

# High court decision deals a blow to contractors' submittal process

■ *The ruling moves claims provisions compliance to the preconstruction stage.*

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The Supreme Court of Washington's recent decision in *Nova Contracting* versus the city of Olympia dealt another blow to contractors in unanimously holding a contractor's failure to strictly comply with protest and notice procedures during the preconstruction submittal process was a waiver of future claims.

The court was indiscriminating in its application of the written protest and notice provisions and for that reason overturned the Court of Appeals and did not consider the underlying facts leading to the contractor's termination for default on the public works construction contract.

The city contracted with Nova to replace an underground culvert using the pipe-bursting technique.

Prior to beginning construction, the contract required that Nova send numerous submittals to the city's engineer for approval. As is typical, the contract provided that the city's engineer would review these submittals, the city's decision would be final, and Nova would bear all risk and cost of work delays caused by non-approval of any submittals. The contract further required Nova to complete the work within 45 working days after the city issued notice to proceed.

In an unpublished decision, the Court of Appeals overturned a summary judgment dismissal of Nova's claims by the trial court holding that the contract

provision giving the city discretion in reviewing submittals was not absolute. Applying the duty of good faith and fair dealing, the Appeals Court determined a question of fact existed as to whether the city acted in a manner that prevented Nova from attaining its "justified expectations under the contract."

The Supreme Court overruled, holding that Nova's failure to strictly comply with a written protest provision (WSDOT Section 1-04.5) barred Nova's claim for breach of the covenant of good faith and fair dealing, despite the numerous disputed facts at issue involving the complicated submittal process.

## Catch-22

As is typical in construction, the contract required the contractor to make a series of submittals before beginning work. This included, in addition to schedule and subcontractors, these submittals: (1) access and haul routes, (2) temporary bypass pumping, (3) temporary work area excavation, (4) work description, (5) steel pipe specifications, (6) pipe sealing and (7) habitat boundary fencing. Given the 45-day duration of the project from notice to proceed (Aug. 11, 2014), time was of the essence.

Nova provided its first set of submittals to the city in early August 2014. The city rejected the submittals and required Nova revise and resubmit.

Nova revised its submittals while contending much of the information requested was redundant or already specified by the contract specifications. Nova also argued that any perceived inadequacy in its submittals resulted from the city's own design flaws. While Nova complained the city was abusing the submittal process, Nova did not file a formal "notice of protest" on this issue.

On Sept. 4, 2014, the city placed Nova on notice of default, to which Nova did file a formal written protest.

Nova submitted its third batch of submittals, revised its schedule and began mobilization, which was essential for it to "cure" its default. The city responded with a stop work order, based on lack of approved submittals — clearly placing the contractor in a Catch-22 circumstance.

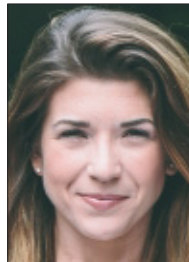
The city terminated the contract for default on Sept. 24, 2014. In response, Nova filed another formal written protest. Nova claimed the city breached the contract by failing to give Nova access to the work site, act in good faith, and properly administer the contract — all defenses which are primarily fact-based as the Court of Appeals so held.

The Supreme Court disagreed, formulating the sole issue as whether failure to comply with Section 1-04.5, the contract's written protest provision, barred Nova's defense. This is an entirely different issue than identified by the Court of Appeals.

The Court of Appeals focused on the issue of the city's duty of good faith and fair dealing, and held that evidence was sufficient to create a genuine issue of fact that the city prevented Nova from attaining its justified expectations under the contract. Thus, the Court of Appeals dismissed consideration of 1-04.5 in a footnote by reasoning that "... although Nova may have waived claims



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for the cost of work performed under the contract, Section 1-04.5 does not apply to expectancy and consequential damages.”

Essentially ignoring the facts in its ruling, the Supreme Court reversed, holding there is no exception to Section 1-04.5’s written protest requirement for claims for consequential or expectancy damages. The Supreme Court’s application of Section 1-04.5’s written protest requirements gave zero consideration as to whether the city acted in a manner that prevented Nova from attaining its justified expectations under the contract.

### **Claim rights deprived**

Section 1-04.5 is the “Procedure and Protest by the Contractor” clause taken from the WSDOT Standard Specifications. It provides that if the contractor disagrees with “anything” required in an order (written or oral) by the project engineer, the contractor shall “... immediately give a signed written notice of protest ... before doing the work. By not protesting ... the contractor ... waives any additional entitle-

ment and accepts from the engineer any written or oral order.”

Failure to comply with the protest procedures of Section 1-04.5 “completely waives any claims for protested work.”

Based on that logic, Nova was deprived not only of its claim rights but its ability to contest the merits of the city’s termination for default. This “strict compliance” application of the protest provision is unprecedented and places procedure above substance, resulting in a complete forfeiture of contractor rights as well as its contract.

Here, the evidence is clear: Nova disagreed and objected to the conduct of the city throughout the submittal process, and it simply failed to cite to Section 1-04.5 or use its specific terms. The submittal process requires constructive interaction, and filing a formal protest during that preconstruction stage would only inflame the situation and would likely not improve relations. Scrutiny of the court’s ruling demonstrates clearly the inherent flaws in logic.

WSDOT’s specifications have become the industry standard for municipal public works projects. The specifications, well accepted in the industry to

be both thorough and objective, do not specify the duty of good faith and fair dealing that is an unwritten warranty established by our courts to be implied in every contract in America.

In our practice, we find that difficulties experienced in the submittal process are continuously causing projects to start off on a contentious basis — the parties fail to recognize their obligation to cooperate so that each party may benefit from full performance.

This decision in disregarding/overturning an exemplary application of the implied duties of good faith and fair dealing by the Court of Appeals now extends a strict duty of claims provisions compliance to the preconstruction stage. A sad day for the construction industry.

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