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Supreme Court No. 94711-2
Court of Appeals No. 48644-0-II

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

**City of Olympia,
Petitioner**

v.

**Nova Contracting, Inc.,
Respondent**

**SUPPLEMENTAL BRIEF OF
RESPONDENT NOVA CONTRACTING, INC.**

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1. Summary of Critical Point

This case is proceeding to this Court on an untimely argument Olympia is now making that Nova failed to follow the contractual claim procedures and has therefore waived its Claim (or its claim that Olympia's Claim is defective) under *Mike M. Johnson v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003), which had been successfully invoked by the City of Olympia itself in *Realm Inc. v. City of Olympia*, 106 Wn. App. 1, 277 P.3d 679 (2012), prior to the award of the contract at issue here. As argued elsewhere, that argument was not made in Olympia's Motion for Summary Judgment and did not inform the Trial Court's decision below. The argument, to the extent it was made, was contained in two sentences in Olympia's Reply in Support of Summary Judgment and addressed in dicta in a footnote to the Court of Appeals decision reversing the Trial Court.

However, taking the argument at face value, Olympia has argued that "at no time before the City issued the Notice of Default did Nova file a written protest as required by Std. Spec. 1-04.5. Thus Nova's claims that the City unreasonably rejected the submittals, etc. prior to September 4, 2014 were waived." Standard Specification 1-04.05 requires "immediate protest." However, Nova's protest was made on September 9,

2014, the same day that Olympia issued a “Stop Work Order.” The Stop Work Order was the precipitating claim event. Prior to issuance of the Stop Work Order, it was possible for Nova Contracting to perform the contract and thus obtain the benefit of the contract. The date of the Stop Work Order is, therefore, the relevant date on which to start the protest notice clock under Standard Specification 1-04.05, and Nova Contracting’s Protest was therefore timely.

2. Issues Presented for Review

Did Olympia properly raise and preserve an argument that Nova Contracting failed to comply with the claim procedure in this contract? No.

If Olympia did present and preserve an argument that Nova Contracting failed to comply with the contractual claim procedure, did Nova Contracting present sufficient evidence of claim procedure compliance to survive summary judgment? Yes.

3. Argument

This case is proceeding to this Court on what appears to be a red herring – Olympia’s belated assertion that Nova Contracting’s claim that Olympia mishandled the submittal process failed in some way to satisfy the requirements of Claim presentation in this contract and was therefore

waived under *Mike M. Johnson*, 150 Wn.2d 375, 78 P.3d 161 (2003). The *Mike M. Johnson* issue in this case, to the extent there is any such issue in this case, is based on two sentences in Olympia’s Reply in Support of Motion for Summary Judgment, in which Olympia sketches out, but does not make, an argument that Nova Contracting’s initial “Protest” was not timely under WSDOT 2012 Standard Specification 1-04.5. The lines are throw-away lines, made without evidentiary support, and at a time when Nova Contracting had no means to respond. That issue and argument did not inform, or make its way into, the Trial Court’s decision. It received passing reference in dicta in a footnote to the Court of Appeals decision reversing the Trial Court. Now it is the basis of Supreme Court Review, despite having never been properly presented to the Trial Court in a manner that allowed Nova Contracting to actually understand and address the issue.

3.1 *Mike M. Johnson* Requires Revision.

In 2003, this Court decided *Mike M. Johnson*, 150 Wn.2d 375, 78 P.3d 161 (2003), breaking with the majority and Federal rule that contractual claim procedures are practical in nature, with the goal of facilitating communication between the parties to a contract, including communication of potential claims, and thus requiring only reasonable and

fair notice or substantial compliance. This Court, rather, took a hardline view that contractors (or at least public contractors) must strictly comply with the contractual claim procedures or lose their right to be compensated for the cost of extra work or receive a contractual time extension for delays beyond the contractor's control. The *Mike M. Johnson* case has been very problematic. This Court should revisit and reconsider the *Mike M. Johnson* case.

Mike M. Johnson, while it seems a boon to lawyers by requiring that public contractors, who are extremely skilled builders, also have lawyer-like document drafting skills, has actually deprived lawyers and courts of access to the best and most developed body of law on public construction – the Federal law developed and in through the Court of Claims and the Solicitor General's Office. This body of law represents the oldest, most extensive, and best-reasoned Common Law for public contracting. The volume of public contracting by the Federal Government dwarfs that of state and local government in Washington State, leading to a comparably extensive body of caselaw. Further, while Washington State cases are usually heard by judges and juries without a deep background in public contracting, the Federal system is populated by experts and the decisions reflect the benefit of that expertise. This Court should part company with Federal public contracting law seldom and only for very,

very good reasons because such departure deprives courts and practitioners in Washington of the best legal guidance available in public contracting, and the loss of that guidance makes public works more difficult, more uncertain, and more expensive.

Those ill-effects have come to pass. Since *Mike M. Johnson*, public owners have drafted increasingly onerous and detailed requirements for contractor claims while not imposing a similar burden on owner claims. *Mike M. Johnson* has, in fact, created a system of perverse incentives to do just that.

Public contracts are, by their very nature, contracts of adhesion. A contract is a contract of adhesion if (1) the contract was "prepared by one party and submitted to the other on a 'take it or leave it' basis", and (2) there was "no true equality of bargaining power" between the parties. *Blakely v. Housing Authority*, 8 Wn. App. 204 at 212-13, 505 P.2d 151 (1973), citing to *Standard Oil Co. v. Perkins*, 347 F.2d 379 (9th Cir. 1965), and 3 A. Corbin, Contracts § 559 at 271 (1960). Public bidding law prohibits bidders and public agencies from negotiating the terms of the contracts. Contracts are offered to potential bidders on a "take it or leave it basis." *Platt Electric v. Seattle*, 16 Wn. App. 265 at 273-74, 555 P.2d 421 (1976). In fact, it is completely illegal for a bidder on a public contract to attempt to negotiate a term, and any contract formed after such

negotiation is void as an illegal contract. *Hanson Excavating v. Cowlitz Cnty.*, 28 Wn. App. 123 at 125-27, 622 P.2d 1285 (1981).

The public bidding system is designed to give the public agencies the best contract work for the best contract price – but it achieves this end by refusing to allow public bidders any bargaining power and by requiring that they bid on and accept public contracts on a “take it or leave it basis.” That is, public contracts serve the public good because they are contracts of adhesion. However, as contracts of adhesion, the terms of such public contracts should be scrutinized and approached with judicial skepticism.

Mike M. Johnson did not approach public contracts with proper skepticism and the result was that it has empowered and emboldened public owners to engage in “gotcha” contracting. While contractor claim procedures have become increasingly onerous, fast-moving, and detailed, parallel procedures governing public owner claims and communications have been reduced, simplified, or removed completely. The result is a grossly unfair and lopsided set of contract performance and administration duties, where contractors must prepare paperwork on par with the most skilled of attorneys, while public owners and their project managers have to do no more than wait in expectant silence for the contractor to fall short of bureaucratic perfection.

In addition to creating lopsided contractual obligations, the process imposes paperwork perfection on the party least suitable to such a requirement. The gold standard for a contractor is exceptional construction work, not exceptional paperwork. The gold standard for a government worker is the reverse. Yet, *Mike M. Johnson* frees the government project manager from the tasks they are best suited for, transferring the weight of the entirety of construction and project management onto the contractor.

The purpose of the public contracting system is to provide the public with the best possible public works for the best possible price. The effect of the *Mike M. Johnson* decision has been (to an economist, predictably) to undermine this fundamental purpose, at great ultimate cost to the public.

Public contractors have always, and should always, bear the initial cost of performing the work. *Mike M. Johnson* has imposed a substantial and expensive additional layer of costs on the public contractors – the cost of project administration and communication – and has freed the public owner from its historic parallel obligations. This increases the cost of contract administration because the unilateral imposition of the costs on the contractor force contractors to “price in” risks and administrative burden when bidding the work, resulting in higher prices for public work.

The result has been increasingly expensive public projects performed by a decreasing number of qualified and capable public contractors.

These requirements impose significant, often insurmountable, barriers to entry into public work contracting by new firms, reducing the number of firms able to successfully enter the market and compete for public work. At the same time, periodic errors in contract administration by existing public contractors can have catastrophic consequences, including bankruptcy, for those contractors. If a contractor is directed to perform extremely expensive extra work by the owner, and does so, but fails to submit its Claim documentation perfectly, that contractor forfeits a right to be paid for work that any fair observer would conclude should be paid for. This results in contractors going out of business, and projects being performed, at increased performance cost and with substantial delays, by replacement contractors through the performance bond process.

At the same time, the changes to public contract administration since *Mike M. Johnson* present an economic “moral hazard” problem with regard to the public owners. By transferring the entire burden of project administration and contract communication onto the contractors, public owners are left without substantial obligations and therefore without real consequences to misbehavior, miscommunication, or simply sharp dealing. The *Mike M. Johnson* process has caused public owners to be

increasingly unreasonable and slipshod in their public works, because they can be unreasonable and slipshod without consequences, having transferred the obligations and consequences onto the contractors.

That may be what happened here. It seems likely that Olympia learned bad and unhelpful lessons from its success in *Realm Inc. v. City of Olympia*, 106 Wn. App. 1, 277 P.3d 679 (2012). That is, it learned that it could be inattentive to contractor communications and concerns, and unreasonable in exercising its discretion under its contract, because, in the end, the contractor will likely fail to comply with some technical or difficult requirement in the claim process and thus waive its Claim and forfeit its right to be paid extra money, or receive additional time, for extra work.

3.2 Nova complied with Claim Requirements.

However, while *Mike M. Johnson* should be revisited and modified by this Court at some point, this is not the proper case in which to do that. First, as observed above and argued elsewhere, the *Mike M. Johnson* claim presentation issues were not properly presented or fully briefed to the Trial Court. The Trial Court's decision is not based on any *Mike M. Johnson* claim presentation issues. The Court of Appeals decision mentions *Mike M. Johnson* issues only in passing dicta in a footnote. For these reasons,

this case is not the proper vehicle to evaluate or re-evaluate the *Mike M. Johnson* decision.

However, in addition to the paucity of this case record with regard to the critical legal issues raised by *Mike M. Johnson*, the record shows that Nova Contract, in fact, complied with the claim presentation requirements of this contract and therefore complied with the requirements of *Mike M. Johnson*.

Olympia's *Mike M. Johnson* argument, which it made for the first time in its Reply in Support of its Motion for Summary Judgment (on which it sought entry of judgment on its own breach of contract claim, rather than summary judgment dismissal of Nova Contracting's claim on *Mike M. Johnson* claim presentation grounds) is essentially a two-sentence argument: "But at no time before the City issued the Notice of Default did Nova file a written protest as required by Std. Spec. 1-04.5. Thus Nova's claims that the City unreasonably rejected the submittals, etc. prior to September 4, 2014 were waived." This argument contains two critical defects. First, it is based on an ambiguous and sliding usage of the word "claim." Second, it essentially states that Nova's claim is untimely under the contract because Nova failed to make it before it arose.

In the context of construction claim procedure under *Mike M. Johnson*, the word "claim" is used in two ways – (1) as the name of a

formal document submitted by one party to the other stating in detail the basis on which that parties asserts that it is entitled to some adjustment of the contract to catch it up to events that occurred during contractual performance, and (2) as the details stated in the Claim document itself. To avoid ambiguity, the name of the formal document is often capitalized to distinguish it. Thus, a contractor submits a Claim to the owner in which the contractor claims that certain things happened on the project, and further claims that these things had an impact on the cost of or time required for the work, and therefore claims a right to an adjustment of the contract price, the allowed contract time, or both. Olympia’s argument improperly substitutes an attack for the “little c” claims as if it were a fatal attack on the legal propriety of the “big C” Claim. Of course the “little c” claims (the asserted basis on which the Claim is asserted) preceded, often by some time, the Claim itself. If not, the Claim would have no content or basis in fact.

Under *Mike M. Johnson*, contract claim presentations are strictly enforced (at least against public contractors, rather than public owners). Claims that don’t strictly comply with such claim procedures are deemed waived, thus depriving contractors of the right to recover extra money for cost of extra work they actually performed (usually at the direction and insistence of the owner) or extra time for delay events they actually

suffered (usually as result of some delaying event or lack of direction from the owner). These claim procedures have three elements: (1) they require that Claims be submitted in written form, (2) they require that the Claim contain certain substantive and formal requirements (that is, set forth the basis of the claim and include a signature or certification), and (3) they require that the Claim be submitted within a limited time window after the precipitating event giving rise to the Claim. Thus, a contractor's breach of contract case can be lost due to waiver of rights if (1) the contractor failed to present the owner with any formal written Claim, (2) the Claim lacked some required content, or (3) the Claim was late.

Of these defects, the first is the most serious. If no formal written Claim is submitted at all, then that Claim is lacking in all formal content and is infinitely late. That was the defect in *Mike M. Johnson*. The contractor in *Mike M. Johnson* never made a formal, written Claim at all, instead relying on oral discussions on the jobsite gleaned from records of onsite construction meetings.

There is no allegation that Nova failed to submit a Claim here. In fact, the record includes the formal Claim documents submitted by Nova (Exhibits C and D to the Declaration of Jordan Opdahl, CP 289-314.) Further, Olympia's argument does not allege that Nova's Claim failed in content, either by omitting some required information or by lacking some

formality required of Claims under the contractual claim procedure. In fact, a review of Nova's Claim documents show that the Claim did comply with the content and form requirements of the two-part claim process applicable here (that in the WSDOT 2012 Standard Specifications, Sections 1-04.05 and 1-09.11). Further, Olympia's argument, such as it is, does not assert that Nova's ultimate claim, submitted under Standard Specification 1-09.11, was untimely. Olympia's sole contention is that Nova's original "Protest" was untimely under Standard Specification 1-04.05.

To evaluate whether Nova's Protest was timely under Standard Specification 1-04.05 we must keep in mind what Nova's Claim is. Nova is claiming, through its Claim, that Olympia breached the implied warranty of good faith and fair dealing. The warranty of good faith and fair dealing fundamentally "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Badgett v. Security State Bank*, 116 Wn.2d 563 at 570, 807 P.2d 356 (1991); RESTATEMENT (SECOND) OF CONTRACTS § 5 (1981). If one party has some discretion, as here, that party can violate the warranty by exercising that discretion unreasonably, if that unreasonable use (abuse) of discretion frustrates the purpose of the contract or otherwise deprives the other party of its expected contractual benefits. *Scribner v. Worldcom*,

Inc., 249 F.3d 902, 909 (9th Cir. 2001); see also, *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 103 at 113 323 P.3d 1036 (2014); *Edmonson v. Popchoi*, 172 Wn.2d 272, 280-281, 256 P.3d 1223 (2011); *Frank Coluccio Const. Co., Inc. v. King County*, 136 Wn. App. 751, 766, 150 P.3d 1147 (2007). The allegation here is that Olympia did so abuse its discretion with the result of causing this contract to fail, thus depriving Nova of its expected contractual benefits.

Thus, at its simplest, the implied warranty has two elements: (1) that a party act in a manner (such as by unreasonably abusing its discretion) that (2) deprives the other party of full benefit of that party's performance of the contract. There is no breach of the implied warranty of habitability until both these elements are met. A party with discretion can abuse its discretion in many unreasonable ways, which can vex, frustrate, alarm, or anger the other party, without depriving the other party of the benefit of the contract. Vexatious abuse of discretion, as annoying as it is, is not a breach of warranty of good faith and fair dealing unless it undermines the value of the contract to the other party.

In this case, the record shows that Olympia was exercising its discretion in the submittal process in an unreasonable manner, and Nova was responding with increasing alarm, even eventually anger. (See Declaration of Dana Madsen, CP 315-436.) Olympia's vexatious abuse of

discretion was well outside industry norms of behavior. (See Declaration of Frank Pita, CP 245-272.) However, one critical aspect of discretion is that the party with discretion can always change its mind. Olympia could have modified its behavior at any point and allowed this project to proceed. The record shows that, up to the time Olympia issued its conflicting “Notice of Default” (September 4) and Stop Work Order (September 9), Nova was ready, willing and able to perform the contract work and thus obtain the benefit of that performance. (CP 246:3 – 247:17 and CP 276:1 – 277:10). Further, even the “Notice of Default” left open the possibility of performance. It stated the basis of default as Nova’s failure to mobilize to the site. However, Nova had mobilized to the site on September 4 (CP 279:9-13). This prompted the Stop Work Order issued on September 9.

Thus, the precipitating claim event was the Stop Work Order issued on September 9. Prior to the issuance of that Stop Work Order, Olympia had not yet deprived Nova of the benefit of contractual performance. Since contract award, Olympia had been behaving in a manner that would lead to that result. However, because Olympia was acting within its realm of discretion, it could have changed its behavior at any time prior to the full stop position it took through the Stop Work Order issued on September 9. Therefore, September 9 is the triggering event

against which compliance with the time requirements of Specification 1-04.05 should be judged.

Specification 1-04.05 requires “immediate” written notice of protest to be supplemented with a detailed writing within fourteen days of the triggering event. Nova complied with these time requirements. In fact, Nova did one better, providing a fully compliant, detailed writing “immediately” by submitting its fully stated written protest to Olympia on September 9, the same day on which it received the Stop Work Order. Nova not only timely complied with the contractual claim procedure, it did so on an accelerated schedule, submitting a fleshed-out protest, fourteen days early. There is no *Mike M. Johnson* problem here.

4. Conclusion

This case is proceeding on a red herring argument. The *Mike M. Johnson* argument Olympia now wishes to assert was not properly raised below and did not inform the Trial Court’s decision. It was addressed in passing dicta by the Court of Appeals, but that does not transform it from a red herring to a live issue. Nova has not been given a full and fair opportunity to develop the record below. In fact, it is not even clear from the two-sentence in the Olympia’ Reply exactly what the alleged *Mike M. Johnson* problem is.

It seems, from the argument sketch in Olympia' Reply, that Olympia is asserting that Nova Contracting failed to timely protest Olympia's abuse of the submittal process as required by WSDOT 2012 Standard Specification, Section 1-04.05. However, the Claim procedure only relates to "Claims" (that is, contractor requests for additional time and money) and not to Contractor "claims" (that is, facts asserted to be true by the Contractor in the context of litigation and argument). Olympia's argument, such as it is, appears to be based on this ambiguity between "Claim" (meaning an assertion of a contractual entitlement) and "claim" (meaning a statement that some fact is true).

In any case, WSDOT 2012 Standard Specification, Section 1-04.05 requires that the Contractor immediately notify the Owner, through a "Protest", if the Contractor disagrees with some determination of the Owner. In this case, Olympia killed the project by issuing a Stop Work Order on September 9, 2014. Prior to that time, while the contract period was running out of time, performance was still possible. Nova Contracting complied with 1-04.05 and submitted a written protest of Olympia's Stop Work Order on the day it was issued – September 9, 2014.

However, while the record below appears to foreclose the *Mike M. Johnson* argument as made by Olympia, it is far from complete on claim presentation issues. It has never been developed for claim presentation

issue. The best way to handle this *Mike M. Johnson* defense is to remand this case and allow the parties to develop the record on it. This Court should therefore affirm the Court of Appeals decision and remand this matter to the Trial Court for further proceedings.

Respectfully submitted this 29th day of December, 2017.

DESCHUTES LAW GROUP, PLLC


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CERTIFICATE OF SERVICE

I certify that on the date signed below, I caused the foregoing document to be filed with this Court, and electronically served upon Petitioner's attorneys of record.

DECLARED UNDER PENALTY OF PERJURY ACCORDING TO THE LAWS OF THE STATE OF WASHINGTON.

Dated this 29th day of December, 2017, in Olympia, Washington.


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