ responded by summarizing various project delays and their impacts. The entire reference to MMJ's concerns with Seventh Avenue stated, "US West disrupted our work on 7th Ave. when they had to relocate all their shallow and/or unknown services." CP at 236. In closure, MMJ informed the county that it was developing "a detailed progress schedule" which would "identify the major impacts to costs, time, and sequence" and "summarize the delays and additional costs" for which it expected to be compensated. CP at 237. The record, however, reveals that a "detailed progress schedule" was never prepared or sent to the county.

On August 3, 1998, the county notified MMJ that it believed the utility conflicts should not impact the overall schedule of the projects. The county's position was based on contract language placing the risks associated with mislocated or unknown utilities on the contractor³ and on the contractor's obligation to locate utilities before digging, pursuant to RCW 19.122.030. On August 7, 1998, the county directly responded to MMJ's July 24 letter, stating:

To the extent that [MMJ] may consider that letter any sort of formal notification of a claim pursuant to the contract, a request for additional time, a request for a change order, or a request for any other remedy allowed by the contract, the letter *382 is rejected because it is too general and nonspecific regarding any relief or remedy which may have been requested. In this regard, you are referred to the applicable contract specifications. All requests for additional time to complete the contract, additional compensation or change order must be submitted within the time permitted and in the form specified in the contract documents. Spokane County simply cannot accept a letter, such as the July 24, 1998 letter, as anything other than an attempt to cause Spokane County to acquiesce in what might be later claimed to be some sort of attempt to modify our contract. As we have repeatedly advised you, Spokane County must insist that you follow the terms and conditions of our contract in every respect on both of these projects.

CP at 589-92.

On August 14, 1998, MMJ notified the county that it returned to work on Seventh Avenue and again encountered existing utilities, putting work on standby. The letter simply noted that "we expect to be compensated for all costs and time associated with maintaining this road while waiting for others to complete their work." CP at 240. On August 25, 1998, MMJ's attorney, Patrick Sullivan, submitted requests for \$98,000 and a time extension of 50 days to the county's attorney, Jerry Cartwright. CP at 252-54. He included a spreadsheet entitled "Cost Time Impacts," which contained twenty-nine line items of dates occurring three and a half months earlier without supporting explanations and without any reference to the contract or to whether responsibility under the contract laid with MMJ or the county. *Id.* The Seventh Avenue entry stated, "phone lines too shallow, line F" and noted 120 hours of time at an hourly rate of \$188.91, amounting to a total cost of \$22,669.20. *Id.* at 254.

**165 On September 1, 1998, Mr. Cartwright wrote Mr. Sullivan, stating that the purpose of the letter was to provide "an effort to facilitate a means of timely completion of the project and settlement of the parties' claims to date" and should not "be taken as a formal response to or recognition of the claims" in Mr. Sullivan's memo. CP at 257. Additionally, he explicitly stated that the county did not "intend [a] waiver of any claim or defense which the *383 county might currently have against [MMJ]." *Id.* Thereafter, MMJ submitted several letters claiming that the county owed it additional compensation but never submitted a formal claim as required by section 1-09.11 of the contract. On December 22, 1998, Mr. Sullivan provided Mr. Cartwright with a letter summarizing MMJ's claims, stating "[t]his letter is being provided under Rule of Evidence 408 and is intended for settlement purposes only." CP at 300. Thus, the letter on its face was not

intended as a formal claim under contract section 1-09.11(2), and even if it were, it did not comply with section 1-09.11 because it failed to include the requisite information and final contract voucher certification.

The county answered MMJ's settlement attempts by letter on December 23, 1998 and January 27, 1999. On December 23, Mr. Cartwright stated that it was the county's position that MMJ "has failed to perfect any claims in this claim and has repeatedly failed and/or refused to follow the procedure set forth in the contract for submitting claims." CP at 386. He emphasized that "[a]ll through this process of trying to get these jobs finished ... we have made it very clear that the County would not be waiving any of its contractual rights, claims or defenses." *Id.* Mr. Cartwright, however, agreed to forward MMJ's claims to the county but notified MMJ that "if this is an attempt to submit claims pursuant to the terms of the contract, please take notice that it is the county's position that the claims submitted are not timely." *Id.* On January 27, 1999, Mr. Cartwright delivered a letter to Mr. Sullivan containing information for their January 29 meeting. CP at 594-95. He reiterated:

In agreeing to meet with you ... it should be understood that the County wishes to negotiate with you and your clients but does not intend to waive any claim or defense which it might have, under the contract documents or at law, including ... failure by [MMJ] to follow the contract requirements regarding claims/notice/disputes.

***384** *Id.* The letter stated that the information was submitted for purposes of discussing settlement and "in an attempt to avoid litigation." *Id.*

Throughout this lengthy period of correspondence, MMJ failed to comply with the contractual protest procedures required under section 1-04.5 and, additionally, failed to follow the formal claim procedures under section 1-09.11, which were a "contractual condition precedent to [MMJ's] right to seek judicial relief." CP at 122. The record establishes that MMJ's president, Mike Johnson, admitted he knew of the protest and claim provisions but could not say whether he actually complied. CP at 626-32. MMJ's contract administrator, Ben Price, testified by affidavit that he discussed the contract provisions with Mr. Johnson, but Mr. Johnson did not care to comply because compliance was too time consuming. CP at 633-34. Instead, Mr. Johnson's tactic was to "complain[] by letter stating generally that MMJ expected to be paid for extra work, and then to sort through the mess at the end of the contract." *Id.* at 634.

Contemporaneously with these discussions, MMJ and the county discussed many other issues unrelated to change order number 3. For example, the county removed a portion of the Wolfland project from MMJ, and the parties were in negotiations over the county's purchase of supplies already procured for the project by MMJ. MMJ and Spokane County were unable to work out their disputes, and on February 19, 1999, MMJ filed a complaint for damages against the county. MMJ alleged claims for additional compensation arising out of the contract, as well as claims for unpaid contract balances on both projects. The county filed an answer, asserting affirmative defenses and counterclaims against MMJ. In regard to MMJ's claims for additional compensation, the county argued that MMJ failed to comply with mandatory ****166** contractual protest and claim provisions, barring it from seeking judicial relief at this time.

The county moved for summary judgment on MMJ's claim for additional compensation, and MMJ filed a cross-motion for partial summary judgment. On June 19, 2000, ***385** the trial court granted the county's motion and dismissed with prejudice MMJ's claim. On October 30, 2000, the court issued a supplemental order clarifying its order granting summary judgment and also denied MMJ's motion for reconsideration. The court clarified that no genuine issue of material fact exists as to whether MMJ failed to comply with the contractual protest and claim procedures, which were mandatory for seeking additional compensation; thus, as a matter of law, the court dismissed with prejudice MMJ's claims for additional compensation. The court stated that it did not make any specific findings of fact or conclusions of law as to the related issues of actual notice, prejudice, equity, substantial compliance, or reservation of rights.

The issues which remain for trial include MMJ's claims for unpaid contract balances on both projects, the county's counterclaims for liquidated damages and other back charges, as well as the county's third-party claims against U.S.

West. The trial court's supplemental order notes that the dismissal of MMJ's claims does not prejudice or impair MMJ's right to assert affirmative defenses arising under the contract in response to the county's counterclaims.

On June 21, 2001, the trial court issued a stipulation and order certifying the summary judgment order for appeal and staying the remaining action pending appellate review. MMJ appealed. The Court of Appeals determined that the trial court improperly granted summary judgment on MMJ's claims for additional compensation. *Mike M. Johnson, Inc. v. County of Spokane*, No. 20347-6-III, 111 Wash.App. 1051, 2002 WL 1038808, slip op. at 2 (Wash.Ct.App. May 23, 2002). The court held dismissal improper because issues of material fact exist regarding whether the county's "actual notice" of MMJ's claims excuses MMJ from complying with the mandatory contractual protest and claim procedures and whether the county's conduct of negotiating a settlement with MMJ implied its waiver of enforcement of the procedures. *Id.* at 4-5. Initially, the court did not publish the opinion, but on July 2, 2002, it granted motions to publish. *Mike M. Johnson, Inc. v. Spokane County*, 112 Wash.App. 462, 49 P.3d 916 (2002). We granted review.

ANALYSIS

[1] [2] [3] This case presents two issues for the court's resolution: (1) whether Spokane County's "actual notice" of MMJ's protests and claims acts as an exception to MMJ's compliance with the mandatory protest and claim procedures under the contract and (2) whether summary judgment dismissal was inappropriate because an issue of material fact exists regarding whether the county's conduct implied a waiver of the contractual protest and claim procedures.⁴

Actual Notice

[4] [5] Washington law generally requires contractors to follow contractual notice provisions unless those procedures are waived. *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wash.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 Metals Co. v. Elec. Smith Constr. & Equip. Co.*, 4 Wash.App. 695, 700, 483 P.2d 880 (1971). Waiver by conduct, however, "requires unequivocal acts of conduct evidencing an intent to waive." *Absher*, 77 Wash.App. at 143, 890 P.2d 1071 (citing ****167** *Birkeland v. Corbett*, 51 Wash.2d 554, 565, 320 P.2d 635 (1958)).

This court, as well as the state appellate courts, has historically upheld the principle that procedural contract ***387** requirements must be enforced absent either a waiver by the benefiting party or an agreement between the parties to modify the contract. See *Bjerkeseth v. Lysnes*, 173 Wash. 229, 22 P.2d 660 (1933) (affirming dismissal of contractor's claim for extra work where there was no written order as required by contract and no waiver of the requirement); *Ellis-Myloie Lumber Co. v. Bratt*, 119 Wash. 142, 153, 205 P. 398 (1922) (where no required written order of architect exists, "[t]he only theory upon which the contractors would be able to recover would be that of a waiver"); *Wiley v. Hart*, 74 Wash. 142, 146-48, 132 P. 1015 (1913) (where owner has not waived the required written order of architect, owner could not be liable for extra costs); *Sime Constr. Co. v. Wash. Pub. Power Supply Sys.*, 28 Wash.App. 10, 621 P.2d 1299 (1980) (affirming dismissal of contractor's claim where contractor failed to comply with contractual notice procedures); *Svenson v. Lowe*, 5 Wash.App. 186, 188, 486 P.2d 1120 (1971) ("A building contract provision requiring a written order for alterations or extras will be enforced. However, the requirement of a writing is for the benefit of the owner, and the owner, either expressly or by conduct, may waive such a requirement." (Citation omitted.))

MMJ argued to the Court of Appeals, and maintains before this court, that when an owner has actual notice of a contractor's protest or claim, that notice, in and of itself, excuses the contractor from complying with mandatory contractual protest and claim procedures. MMJ contends that the decision of *Bignold v. King County*, 65 Wash.2d 817, 822, 399 P.2d 611 (1965) establishes an "actual notice" exception.

the [owner] became immediately aware of the changed conditions as soon as they developed and ordered the contractor to perform the changes and extra work involved ... [u]nder such conditions, the county cannot defeat recovery by a contractor even if no written notice was given.

Id. at 822, 399 P.2d 611.

Contrary to MMJ's contention, the Court of Appeals in *Bignold* did not hold that the owner's actual notice of the *388 changed condition *in and of itself* excused the contractor from complying with the contractual notice provisions. Rather it was the owner's knowledge of the changed conditions coupled with its subsequent direction to proceed with the extra work that evidenced its intent to waive enforcement of the written notice requirements under the contract. *Bignold* does not establish an "actual notice" exception and actually reaffirms the long established rule requiring contractors to follow contractual notice provisions unless those procedures are waived by the owner.

In addition to the *Bignold* decision, MMJ contends that other Washington cases establish an "actual notice" exception to contractual compliance. However, as with *Bignold*, the authorities MMJ cites do not establish such a rule but rather hold that a contractor must comply unless those provisions are waived by the benefiting party. See *Lindbrook Constr., Inc. v. Mukilteo Sch. Dist. No. 6*, 76 Wash.2d 539, 542-44, 458 P.2d 1 (1969) (failure to comply with contractual notice requirement did not bar contractor's right to recovery additional compensation where "squarely notice in writing had been waived" by the agent's conduct). See also *Am. Sheet Metal Works, Inc. v. Haynes*, 67 Wash.2d 153, 159, 407 P.2d 429 (1965) ("There is evidence in the instant case indicating that appellant authorized, permitted, and directed respondent to perform the work in question.... The trial court did not err in considering the condition waived."); *Morango v. Phillips*, 33 Wash.2d 351, 357-58, 205 P.2d 892 (1949) ("If any extras were furnished at the express request of the respondent, recovery can be had therefor, as such request would amount to waiver of the contractual provision."); *Barbo v. Norris*, 138 Wash. 627, 635-36, 245 P. 414 (1926) (actions of parties amounted to waiver); *A. Gehri & Co. v. Dawson*, 64 Wash. 240, 243, 116 P. 673 (1911) (approving jury instructions stating "the contract means that unless the other party **168 waives, by his conduct and acts, the right to demand such writing, there shall be no recovery"); *Crowley v. United States Fid. & Guar. Co.*, 29 Wash. 268, 274, 69 P. 784 (1902) (contractual requirement for writing waived by actions of owner).

*389 The county contends that the precise issue in this case, whether a contractor's failure to comply with mandatory contractual claim procedures precludes later recovery, has been addressed before, and the courts consistently hold that, absent waiver, failure to comply bars relief. See *Clevco, Inc. v. Mun. of Metro. Seattle*, 59 Wash.App. 536, 542, 799 P.2d 1183 (1990) ("failure to comply with the requirements of the change order provision is fatal to a later claim for compensation based on extra work"); *Sime Constr. Co. v. Wash. Pub. Power Supply*, 28 Wash.App. 10, 16, 621 P.2d 1299 (1980) (claim for additional compensation due to change order not timely as required by contract). The county specifically points to *Absher*, 77 Wash.App. at 142, 890 P.2d 1071, as directly analogous to this case.

In *Absher*, a subcontractor claimed that the district had provided "overwhelmingly defective plans," causing it additional expenses. *Id.* at 141, 890 P.2d 1071. The contract, however, contained mandatory dispute procedures, requiring the contractor "to give the District prompt and detailed written notice of any claims 14 days after events giving rise to the claims ... before any lawsuit could be commenced." *Id.* at 139, 890 P.2d 1071. The requirement could not be waived except by written waiver signed by the owner, and the contractor's failure to comply with the written notification requirement was "an absolute waiver of any claims arising from or caused by delay." *Id.* at 140, 890 P.2d 1071. Furthermore, acceptance of final payment constituted a waiver of all unidentified claims, as well. *Id.* After the contractor accepted final payment, it attempted to submit the subcontractor's claim to the district. *Id.* at 140-41, 890 P.2d 1071. The district contended that the contractor waived all claims because it failed to follow the mandatory claim procedures under the contract. The trial court granted summary judgment for the district, and the contractor appealed, arguing that material issues of fact remained regarding notice, waiver, and prejudice. *Id.* at 141, 890 P.2d 1071.

The Court of Appeals affirmed. Addressing the contractor's argument that the district's notice of the claims excused the subcontractor's noncompliance with the claim procedures, the court found that the subcontractor had *390 submitted "forms, comments, concerns and objections" that did not include the amount of the claim or length of delay, as required by the contract. *Id.* at 143, 890 P.2d 1071. The court held that these "were not sufficient to meet the contract written notice requirements." *Id.* While the court recognized that the district did not actually have notice of these concerns and claims, it noted that "[e]ven if the District had known of the concerns, those concerns were not claims under the contract." *Id.* Accordingly, the court held that the owner's actual notice of concerns did not excuse the contractor from complying with the contractual claim procedures. *Id.*

The court next considered the contractor's argument that the architect and subconsultant, acting as agents of the district, had waived compliance with the claim procedures. *Id.* at 143-44, 890 P.2d 1071. The court noted that any waiver would have to be by conduct, since the district had not submitted a written waiver as required by the contract. *Id.* at 143, 890 P.2d 1071. The court, however, found that the contractor "cites no specific conduct by the District evidencing an intent to waive the contract provisions explicitly denying the authority of the architect and its subconsultant to act as its agent." *Id.* at 144, 890 P.2d 1071. Because the district did not waive the notice requirements or designate the architect as its agent who could waive the requirements, the contractor was required to comply with the notice provisions. *Id.*

[6] In this case, MMJ submitted letters to the county indicating its concern over change order number 3 and that it expected additional compensation for its work under the order. However, as in *Absher*, these letters did not provide the information required by the contract to support a protest or a formal claim. The county, furthermore, **169 told MMJ throughout this lengthy period of correspondence that MMJ's vague references to problems were insufficient for the county to deal with as claims. MMJ's general notice to the county that it expected additional compensation did not amount to claims under the contract, nor did it excuse MMJ from complying with the contractual claim procedures.

[7] *391 MMJ argues, though, that the Court of Appeals correctly found that "an unresolved question exists regarding whether the county's actual notice of [MMJ's] claims should act as a waiver to [MMJ's] strict compliance with the contract terms." *Johnson*, No. 20347-6-III, 2002 WL 1038808, slip op. at 4. MMJ is incorrect.

A waiver of a contract provision must be made by the party benefiting from the provision. Here, the county stood to benefit from the mandatory protest and claim procedures; thus, only the county could waive MMJ's compliance with the procedures. MMJ simply could not waive enforcement of the provisions for the county, and MMJ's notifying the county that it had concerns does not in any way evidence the county's intent to waive the contract's requirements. Moreover, to hold that a contractor's notice of protest to the owner serves to excuse the contractor from complying with mandatory claim procedures would render contractual claim requirements meaningless. There would be no reason for compliance, as the contractor could merely assert general grievances in order to secure a later claim.

We hold that "actual notice" is not an exception to contract compliance.

Waiver

MMJ alternatively argues that a genuine issue of material fact exists regarding whether the county waived MMJ's compliance with the contractual protest and claim provisions through its conduct.

As stated, a party to a contract may waive a contract provision meant for its benefit, but waiver by conduct "requires unequivocal acts of conduct evidencing an intent to waive." *Absher*, 77 Wash.App. at 143, 890 P.2d 1071 (citing *Birkeland*, 51 Wash.2d at 565, 320 P.2d 635). The county argues that the record unequivocally indicates that it intended no waiver of any rights under the contract or of MMJ's compliance with the mandatory protest and claim provisions.

[8] *392 The county is correct. In correspondence between the county and MMJ, the county repeatedly asserted that it did not intend a “waiver of any claim or defense” or “of any other remedy or contract provision.” CP at 257 (letter dated Sept. 1, 1998); CP at 386 (letter dated Dec. 23, 1998); CP at 594 (letter dated Jan. 27, 1999). Moreover, as late as December 23, 1998, the county notified MMJ that it “has failed to perfect any claims in this claim and has repeatedly failed and/or refused to follow the procedure set forth in the contract for submitting claims.” CP at 386. In the same correspondence, the county stated that “[a]ll through this process ... we have made it very clear that the County would not be waiving any of its contractual rights, claims or defenses.” *Id.*

MMJ also urges that the county's continued negotiations may evidence its intent to waive MMJ's compliance. The parties were not only discussing concerns over change order number 3, however, but were discussing numerous issues and protests throughout this period of time. Adopting MMJ's view would have the county unrealistically halt all discussions for fear of evidencing its intent to waive mandatory claim provisions under the contract. We decline to reach such a result, as it would detrimentally impact all concerned. We find no question of material fact as to whether the county waived contractual compliance.

CONCLUSION

MMJ's notice to the county concerning its grievances did not excuse MMJ from complying with the contractual requirements. Furthermore, the evidence does not establish a question of whether the county waived enforcement of the claim procedures through its conduct, including its continued negotiations with MMJ.

*393 Accordingly, we reverse the Court of Appeals and hold summary judgment dismissal of MMJ's contractual claims proper.

ALEXANDER, C.J., BRIDGE, OWENS, and FAIRHURST, JJ., concur.

**170 CHAMBERS, J. (dissenting).

Here the owner directed the contractor to do additional work, was fully informed of all relevant information known by the contractor, and observed the contractor perform the work. It is unjust to declare as a matter of law that the contractor is *not* entitled to fair compensation merely because the contractor did not *also* conform to additional highly technical claims procedures. It is not merely unjust, it is out of step with Washington law. The majority's articulation of the relevant rule fails to encompass significant factors necessary for a full and fair resolution of such cases. Whether viewed as a conflict over contractual compliance or a conflict over waiver, this case requires a full hearing to determine the material facts before the law can be applied.

Under the majority's holding today, an owner can demand additional work outside the scope of the original contract, observe the contractor perform that work, discuss the work with the contractor, and yet deny fair compensation for services rendered if, within 15 days, and before the owner's plans are even completed, the contractor fails to submit a written request for additional time for the demanded work or fails to produce an itemized invoice in a precise technical format.

This is unreasonable and out of step with the actual practice of construction and construction law. Certainly, contracts should be enforced as written. But countervailing legal principles have compelled courts to allow recovery of fair compensation by the contractor where the owner directs the work be done and the owner is not prejudiced by the contractor's failure to abide by the technical requirements of submitting a claim for payment.

*394 The contractor, Mike M. Johnson, Inc. (MMJ), presented facts upon which a reasonable juror could find compliance with the contractual requirements regarding notice. Alternately, a reasonable juror could find facts that would establish that Spokane County waived strict compliance with the contract's requirements for claim submission. Because I believe resolution of this case is improper on summary judgment, I respectfully dissent.

FACTS

MMJ was the low bidder for two public works projects in a competitive bidding process. The projects, Apple Valley and Wolfland, required MMJ to lay sewer lines, and then grade and pave the streets.

After the contracts were awarded but before the project began, the county learned that a road improvement district (RID) had been formed for Seventh Avenue, one of the streets in the Apple Valley project. This substantially changed the scope of the original work. The RID doubled the proposed width of Seventh Avenue and added gutters and curbs. At a preconstruction conference on April 23, 1998, the county informed MMJ of the RID and told MMJ that a change order and new design would be prepared. The proposed change order was presented to MMJ on June 4, 1998, although it was not finalized until September 1998. In the change order, the county proposed allotting an additional eight days and \$69,319 for the extra work on Seventh Avenue.

The construction schedule provided that the Apple Valley and Wolfland jobs would be performed in sequence, beginning with Apple Valley. MMJ was to start on Fourth Avenue, go on to Sixth Avenue, and then to Seventh Avenue. When Seventh was complete, all three streets would be paved by MMJ's paving subcontractor. The paving subcontractor would only pave a minimum of three streets at a time.

*395 In June, MMJ installed the main sewer line on Seventh Avenue. In late June, MMJ began subgrade preparations for the roadway and encountered U.S. West phone lines, which were not shown on the drawings furnished by the county. Mike Neville, the project superintendent for MMJ, testified that he understood that the county had already conferred with all utilities, including U S West, about the location of any underground lines and equipment. His understanding was based both on the contract documents and on standard construction procedure. **171¹ As it turned out, the county had not consulted with U S West so the design changes incorporated in change order number 3 were inaccurate. When Neville discussed the problem with U S West, it "[was] upset over the county releasing the drawings for construction without [U S West's] signature." Clerk's Papers (CP) at 723.

The county verbally instructed MMJ to stop work until the county could redesign the project. This prevented MMJ from starting work on other streets during the approximately six weeks it took to complete its redesign. When MMJ sought to do work on other streets so as to keep on schedule, the county forced MMJ to quit.

On August 7, 1998, the redesign was complete and the county told MMJ to go back to work. However, a week later, on August 14, it was discovered that the county's design grades were erroneous. The county required MMJ to shut down again while the county corrected the problem.

On August 25, 1998, MMJ submitted a request for \$98,000 and a time extension of 50 days. The claim identified each delaying event by date, line location, description of event, crew affected, time impact, hourly rate, and total cost impact. MMJ received final, corrected grades for Seventh Avenue in mid-September.

During this time, county inspectors met daily with MMJ's superintendent, Neville. Neville met periodically, if not *396 daily, with the county's construction field engineer. Neville met weekly with the county's construction manager/contract administrator. There were ongoing discussions regarding the time and cost associated with the change order, and MMJ sent numerous letters to the county concerning the delays and associated costs.

Despite the design delays, the county refused to extend the deadlines for completion. The county sent formal notice threatening to terminate the contract on September 10, 1998 because the project was behind schedule.

The work was completed in October. MMJ submitted another claim on December 22, 1998, which included the earlier claims as well as new ones. The county refused to consider any of the claims.

MMJ filed suit seeking compensation for the additional time and work on the projects associated with Seventh Avenue. The county filed for summary judgment, seeking dismissal of MMJ's claims on four grounds: (1) the contract placed all risks of unknown utilities on MMJ; (2) there was no evidence that the county breached the terms of contract; (3) MMJ should be estopped from asserting its claim for unbalanced work; and (4) MMJ's claims were barred by its failure to follow claims procedures.

In response, MMJ filed a cross motion for partial summary judgment. The trial court granted the county's motion and denied MMJ's motion. The trial court found that "[MMJ] did not comply with the protest and claims procedures of the contract for recovering additional compensation" and dismissed with prejudice MMJ's claims for additional compensation. CP at 770. The trial court did not make any findings on the issues in MMJ's cross-motion, including the issues of actual notice, prejudice, equity, substantial compliance, and reservation of rights.²

*397 MMJ appealed and Division Three of the Court of Appeals reversed. *Mike M. Johnson, Inc. v. County of Spokane*, 111 Wash.App. 1051 (2002). The Court of Appeals found genuine issues of fact regarding whether the county had actual notice of a claim for additional compensation under a public works construction contract and whether the county waived compliance with contractual claims procedures.

The county appealed and we accepted review. *Mike M. Johnson, Inc., v. County of Spokane*, 148 Wash.2d 1009, 62 P.3d 890 (2003). The county requests that we reverse the Court of Appeals and affirm the trial court's dismissal of MMJ's claims. MMJ requests that we affirm the Court of Appeals, or in the alternative, send the case back to the trial court for findings of fact and conclusions of law on the unaddressed issues in MMJ's cross-motion for summary judgment.

ANAYLSIS

In reviewing an order of summary judgment, the appellate court engages in the same inquiry as the trial court. *Bowles v. Dep't of Ret. Sys.*, 121 Wash.2d 52, 62, 847 P.2d 440 (1993). Summary judgment may be granted only if the record demonstrates that there is no genuine issue as to any material fact, and that reasonable persons could reach but one conclusion. *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982); CR 56(c). In reviewing the record, the court considers the facts in the light most favorable to the nonmoving party. *Bowles*, 121 Wash.2d at 62, 847 P.2d 440.

The county concedes it had actual notice of the additional time and work encountered by MMJ as a result of the county's redesign of Seventh Avenue. However, the county argues that MMJ failed to follow the proper claims procedures and that this is fatal to MMJ's request for compensation, because under the contract the contractor waives his right to compensation if he fails to comply with claims procedures. The county argues that the notices MMJ did submit were not sufficiently detailed or timely to comply *398 with the contract, and asserts it did not waive compliance with the claims procedures. The county also argues as a matter of law that there is no actual notice exception to strict compliance with a contract's claims provisions. There are genuine issues of fact regarding whether MMJ's notices were sufficient to constitute compliance with the contract's claims provisions under the circumstances.

MMJ was required under the contract to give immediate written protest if it had any objection to the proposed change order, and then to supplement the written protest within 15 days with more detailed information regarding the nature

of the objection, additional costs, and additional time. First, the county argues that MMJ's notice was not timely. Apparently the county believes the written protest was due within 15 days of June 4, 1998, the date of the first change order. However, MMJ had no objection to the first change order number three. It was only when the county's designs proved to be inaccurate that problems arose. The redesign was initially completed August 7, but additional problems were found, so it was not until August 14 that MMJ was allowed to go back to work. The county never satisfactorily explains why the August 25 claim did not suffice as written protest within 15 days. At a minimum, there is an issue of fact whether MMJ's notice was timely and thus substantially complied with the contract's claim requirements.

Second, the county also points out the MMJ failed to give written notice of a request for extension of time. However, it was the county that ordered and was in control of the extension of time. *Cf. Bignold v. King County*, 65 Wash.2d 817, 823-24, 399 P.2d 611 (1965) (rejecting the argument that the contractor had a duty to comply with the strict terms of the contract despite effectively contrary direction from the county engineer and imposing "resolute good faith" on the county to abide by the direction of its agents). The evidence presented by MMJ was that the county told it to halt work until the county could redesign the project. It is a question of fact whether the county ordered a work *399 stoppage. If the county sought the extension, then MMJ would not have had a duty to give written notice of it.

Third, the county argues that the letters and claims for additional compensation submitted by MMJ were not sufficiently detailed to comply with the claims procedures. Again, it is a factual issue whether, under the circumstances, MMJ's notices complied. MMJ could not be expected to provide a detailed time and cost estimate when it did not even have a design to work with and did not know when one would be provided. The county forced MMJ to stop working and said, in essence, "We will tell you when we are done with the design and when you can **173 restart. In the meantime you must forecast how long the delay will be and submit documentation upon which we will rely in determining your compensation."

Based on the record before us, with all inferences in favor of the nonmoving party, it appears MMJ did comply with the contract. MMJ sent letters asking the county to produce the design as soon as possible and telling the county that its costs were mounting the longer it remained idle. Prior to receiving the final design, MMJ sent numerous letters to the county. For example, MMJ sent notices on June 16, 1998 (field notice from John Neville to Chad Coles); June 26, 1998 (letter to county outlining specific objections to change order number three); letters of July 7, 1998 and July 9, 1998 (concerning mounting costs due to work stoppage); letter of July 10, 1998 (requesting ability to proceed with work and avoid additional delays); and letters of July 24, July 29, August 6, August 14, August 18, from Ben Price, MMJ's contract administrator. The county's response was simply to reiterate it required compliance with the claim procedures.

MMJ presented evidence that the letters and notices it provided were standard in the industry. The "contract language is interpreted in light of industry practice." Barry B. Bramble & Michael T. Callahan, *CONSTRUCTION DELAY CLAIMS* § 2.01 (3d ed.2000). In these circumstances, there are genuine issues of fact whether the notices provided by *400 MMJ satisfied the contract requirements in light of industry practice.

1. ACTUAL NOTICE PLUS

I concur with the majority that "actual notice" alone is not sufficient to comply (or waive compliance with) a contract. However, the issue is more complex than that. This is largely because the "concept of construction delay is universal to the industry." Bramble & Callahan, *supra*, § 1.01. The purpose of a prompt notification requirement of changed conditions involving possible delay and increased expense is to give the owner the opportunity to verify and investigate the differing site condition and to make the most cost-effective arrangements possible. James F. Nagle & Douglas S. Oles, *WASHINGTON BUILDING CONTRACTS AND CONSTRUCTION LAW* § 15.45 (1996); *Sime Constr. Co. v. Wash. Pub. Power Supply Sys.*, 28 Wash.App. 10, 621 P.2d 1299 (1980) (owner was prejudiced by contractor's lack

of written notice because it could have made more favorable, alternate arrangements). MMJ fulfilled that purpose in notifying the county immediately of utility problems.

MMJ was required by the contract to notify the county engineer of changed conditions in writing. The engineer was required by the contract to "make an equitable adjustment in the payment or the time required for the performance of the work." CP at 111. Now the county wants to renege on its agreement to equitably compensate MMJ for work it required merely because MMJ failed to comply with the technical requirements regarding the form of its request for additional compensation.

However, the rule in Washington has been that where the contractor notifies the owner of the changed condition, failure to precisely follow claims procedures will not defeat the contractor's right to compensation unless that procedural error causes prejudice to the owner. *Bignold*, 65 Wash.2d 817, 399 P.2d 611. In *Bignold*, the county's representative ordered the contractor to perform extra work because of an anticipated *401 site condition, of which the owner had been promptly notified. The contractor sought compensation for the additional work caused by the unanticipated conditions. The county defended on the grounds that the contractor did not make a written claim according to the contract's requirements. The court held that the county was required to make an equitable adjustment to the contract price, holding:

the [owner] became immediately aware of the changed conditions as soon as they developed and ordered the contractor to perform the changes and extra work involved.... Under such conditions, the county cannot defeat recovery by a contractor even if no written notice was given.

Bignold, 65 Wash.2d at 822, 399 P.2d 611.

The material facts in this case are substantially similar to *Bignold*, and the result **174 should be the same. The majority attempts to distinguish *Bignold* by pointing out that it was not just the actual notice in *Bignold* that caused the court to grant the contractor recovery despite lack of written notice. The majority points out that "it was the owner's knowledge of the changed conditions coupled with its subsequent direction to proceed with the extra work that evidenced its intent to waive enforcement of the written notice requirements under the contract." Majority at 167. But that is exactly what happened here. The county knew of the changed conditions, created the plans to deal with those conditions, and subsequently directed MMJ to proceed with the extra work.

Similarly, in *Lindbrook Constr., Inc. v. Mukilteo Sch. Dist. No. 6*, 76 Wash.2d 539, 458 P.2d 1 (1969), this court required the owner to pay for additional work even though the contractor did not strictly comply with the notice and claim requirements. The contractor encountered unexpected site conditions when performing grading and drainage work at the site of a new school, requiring extra work to complete the project. The architect, who was the school district's representative, had actual knowledge of the conditions as they surfaced. This court denied the county's attempt to avoid payment for the contractor's additional *402 work on the basis of failure to comply with the contract's notice provision. This court found that the owner's actual notice was critical to the result, noting the architect was the one "who told the contractor what to do, and what not to do. It strains credulity to believe that he failed to keep the School District authorities advised of what was happening." *Lindbrook*, 76 Wash.2d at 543, 458 P.2d 1. The court concluded that the "contractor's right to recover under the circumstances of this case is clear." *Lindbrook*, 76 Wash.2d at 544, 458 P.2d 1 (citing *Bignold*, 65 Wash.2d 817, 399 P.2d 611); see also *Am. Sheet Metal Works, Inc. v. Haynes*, 67 Wash.2d 153, 407 P.2d 429 (1965) (owner cannot deny compensation to contractor for extra work authorized and directed by owner, despite contractor's failure to get written approval).

Accordingly, I agree that mere actual notice is not sufficient to comply with or waive the contractual notice requirements. However, an obligation to pay for work performed may be triggered by actual notice and direction by the owner or his agent to continue working.

2. WHETHER *ABSHER* REQUIRES A DIFFERENT RESULT

The county relies on *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wash.App. 137, 890 P.2d 1071 (1995), for the proposition that Washington now follows a rule of strict compliance in enforcing a construction contract's claims procedures and that unequivocal conduct is required before a contract provision will be deemed waived. This citation is not well taken. In *Absher*, the owner had *no* notice of the contractor's additional work until it was already completed. The owner had no opportunity to investigate the differing site conditions and make a determination how to accommodate it. In *Absher*, the contractor went ahead and completed the work and then presented the bill. In the present case, MMJ was completing work expressly required by the county and under the county's daily inspection. We should not extend *Absher* for the proposition that an owner can direct additional work be done and then avoid *403 paying for it if the contractor fails to submit a claim in 15 days which includes details which could not possibly yet be known.

The county contends that under *Absher*, it is no longer relevant whether the owner has actual notice of the changed conditions and the additional work made necessary by those conditions. The county points out that the Court of Appeals in *Absher* wrote that “[e]ven if the District had known of the concerns, those concerns were not claims under the contract.” *Id.* at 143, 890 P.2d 1071. Based on this language, the county contends that actual notice of changed site conditions no longer has any relevance in evaluating the contractor's entitlement to compensation.

However, the statement in *Absher* regarding what the result in that case would have been if actual notice had occurred is plainly dicta. Actual notice did not occur, and therefore the parties were not meaningfully adversed on this point. The contractor did not **175 provide any notice to the owner, and the owner did not have the opportunity to investigate alternate arrangements and was not able to direct the contractor how to proceed. The county cannot rely on dicta from a case where actual notice was not an issue. Nor can the county effectively argue that *Absher* changed the rules in Washington regarding actual notice. Notably, the *Absher* decision did not meaningfully evaluate governing Washington precedent on that issue, such as *Bignold* and *Lindbrook*.

3. PREJUDICE

Nor did *Absher* change the rule in Washington regarding the relevance of prejudice to the owner if a contractor fails to provide proper written notice. The general rule is that a contractor does not forfeit his claim to equitable adjustment merely because he has failed to technically comply with a contract's notice provisions; the owner must also show that he has actually suffered prejudice. Kenneth M. Cushman & Joyce K. Hackenbrach, *Advanced Construction Claims* *404 *Workshop: The Law, Analysis, and Pricing of Delays and Disruptions*, in REAL ESTATE LAW AND PRACTICE *44-45 (PLI Real Estate Law & Practice Course Handbook Series, Oct. 18-19, 1990), available in Westlaw 357 PLI/Real 11; Jon M. Wickwire et al., CONSTRUCTION SCHEDULING: PREPARATION, LIABILITY, AND CLAIMS § 3.14(D) (2d ed.2003).

Traditionally, Washington courts have followed the general rule and held that lack of written notice “can be overcome by a showing that the owner had actual or constructive knowledge or suffered no prejudice.” Nagle & Oles, *supra*, § 14.5. *Absher* did not change Washington's adherence to the general rule. The *Absher* court stated that prejudice is not required to enforce contractual notice provisions. *Absher*, 77 Wash.App. at 144, 890 P.2d 1071. The court then cited *Sime*, a case in which prejudice to the owner was an important factor of the case. *Sime* expressly stated that prejudice to the owner would have been avoided if notice had been given. *Sime*, 28 Wash.App. at 16, 621 P.2d 1299. Thus, after *Absher*, the rule remains that prejudice to the owner is relevant in determining the enforceability of notice provisions.

4. WAIVER

In addressing the waiver issue, the majority relies on the county's written correspondence informing MMJ that it was not waiving the requirements of written notice and claim submission. However, the county's actions indicated otherwise. Again, there was ample evidence presented by MMJ upon which a reasonable juror could find waiver.

The majority quotes *Swenson v. Lowe*, 5 Wash.App. 186, 486 P.2d 1120 (1971), stating “ ‘the requirement of a writing is for the benefit of the owner, and the owner, either expressly or by conduct, may waive such a requirement.’ ” Majority at 167 (quoting *Swenson*, 5 Wash.App. at 188, 486 P.2d 1120). The majority fails to include the very next sentence in the quoted opinion, which is:

***405** As stated in Annot., 2 A.L.R.3d 620, 661 (1965), “where ... the work was orally ordered, requested, directed, authorized, or consented to by the owner ...” the requirement is deemed waived. *Morango v. Phillips*, 33 Wash.2d 351, 205 P.2d 892 (1949); *Eggers v. Luster*, supra [32 Wash.2d 86, 200 P.2d 520 (1948)]; *Bjerkeseeth v. Lysnes*, 173 Wash. 229, 22 P.2d 660 (1933); *Crowley v. United States Fid. & Guar. Co.*, 29 Wash. 268, 69 P. 784 (1902). See 13 Am.Jur.2d *Building and Construction Contracts* § 24 (1964).

Swenson, 5 Wash.App. at 188-89, 486 P.2d 1120.

Our cases are in accord. Where the owner directs the contractor to do the work, the owner cannot then complain the contractor did not seek written authorization. The county cannot prevent waiver from occurring simply by disclaiming waiver in its letters while at the same time engaging in conduct which constitutes waiver under the law. Under our construction law, at the very least, when the county says one thing and then does another, it creates a question of fact. As in *Swenson*, the county may not direct that work be done and then refuse to compensate MMJ just because the original contract required that a demand for compensation be in a technical, detailed writing.

****176** The county's reliance on *Absher* regarding waiver is again misplaced. The *Absher* court found there was no conduct on the part of the owner that could be interpreted as a waiver of the requirement of notice or a waiver of the requirements regarding claims procedure for additional compensation. However, in the present case, there is ample evidence that the county was intending to waive the requirements of written claim procedures. The county orally ordered MMJ to halt work twice, both times without providing notice to MMJ of when it could return to work and it orally told MMJ when to return to work. Under these facts, a reasonable juror could find that the requirement of written notice was waived.

5. RISK OF MISLOCATED UTILITIES

The county argues that MMJ assumed all risk of delay and other potential problems due to utilities at the site. ***406** MMJ claims the county breached its implied warranty to furnish the contractor with accurate plans, and the delay was thus owner-caused.

As “[b]etween the owner and the contractor, the owner is responsible for the design and any losses due to defects in design. This responsibility is often stated in terms of the owner's implied warranty of the adequacy of the plans and specifications.” *Bramble & Callahan*, supra, § 3.02(D). There is evidence submitted by MMJ that plans associated with change order number three were inaccurate. According to its standard practice, prior to soliciting bids from contractors, the county requested input from all utility companies regarding the presence of equipment within the boundaries of the Apple Valley and Wolfland projects. MMJ provided evidence through the affidavit of an expert witness in construction management that the standard in the trade is that the owner is responsible for confirming the location of utilities.

However, the county failed to solicit input from utility companies after it expanded the scope of the project. The change order was presented to MMJ on June 4, 1998 and MMJ was required to start work immediately, prior to approval by the utility director. The drawings the county provided to MMJ indicating utility line placement were in error.

MMJ contends, and the evidence suggests, that the error was the result of the county failing to follow its standard procedures and failing to fulfill its duty to provide adequate plans. MMJ was entitled to rely on the standard practice of the county to involve utilities in the design process. This is an unresolved factual issue that is material to the outcome of the case. The county says it disclaimed the implied warranty in its contract document. Standard specification 1-07.17 allocates to the contractor all costs associated with relocation of utilities. Therefore, according to the county, MMJ's reliance on the contract plans and specifications was unreasonable. Whether the reliance was reasonable is a question of fact, making summary judgment inappropriate in this case.

*407 This is not a novel question of law. For example, in *Clevco, Inc. v. Mun. of Metro. Seattle*, 59 Wash.App. 536, 799 P.2d 1183 (1990), Clevco won a bid to install sewers in east King County. The contracts purported to allocate all risk of underground utilities to Clevco, the contractor. Like the case at bar, Metro failed to indicate utilities on its plans and Clevco submitted a bill for additional compensation. Metro moved for summary judgment, arguing the contract clearly placed the risk of utilities on the contractor. The appellate court disagreed stating the general rule is that the contractor's recovery "is determined by the question of whether the contractor's reliance on contractual representations was reasonable." *Id.* at 543, 799 P.2d 1183 (emphasis added). Where the plans or specifications lead a public contractor reasonably to believe that conditions represented on the plans do exist and may be relied upon, he is entitled to compensation for extra expense incurred as a result of the inaccuracy of those representations. *Id.* at 542, 799 P.2d 1183 (citing *Dravo Corp. v. Mun. of Metro. Seattle*, 79 Wash.2d 214, 484 P.2d 399 (1971)); see also *Scozzolo Constr., Inc. v. City of Renton*, 102 Wash.App. 611, 9 P.3d 886 (2000) (contract language stating contractor bears risk of delays due to utilities does not necessarily preclude contractor's recovery but what parties intended contract language to mean is a factual issue which prevents summary judgment).

**177 CONCLUSION

I agree with the majority that actual notice is not an exception to contract compliance. But that is not the issue here. Instead, the question is whether actual notice plus direction to proceed with the work may substantially comply with a contract or waive technical portions of the claims procedure. This is a factual question ill suited for summary judgment resolution.

The county warns that if we hold there is a factual dispute regarding compliance with the contract's notice and *408 claim provisions, or a factual dispute regarding waiver, contractors will be free to run up costs and incur delays wherever they like, and then present a surprise bill to the owner at the end of the project. This is simply untrue. The general rule is, and our cases state, that when the owner directs the contractor to do work outside the contract, and then observes the work being done, the owner cannot later rely solely on technical claim provisions requiring a writing to deny equitable and reasonable compensation to the contractor, especially where the lack of a writing has not caused the owner any prejudice. The trier of fact should be the one to decide whether that is what happened here.³

We are not deciding whether there were reasonable grounds for upholding a jury's decision. Certainly, the majority has found many potentially compelling facts from which a rational jury might find for the county. A conflict of material fact exists. I would affirm the Court of Appeals and remand the case for trial.

JOHNSON, IRELAND, and SANDERS, JJ., concur.

All Citations

150 Wash.2d 375, 78 P.3d 161

Footnotes

1 The County increased the compensation to \$75,467 in September (1998).

2 Section 1-07.17 of the contracts provides:

The existence and location of all utilities are shown on the plans based upon information available to Owner at the time of design. It is to be expected that the actual location of utilities will at times vary, sometimes substantially, from the locations indicated on the plans.

ALL RISKS OF UTILITIES MISLOCATED ON THE PLANS, OR OF UTILITY CONFLICTS NOT SHOWN ON THE PLANS SHALL BE CONTRACTOR'S. If the Engineer determines that the project requires work to relocate or provide other adjustments to utilities that are either mislocated on the plans or that entail utility conflicts, the work (labor and equipment) shall be performed by Contractor at no additional cost to Owner. Any net additional costs for *materials* ... will be reimbursed by Owner. Contract time may be extended as provided in Section 1-08.8, Extension of Time.

Ex. B, Clerk's Papers (CP) at 46.

3 See *supra* note 2.

4 The standard of review on summary judgment is well settled. *Trimble v. Wash. State Univ.*, 140 Wash.2d 88, 93, 993 P.2d 259 (2000). The appellate court engages in the same inquiries as the trial court, determining whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Id.* The court considers all facts and reasonable inferences from them in the light most favorable to the nonmoving party, and "[t]he motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Id.* (quoting *Clements v. Travelers Indem. Co.*, 121 Wash.2d 243, 249, 850 P.2d 1298 (1993)). Bare assertions that a genuine material issue exists, however, will not defeat a summary judgment motion in the absence of actual evidence. *Id.*

1 Also, MMJ had prior experience with Spokane County. MMJ had performed, without incident, one other contract for the county earlier in the year.

2 The trial court certified some issues for review and stayed others pending appellate review. The trial court stayed MMJ's claim for unpaid contract balances on both projects, the county's counterclaims for liquidated damages and other back charges, as well as the county's third party claims against U S West.

3 One of the issues raised by MMJ in its summary judgment motion, which the trial court did not address, is whether the contract's provision regarding complete forfeiture of the contractor's claim violates RCW 4.24.360. The statute nullified "no-damages-for-delay" clauses. *Scozzolo*, 102 Wash.App. at 616, 9 P.3d 886. Under the statute, any contract language, which purports to extinguish a party's right to an equitable adjustment for unreasonable delay, is void as against public policy. MMJ contends the county's delays were unreasonable.

The trial court also failed to address MMJ's claim that its reservation of rights in the executed change order effectively preserved its claims, although there is authority for that position. Thomas H. Asselin & M. Catherine Harris, *How to Recognize, Preserve, Present, and Prosecute Construction Contractors' Delay Claims*, 40 S.C. L. REV. 943, 950 (1989).

APPENDIX 2

KeyCite Yellow Flag - Negative Treatment
Distinguished by Wm. Dickson Co. v. Misener Const., Inc., Wash.App.
Div. 2, July 2, 2013

162 Wash.2d 762
Supreme Court of Washington,
En Banc.

AMERICAN SAFETY CASUALTY INSURANCE
COMPANY, a foreign corporation, Respondent,

v.

CITY OF OLYMPIA, Petitioner.

No. 79001-9.

|
Dec. 27, 2007.

Synopsis

Background: Surety on performance and payment bond, as assignee of general contractor's rights under public works construction contract, sued city to recover money allegedly owing on contract. The Superior Court, Thurston County, Richard D. Hicks, J., entered summary judgment in city's favor. Surety appealed. The Court of Appeals, Van Deren, Acting C.J., 133 Wash.App. 649, 137 P.3d 865, reversed and remanded. Review was granted.

[Holding:] The Supreme Court, Bridge, J., held that city's equivocal conduct by agreeing to enter negotiations with surety could not impliedly waive contractual right to demand compliance with time requirements for filing administrative claim.

Reversed.

Opinion

**55 BRIDGE, J.

*764 ¶ 1 This case arises from a contract dispute between American Safety Casualty Insurance Company (American Safety)¹ and the city of Olympia (City) and the trial court's award of summary judgment in favor of the City.² There is no dispute that American Safety did not follow the contract's provisions when it sought additional compensation for work it had performed and

that it filed suit after the 180-day time limit established in the contract. However, American Safety argues that the City implicitly waived its right to demand compliance with the contract's provisions when it agreed to negotiate and try to reach a settlement. American Safety argues that the trial court erred in granting summary judgment to the City, and that the Court of Appeals was correct to reverse because an issue of material fact existed as to whether the City waived its contractual defenses. The City maintains that it expressly reserved its rights; that any waiver of rights must be unequivocal; and that, at most, its acts were equivocal and thus did not constitute a waiver. We agree with the City and reverse the Court of Appeals.

I

Facts and Procedural History

¶ 2 In 2000, the City awarded contractor Katspan, Inc. (Katspan) a contract to construct a segment of the LOTT southern connection pipeline project. Under the terms of the contract, the contractor was required to follow the contractual procedures if it wished to file a protest, formal claim, or lawsuit.³ Katspan agreed that protests to any change *765 orders or compensation issues were to be brought to the attention of the project engineer immediately. If Katspan disagreed with the project engineer's resolution of the protest, it could file an administrative claim. Any cause of action under the contract was to be brought within 180 days of the final acceptance and closeout of the project. Pursuant to the contract, failing to follow the **56 procedures constituted a waiver of the claims. Clerk's Papers (CP) at 47 ("By failing to follow the procedures of this section [Procedure and Protest by the Contractor] and Section 1-09.11 [Disputes and Claims], the Contractor completely waives any claims for protested work."); CP at 55 ("[T]he Contractor's failure to bring suit within the [180-day] time period provided, shall be a complete bar to any such claims or causes of action.").

¶ 3 From the beginning, the City was frustrated with Katspan's work—the City had to direct Katspan to fix deficient work, and Katspan failed to meet the scheduling requirements. On April 2, 2001, the City sent Katspan a letter stating that it considered Katspan to be in breach of the contract, as Katspan had not completed the work

according to the time frame established in the contract. The City indicated that, pursuant to the contract, it was entitled to collect liquidated damages from Katspan for the breach. The City also stated that it “reserve[d] its right to demand strict compliance with all other terms of the contract documents, including ... the required procedure for protest by the Contractor.” CP at 338. On April 18, 2001, the City sent Katspan a letter in which the City stated that because Katspan failed to follow the procedures set forth in the contract, it had waived its claims. Katspan never disputed this letter.

¶4 When the work was finished, the City began the process of finally accepting the project as complete. On May 10, 2001, the project engineer, Parametrix Inc. (Parametrix), sent Katspan a letter asking Katspan to submit its final cost *766 proposals in order to close out the project. Katspan did not respond. On May 25, 2001, Parametrix sent Katspan another letter, again asking for Katspan to provide the information by June 4 so it could begin the closeout. Katspan responded on June 11, 2001, saying that it was “in the final stages of compiling data” and that the requested information “should be ready shortly.” CP at 95. Parametrix did not receive the information, so it reviewed the files and changes to the original contract and computed what it considered to be reasonable costs for the additional work. On June 18, 2001, Parametrix sent Katspan a letter with the change order it prepared to cover the additional work. Parametrix asked Katspan to sign the final payment estimate and return it if it was acceptable. Katspan never responded, and on July 2, 2001, the City sent Katspan a letter stating that if Katspan did not return the final payment request, the City would unilaterally establish final acceptance of the project. The City received no response, and on September 10, 2001, the City unilaterally closed out the project.

¶ 5 On November 26, 2001, American Safety, surety for Katspan,⁴ sent the City a “Request for Equitable Adjustment on Southern Connection Pipeline Project” (Request). CP at 116–321. The document did not comply with the standards set out in the contract for filing a claim. American Safety received no response to the Request until March 14, 2002 (more than 180 days after the final acceptance date), when American Safety left a voicemail message for the City’s counsel, stating that it had some ideas for “some possible quick solutions.” CP at 329.

¶ 6 The City agreed to enter negotiations, but asked American Safety to provide further information so it could determine whether a quick resolution was possible. American Safety subsequently sent the City two three-ring binders of documents; however, it did not include all of the information that the City needed to evaluate the request. *767 On August 1, 2002, the City sent American Safety a letter in which it asked for further documentation. American Safety indicated that it was having trouble obtaining the requested information. On October 2, 2002, the City reiterated that it was willing to negotiate, but that it would not do so unless American Safety could provide adequate backup information for its claims. The City received no response, and on November 12, 2002, sent American Safety a letter in which it stated that “[w]ithout waiving any of its **57 defenses, LOTT has stated several times that it is willing to negotiate these claims in order to come to a quick resolution.” CP at 354. The City asked whether American Safety was still interested in negotiations, as the City had received no response from its last request for information.

¶ 7 On January 22, 2003, American Safety informed the City that it had received four or five boxes of documents from Katspan for the City to review. Upon review, the City discovered that some information was still missing. On April 23, 2003, the City sent American Safety yet another letter requesting certain documentation. The City stated that if it did not receive the requested information by May 16, 2003, it would deny American Safety’s claim. On May 14, 2003, American Safety wrote to the City that although it believed it had provided sufficient information, “we are presently determining the feasibility of accommodating LOTT’s request for supplemental cost information, or creating the equivalent.” CP at 368. The documentation never arrived, and on May 16, 2003, the City denied American Safety’s Request.

¶ 8 On July 31, 2003, Thomas Presnell, a claims consultant representing American Safety, e-mailed Paul Pedersen, the City’s forensic accountant, asking him whether they could meet to discuss the project and the information the City needed to complete its audit. Pedersen responded that he had been given the green light to discuss the matter. Presnell and Pedersen exchanged a few more e-mails in which they discussed what form the requested information should be in and when they could meet. However, no meeting ever took place.

*768 ¶ 9 On May 21, 2004—more than a year after the City denied American Safety's claim—American Safety called the City and said that it had finally obtained the information necessary for the City to evaluate its Request. The City responded that the Request did not comply with the procedures set forth in the contract and that the claim had been denied more than a year prior for lack of information.⁵

¶ 10 On August 17, 2004, American Safety filed suit against the City in Thurston County Superior Court. The trial court granted summary judgment in favor of the City, finding that American Safety did not comply with the contractual provisions and that the City had not waived its right to demand compliance with these agreed upon procedures. The Court of Appeals reversed, finding that whether the City had waived its right to demand compliance with the contractual provisions was an issue of material fact for a fact finder to decide. *Am. Safety Cas. Ins. Co. v. City of Olympia*, 133 Wash.App. 649, 662, 137 P.3d 865 (2006). The City petitioned for review in this court, which we accepted on June 8, 2007. *Am. Safety Cas. Ins. Co. v. City of Olympia*, 160 Wash.2d 1017, 162 P.3d 1130 (2007). We must now decide whether the trial court was correct in granting summary judgment or whether an issue of material fact exists as to whether the City waived the contractual provisions.

II

Analysis

[1] [2] ¶ 11 We review an order of summary judgment de novo. *Jones v. Allstate Ins. Co.*, 146 Wash.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper “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.” *Id.* at 300–01, 45 P.3d 1068.

*769 ¶ 12 The City argues that the Court of Appeals erred when it failed to recognize that the rule of *Mike M. Johnson, Inc. v. Spokane County*, 150 Wash.2d 375, 78 P.3d 161 (2003), applies. In *Mike M. Johnson*, we considered whether Spokane county implicitly waived its right to demand compliance with contractual procedures when the county entered into negotiations with Mike M.

Johnson, Inc. (MMJ) even after MMJ did not follow the agreed upon procedures. *Id.* at 377–78, 78 P.3d 161. In that case, the county and MMJ entered into a contract for MMJ to **58 construct two sewer projects. *Id.* at 378, 78 P.3d 161. Pursuant to the contract, which included the same standard specifications as those at issue in the instant case, the county could revise the scope of MMJ's work through a change order. *Id.* at 378–79, 78 P.3d 161. If MMJ objected to the change order, the contract specified that it must file an immediate protest. *Id.* at 379, 78 P.3d 161. Under the terms of the contract, failing to follow the contractual procedures would result in waiver of the claims. *Id.* at 380, 78 P.3d 161.

¶ 13 During the course of the project the county submitted a change order, and MMJ did not object. *Id.* at 378–79, 78 P.3d 161. MMJ later sent the county a letter addressing seven points of concern, one of which was the change order. *Id.* at 380, 78 P.3d 161. The letter indicated that MMJ had to perform additional work to accommodate the change order, which was causing additional costs and delays. *Id.* at 380–81, 78 P.3d 161. The county responded to MMJ by stating that if MMJ thought it had a claim for additional compensation, it must follow the terms of the contract and submit a claim pursuant to the contractual provisions. *Id.* at 381, 78 P.3d 161. Correspondence between MMJ and the county continued, and the county stated that it was willing to discuss a settlement and attempt to avoid litigation but that it did not intend to waive any of its contractual defenses. *Id.* at 381–84, 78 P.3d 161. The parties were unable to resolve the dispute out of court, and MMJ ultimately filed a complaint against the county for additional compensation. *Id.* at 384, 78 P.3d 161. The trial court found that because MMJ failed to follow the contractual procedures to pursue a claim for additional compensation, its claim failed as a matter of law. *770 *Id.* at 385, 78 P.3d 161. The Court of Appeals reversed, holding that an issue of material fact existed regarding whether the county's conduct constituted implied waiver. *Mike M. Johnson, Inc. v. Spokane County*, 112 Wash.App. 462, 471, 49 P.3d 916 (2002).

¶ 14 On appeal before this court, MMJ argued that a reasonable fact finder could determine that the county's act of agreeing to enter into negotiations was evidence of intent to waive the contractual procedures, and thus summary judgment was improper. *See Mike M. Johnson*, 150 Wash.2d at 391, 78 P.3d 161. We disagreed. We held

that, absent waiver, failure to comply with contractual procedures bars relief and that “waiver by conduct ‘requires *unequivocal* acts of conduct evidencing an intent to waive,’ ” *Id.* at 391, 78 P.3d 161 (emphasis added) (quoting *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wash.App. 137, 143, 890 P.2d 1071 (1995)). By repeatedly stating that it was not waiving its rights, the county clearly did not unequivocally waive those rights and thus summary judgment in favor of the county was proper. *Id.* at 392, 78 P.3d 161.

[3] ¶ 15 In the instant case, the City asserted in correspondence that it reserved its right to demand strict compliance with the contractual procedures and that it was willing to negotiate “[w]ithout waiving any of its defenses.” CP at 327, 338, 354. American Safety points out, however, that the City expressly reserved its rights just twice prior to the end of the project, and just once after the project's completion. Appellant's Reply Br. at 5. In other correspondence, the City did not reference the contractual provisions and evidenced a willingness to negotiate in order to avoid litigation.⁶ According to American Safety, this distinguishes the case from *Mike M. Johnson*, where the county “continuously” asserted its rights. Resp't's Suppl. Br. at 12 (emphasis omitted). The Court of Appeals agreed, finding that *771 because “the City referred to strict compliance with the contract terms in *only* three instances,” the City's actions were “equivocal” and thus a finder of fact must decide whether the City implicitly waived its rights. *Am. Safety*, 133 Wash.App. at 659, 661, 137 P.3d 865 (emphasis added).

**59 ¶ 16 The Court of Appeals misapplied the law. While in some cases equivocal conduct does create an issue of material fact, in which case it would be improper to grant summary judgment, such ambiguity here means that the conduct by definition was *not* unequivocal, as is required for waiver: “[W]aiver by conduct ‘requires *unequivocal* acts of conduct evidencing an intent to waive,’ ” *Mike M. Johnson*, 150 Wash.2d at 391, 78 P.3d 161 (emphasis added) (quoting *Absher*, 77 Wash.App. at 143, 890 P.2d 1071). At most, the fact that the City agreed to consider negotiations—and we point out that the City never *did* enter into negotiations, for it never received the information it required as a prerequisite to doing so—constitutes equivocal conduct.⁷ Equivocal conduct by definition cannot be unequivocal, and the Court of Appeals thus erred when it found that “the *equivocal* nature of the City's conduct” warranted a trial on the

merits. *Am. Safety*, 133 Wash.App. at 661, 137 P.3d 865 (emphasis added). Given that the City three times expressly asserted that it was not waiving its defenses, a reasonable juror could not find that the City *unequivocally* did exactly the opposite. Amicus Washington School Construction Alliance points out that “[t]he ‘unequivocal acts’ standard is demanding for good reason. *Waiver permanently surrenders an established contractual right.*” Br. of Amicus Curiae Wash. State Sch. Constr. Alliance at 11 (emphasis added). Because American Safety admittedly did not comply with the contractual provisions, and because the City did not unequivocally waive its right *772 to demand compliance with these provisions, we find that the trial court was correct in granting summary judgment to the City.

¶ 17 American Safety also argues that *Mike M. Johnson* can be distinguished because there, the county and MMJ were discussing seven different issues, only one of which concerned the change order and whether MMJ followed the contractual procedures. Therefore, according to American Safety, “continued negotiations of the claim [in *Mike M. Johnson*] were insufficient to create a waiver because those negotiations related several issues, not just the change order.” Appellant's Opening Br. at 29.

¶ 18 It is unclear why this distinction should result in a different outcome here. In *Mike M. Johnson* we noted the fact that the county and MMJ were negotiating several issues in order to point out that if we found that entering into negotiations constituted an implicit waiver of contractual rights, then the county likely would have had to stop all negotiations on all issues for fear of waiving the mandatory claim provisions. 150 Wash.2d at 392, 78 P.3d 161. The same policy consideration is at issue here. Were we to find that by entering into negotiations a party waives its contractual rights, we would frustrate the negotiation and settlement process. Washington law strongly favors the public policy of settlement over litigation. *E.g.*, *City of Seattle v. Blume*, 134 Wash.2d 243, 258, 947 P.2d 223 (1997) (“[T]he express public policy of this state ... strongly encourages settlement.”); *Seafirst Ctr. Ltd. P'ship v. Erickson*, 127 Wash.2d 355, 366, 898 P.2d 299 (1995) (referring to “Washington's strong public policy of encouraging settlements”); *Haller v. Wallis*, 89 Wash.2d 539, 545, 573 P.2d 1302 (1978) (“[T]he law favors amicable settlement of disputes....”). If we found that by agreeing to enter into negotiations the City waived its rights under the contract, we would deter future parties

from attempting settlement before resorting to use of the courts. Such result would be directly contrary to established public policy and thus we find that entering into settlement negotiations, without anything more, does not constitute an implied waiver of contractual defenses.

equivocal. Agreeing to enter into negotiations, without more, does not constitute an implied waiver of contractual rights. Therefore, since American Safety admittedly did not comply with the contractual provisions and thus waived its claim to additional compensation, the trial court was correct in granting summary judgment to the City. The decision of the Court of Appeals is reversed.

**773 Attorney Fees*

¶ 19 Because the City has prevailed here, it is entitled to reasonable attorney fees and costs. RCW 39.04.240; RAP 18.1.

WE CONCUR: Chief Justice GERRY L. ALEXANDER, Justice TOM CHAMBERS, Justice CHARLES W. JOHNSON, Justice SUSAN OWENS, Justice BARBARA A. MADSEN, Justice MARY E. FAIRHURST, Justice RICHARD B. SANDERS and Justice JAMES M. JOHNSON.

****60 III**

All Citations

Conclusion

162 Wash.2d 762, 174 P.3d 54

[4] [5] ¶ 20 Implied waiver of contractual rights requires unequivocal acts, and here the City's acts were, at most,

Footnotes

- 1 American Safety is the surety for Katspan, Inc., the original party to the contract.
- 2 The City acts on behalf of the Lacey, Olympia, Tumwater and Thurston County Wastewater Management Partnership (LOTT). Therefore, some correspondence referred to herein references "LOTT." All acts undertaken by LOTT are binding on the City.
- 3 The contract consisted primarily of the 2000 Washington State Department of Transportation *Standard Specifications for Road, Bridge, and Municipal Construction*, its American Public Works Association supplement, and the supplemental specifications.
- 4 Due to financial difficulties, Katspan ultimately assigned its rights and obligations under the contract to American Safety.
- 5 American Safety does not allege that the information the City requested was unnecessary to resolve the dispute or that the City's repeated requests for the information were a pretext designed to prevent American Safety from achieving compliance with the contractual provisions.
- 6 American Safety argues that the City's "mention of potential litigation" evidenced its intent to waive the 180-day suit limitation period and "allow" American Safety to file a legal claim. Appellant's Reply Brief at 4. The contractual provisions do not establish that American Safety must seek the City's "permission" in order to file a lawsuit; rather, they provide a *defense* to any claim that American Safety might bring.
- 7 We stress that the discussions between the City and American Safety took place after the work was completed, and thus the situation was not one where the City was directing American Safety to perform its obligations under the contract while the parties negotiated the contractual dispute. Had the City directed American Safety to focus on performing work rather than worrying about assembling documentation to comply with contractual provisions, then such situation could arguably be construed as implied waiver. However, as the trial court pointed out, here "the horse ha[d] left the barn." Transcript at 17.

APPENDIX 3

168 Wash.App. 1
Court of Appeals of Washington,
Division 2.

REALM, INC., a Washington corporation, Appellant,
v.
CITY OF OLYMPIA, a municipality, Respondent.

No. 41563-1-II.

|
March 13, 2012.

|
Publication Ordered May 8, 2012.

Synopsis

Background: Contractor for construction of fish passage tunnel brought action against city for breach of contract, seeking additional compensation from city after city had terminated the contract and after contractor had accepted payment from city. The Superior Court, Thurston County, Wm. Thomas McPhee, J., granted summary judgment to city. Contractor appealed.

[Holding:] The Court of Appeals, Worswick, A.C.J., held that contractor did not comply with contract's pre-suit notice requirements.

Affirmed.

West Headnotes (9)

[1] **Judgment** ⇌ Absence of issue of fact

A genuine issue of material fact exists, precluding summary judgment, where reasonable minds could differ on the facts controlling the outcome of the litigation. CR 56(c).

1 Cases that cite this headnote

[2] **Contracts** ⇌ Intention of Parties

The touchstone of contract interpretation is the parties' intent.

5 Cases that cite this headnote

[3] **Contracts** ⇌ Intention of Parties

Washington State courts follow the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used.

7 Cases that cite this headnote

[4] **Contracts** ⇌ Extrinsic facts

Contract interpretation is a question of law when the interpretation does not depend on the use of extrinsic evidence.

1 Cases that cite this headnote

[5] **Contracts** ⇌ Construction as a whole

When contract provisions seem to conflict, the court will harmonize them with the goal of giving effect to all provisions.

2 Cases that cite this headnote

[6] **Contracts** ⇌ Scope and extent of obligation

Contracts ⇌ Waiver

Washington State law generally requires contractors to follow contractual notice provisions unless those procedures are waived.

Cases that cite this headnote

[7] **Municipal Corporations** ⇌ Conditions precedent and limitations

Public Contracts ⇌ Conditions precedent

Under terms of contract with city for construction of fish passage tunnel, which contract included Washington State Department of Transportation Standard Specifications for Road, Bridge, and Municipal Construction, following contract termination for public convenience, contractor was required, as condition precedent to bringing action against city for breach of contract, seeking additional compensation from city after city had terminated the contract and after contractor had accepted payment from city which had been based on city's calculation of full and final payment due on the contract, to give notice of any disputes regarding both costs associated with termination and payment for actual work performed under the contract, and was required to follow this notice within 15 days with additional information set forth in contract.

1 Cases that cite this headnote

[8] **Municipal Corporations** ⇌ Conditions precedent and limitations

Public Contracts ⇌ Conditions precedent

Contractor for construction of fish passage tunnel, as condition precedent to bringing action against city for breach of contract, seeking additional compensation from city after city had terminated the contract based on public convenience and after contractor had accepted payment from city which had been based on city's calculation of full and final payment due on the contract, was required under the terms of the contract, which included Washington State Department of Transportation Standard Specifications for Road, Bridge, and Municipal Construction, to protest city's unilateral change order setting final payment.

Cases that cite this headnote

[9] **Municipal Corporations** ⇌ Rights and remedies of municipality

Public Contracts ⇌ Damages and amount of recovery

A city that prevails on a summary judgment motion and prevails on appeal in a public works contract case may be awarded attorney fees on appeal. West's RCWA 39.04.240.

Cases that cite this headnote

Attorneys and Law Firms

****680** Thomas F. Miller, Jennifer M. Modak, Miller Law Office PS, Tumwater, WA, for Appellant.

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Michael Porter Grace, Groff Murphy PLLC, Tymon Berger, Ashbaugh Beal LLP, Seattle, WA, Amicus Curiae on behalf of Associated General Contractors O.

Opinion

WORSWICK, A.C.J.

***3** ¶ 1 Realm Inc. entered into a contract with the city of Olympia to build a fish passage tunnel. The city subsequently ordered Realm to stop work and terminated the contract for public convenience. After an audit, the city determined the amount it believed was due to Realm, and Realm accepted payment. Realm then sued the city, seeking additional compensation. The city moved for summary judgment, which the trial court granted. We affirm, holding that Realm waived the right to sue by failing to comply with notice provisions that were, by contract, a precondition to litigation by Realm against the city.

FACTS

¶ 2 On June 18, 2008, the city awarded Realm a contract to build a tunnel that would serve as a fish passage route for salmon. Realm began work on the project, but the city ordered Realm to stop all work on September 9, finding that Realm had failed to ****681** maintain the required grade, to retain staff with appropriate expertise, to properly shore the construction, and to achieve adequate progress. On September 30, the city terminated the contract.

¶ 3 On December 29, Realm submitted a claim to the city for work performed on the project, seeking \$1,109,418.75. The city employed an auditing firm that determined the city owed Realm \$535,852. After Realm refused to sign a change order agreeing to that amount, the city unilaterally issued the change order and issued a check to Realm. Realm cashed the check.

¶ 4 Realm sued the city, alleging breach of contract for the city's failure to pay Realm the full amount Realm had claimed. The city moved for summary judgment, arguing ***4** that Realm had waived its claim by failing to comply with the contract's notice provisions and that Realm's acceptance of payment constituted an accord and satisfaction. The trial court granted summary judgment to the city.¹ Realm appeals.

ANALYSIS

I. STANDARD OF REVIEW

[1] ¶ 5 Summary judgment is appropriate where, viewing all facts and resulting inferences most favorably to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Briggs v. Nova Servs.*, 166 Wash.2d 794, 801, 213 P.3d 910 (2009); CR 56(c). “A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation.” *Ranger Ins. Co. v. Pierce County*, 164 Wash.2d 545, 552, 192 P.3d 886 (2008). We review a grant of summary judgment de novo. *Briggs*, 166 Wash.2d at 801, 213 P.3d 910.

II. CONTRACTUAL NOTICE REQUIREMENT

¶ 6 Realm argues that it was not required to comply with contractual notice provisions because its dispute with the city did not arise until after the city terminated the contract. We disagree, holding that Realm was required to comply with the notice provisions even after termination.

[2] [3] [4] ¶ 7 The “touchstone of contract interpretation is the parties' intent.” *5 *Durand v. HIMC Corp.*, 151 Wash.App. 818, 829, 214 P.3d 189 (2009) (quoting *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wash.2d 656, 674, 911 P.2d 1301 (1996)), *review denied*, 168 Wash.2d 1020, 231 P.3d 164 (2010). Washington courts follow the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wash.2d 493, 503, 115 P.3d 262 (2005). Contract interpretation is a question of law when, as here, the interpretation does not depend on the use of extrinsic evidence. *Dice v. City of Montesano*, 131 Wash.App. 675, 684, 128 P.3d 1253 (2006) (quoting *Tanner Elec. Coop.*, 128 Wash.2d at 674, 911 P.2d 1301).

[5] [6] ¶ 8 When contract provisions seem to conflict, we will harmonize them with the goal of giving effect to all provisions. *Nishikawa v. U.S. Eagle High LLC*, 138 Wash.App. 841, 849, 158 P.3d 1265 (2007). “Washington law generally requires contractors to follow contractual notice provisions unless those procedures are waived.” *Mike M. Johnson, Inc. v. Spokane County*, 150 Wash.2d 375, 386, 78 P.3d 161 (2003).

¶ 9 The dispositive issue on review is whether Realm was required to comply with the contract's notice provision after the city terminated the contract. The contract between Realm and the city included the “Washington State Department of Transportation Standard Specifications for Road, **682 Bridge, and Municipal Construction” (Standard Specifications), which provided the general terms of the contract.

¶ 10 Section 1–08.10 of the Standard Specifications sets forth the terms relating to termination of the contract. The city terminated the contract under section 1–08.10(2), which authorized it to terminate the contract “for public convenience” if it determined “that such termination is in the best interests of the Contracting Agency.” Clerk's Papers (CP) at 209. Under section 1–08.10(3), on termination for public convenience, the contractor shall submit “a request for costs associated with the termination.” CP at 209. This request for costs must comply with sections 1–09.11 and 1–09.12.

*6 ¶ 11 Section 1–09.12 requires the contractor to comply with audits, while section 1–09.11 instructs the contractor how to file a formal claim under the contract. Section 1–09.11(1) instructs the contractor to first provide notice of disputes under the contract's notice provision, section 1–04.5. A formal claim is authorized only if the issue is not resolved by the formal notice procedures in section 1–04.5.

¶ 12 Furthermore, section 1–08.10(4) provides that upon termination for public convenience, the contractor will be paid for the actual work performed. It further provides that if the parties cannot agree on the amount due, “the matter will be resolved as outlined in Section 1–09.13.” CP at 209. Section 1–09.13/titled “Claims Resolution,” provides:

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.*

CP at 229 (emphasis added).

¶ 13 Thus, two provisions of the contract relating to termination for public convenience refer back to the contract's notice provision, section 1–04.5. A contractor must comply with section 1–09.11 to file a formal claim for the costs associated with termination, which in turn requires compliance with section 1–04.5. And if unable to agree on the compensation due for the actual work performed after termination for public convenience, the contractor must comply with section 1–09.13. Section 1–09.13 requires compliance with section 1–04.5 twice—it directly requires compliance with 1–04.5, and it requires compliance with section 1–09.11 which, as already noted, itself requires compliance with section 1–04.5. Moreover, section 1–09.13 unambiguously requires contractors to comply “in full” with sections *7 1–04.5 and 1–09.11 as a precondition to litigation, flatly contradicting Realm's argument that it need not comply with section 1–04.5 regarding disputes about the payment due on termination.

¶ 14 Section 1–04.5 provides:

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 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
- *683 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 *8 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).

CP at 194–95 (emphasis omitted).

[7] ¶ 15 Thus, on termination for public convenience, Realm was required to give notice of any disputes regarding both the costs associated with termination and the payment for actual work performed under the contract. And Realm was required to follow this notice with the additional information set forth in section 1–04.5 within 15 days. Realm filed a formal claim for its costs on termination, but it is undisputed that Realm never gave notice under section 1.04–5 in relation to any dispute during or after the contract, including the costs associated with termination and the amount due for the actual-work performed. Realm thus failed to give required notice-under sections 1–08.10(4) and 1–08.10(3).

[8] ¶ 16 Realm also failed to comply with section 1–04.5 regarding the city's change order setting Realm's final payment. On April 24, 2009, the city sent a proposed change order to Realm's counsel listing its calculation of the full *9 and final payment due on the contract.² Realm's counsel stated by e-mail that Realm would not sign the change order. The city replied, "In light of the fact that Realm will not execute a bilateral change order, the City will issue it unilaterally." CP at 130. On May 5, the city did so, unilaterally issuing the change order listing the full and final payment.³

¶ 17 Realm did not protest the change order setting final payment. And section 1–04.5 provides that a contractor accepts all requirements of a change order by failing to protest. Thus, in addition to failing to comply with section 1–04.5 regarding the termination for convenience, Realm also failed to comply with section 1–04.5 regarding the city's final change order. Realm has consequently waived its right to sue under the contract.

¶ 18 Realm's argument to the contrary is understandable due to the somewhat contradictory language of section 1–04.5. But we find Realm's argument ultimately unpersuasive because other wording in the contract **684 clarifies that the provision does not apply only during the work.

¶ 19 Realm points out that section 1–04.5(1) requires the contractor to protest "before doing the work," and thus Realm argues that section 1–04.5 applies only during the work and not after termination. However, change orders under the Standard Specifications are not limited to requiring a contractor to do additional work—in accordance with section 1–04.4, they may delete work or equitably adjust payment as well. Thus, reading section 1–04.5 in harmony with section 1–04.4, the requirement to protest "before doing the work" applies only when the contractor must perform additional work. A contractor must still comply with section *10 1–04.5 even when it is not required to perform any additional work.

¶ 20 The wording of section 1–04.5 bears this interpretation out. Except for the requirement to protest "before doing the work," the section's language regarding additional work is contingent. For instance, it requires contractors to keep records "throughout *any* protested work," showing that the section contemplates orders where no extra work is required. CP at 194 (emphasis added). And it requires contractors to provide the "estimated dollar cost, *if any*, of the protested work and how that estimate was determined," showing the same. CP at 195.

¶ 21 Moreover, the contract refers to section 1–04.5 in the provisions regarding contract termination. As noted above, a contractor must comply with section 1–09.11 when filing a claim for costs associated with termination, and section 1–

09.11 requires compliance with section 1-04.5. And a contractor must comply with section 1-09.13 if in disagreement about the payment due after termination for actual work performed, which again requires compliance with section 1-04.5.

¶ 22 If section, 1-04.5 applied only to situations where the contractor was required to perform additional work, it would not be invoked in provisions relating to contract termination. Because section 1-04.5 applies here and Realm did not comply with it, Realm waived the right to sue for additional compensation under the contract.

¶ 23 This result is further supported by *Mike M. Johnson*, 150 Wash.2d at 375, 78 P.3d 161. There, the Supreme Court held that a contractor's failure to protest work under an older version of the Standard Specifications (which contained a version of section 1-04.5 that was identical in all pertinent respects) precluded a lawsuit claiming extra compensation for that work. 150 Wash.2d at 375, 379-80, 384, 390, 78 P.3d 161.

¶ 24 Realm attempts to distinguish *Mike M. Johnson* by arguing that the city here did not issue the change order *11 until after the contract's termination, while the failure to protest in *Mike M. Johnson* occurred during performance of the contract. But this argument is unavailing. The work that Realm asserts entitled it to extra compensation occurred during the contract's performance and, just as the contractor in *Mike M. Johnson*, Realm was required to protest this work under section 1-04.5 in order to later assert a claim for additional compensation.

¶ 25 Realm attempts an end run around section 1-04.5 by claiming that it may hold any disputes in reserve until after the contract's termination, at which point notice is no longer required. But such an interpretation, in addition to being inconsistent with *Mike M. Johnson*, would render section 1-04.5 a nullity. All contracting agencies using the Standard Specifications would be denied the benefit of advance notice and the opportunity to resolve disputes before they devolve into litigation because contractors could simply choose to litigate their disputes after termination without providing notice of disputes during the work. This is not the result the contract's plain words command that require notice both during the work and after termination for public convenience.

¶ 26 If Realm had shown *some* good faith effort to comply with section 1-04.5, we might reach a different result. In *Weber Construction, Inc. v. Spokane County*, 124 Wash.App. 29, 34, 98 P.3d 60 (2004), Division Three of our court allowed a contractor to maintain litigation despite a technical failure to comply with section 1-04.5. There, the contractor provided the required notice of **685 protest, but it failed to include an estimate of the dollar cost of the protested work because under the case's particular facts, it lacked adequate information to make such an estimate. 124 Wash.App. at 34, 98 P.3d 60. Had Realm made a similar technically defective attempt to comply with section 1-04.5, we might be persuaded that it provided sufficient evidence of compliance with the contract to escape summary judgment. But instead, inadvertently or not, Realm ignored section 1-04.5 both during and *12 after the performance of its contract with the city. Because we reject Realm's argument that it was not required to comply with section 1-04.5 simply because the contract was terminated for public convenience, this total failure to even attempt compliance is fatal to Realm's case.

¶ 27 Realm was required, at the least, to give contractual notice under section 1-04.5 of its dispute regarding the costs on termination, the payment for actual work performed, and the city's final change order. It undisputedly did not do so. We therefore affirm summary judgment.

ATTORNEY FEES

¶ 28 The city requests attorney fees under chapter 39.04 RCW and RAP 18.1. We grant attorney fees to the city as the prevailing party.

¶ 29 RCW 4.84.250 provides that in an action for damages for ten thousand dollars or less, “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.” And under RCW 4.84.270, a defendant is deemed a prevailing party “if the plaintiff ... recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant.”

[9] ¶ 30 Under RCW 39.04.240,⁴ the provisions of RCW 4.84.250 -.280 apply to public works contracts, except that the maximum dollar limitation does not apply. A city that prevails on a summary judgment motion and prevails on appeal in a public works contract case may be awarded *13 attorney fees on appeal under RCW 39.04.240. *See Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wash.2d 762, 773, 174 P.3d 54 (2007).

¶ 31 The city offered to settle this case for \$60,576.30 within the time period specified by RCW 39.04.240. Realm has recovered nothing, making the city the prevailing party on appeal. We therefore award reasonable attorney fees on appeal to the city under RCW 39.04.240.

¶ 32 Affirmed.

We concur: VAN DEREN and JOHANSON, JJ.

All Citations

168 Wash.App. 1, 277 P.3d 679

Footnotes

- 1 The trial court's order granting summary judgment does not specify its basis, and the record does not contain any transcript of the court's oral ruling. But the parties agree that the trial court did not reach the issue of accord and satisfaction. Because we affirm summary judgment based on interpretation of the contract, we do not reach accord and satisfaction. *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wash.2d 55, 68, 1 P.3d 1167 (2000) (quoting *State v. Peterson*, 133 Wash.2d 885, 894, 948 P.2d 381 (1997) (“Principles of judicial restraint dictate that if resolution of an issue effectively disposes of a case, we should resolve the case on that basis without reaching any other issues that might be presented.”)).
- 2 Section 1–04.4 allowed the city to change the contract by written change order, which may add, delete, or modify work to be performed, or may make an equitable adjustment in the payment due to the contractor.
- 3 Section 1–04.4 permitted the city to unilaterally issue a change order adjusting the amount due to the contractor if the parties could not agree on the amount.
- 4 RCW 39.04.240(1) provides,
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.

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

January 02, 2018 - 2:26 PM

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Superior Court Case Number: 14-2-02223-6

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