

## Filing a claim for extra work? Contractors still bear the burden of complying with notice requirements

■ However, a recent court decision reaffirms a contractor's right to recover changes 'outside the contract.'

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In the recently decided *General Construction Co. v. Public Utility District No. 2 of Grant County* case, the Court of Appeals attempted to resolve the 13-year-old conflict between two Washington Supreme Court decisions.

Ultimately, the General Construction decision did not significantly change a contractor's burden to strictly comply with contractual notice requirements. However, the decision does reaffirm — and ever so slightly augments — a contractor's ability to recover for changes "outside the contract," regardless of whether it provided proper notice of a claim.

### Washington's point of view

A brief background on notice requirements and the Washington Supreme Court's take on the same is necessary to put the General Construction decision in context.

The majority of construction contracts include a clause providing that a contractor waives its right to additional time or money if it fails to give notice of the claim in writing, and within a specified period of time.

Courts in some states employ the "actual notice" test, finding that if the contractor gave notice in any form — verbally or in writing — and in any level of detail, such notice is good enough to preserve its claim. Even if a contractor failed to give notice of a claim as required by its contract, most states allow a contractor to recover in quantum meruit — i.e., "as much as deserved." In other words, even if a contractor failed to provide notice of a claim, he should, in fairness, be entitled to recover for the value of the work he performed.

In 1965, the Washington Supreme Court issued its decision in *Bignold v. King County*. In this decision, the court appeared to follow the general legal principles applied by the majority of states: a contractor may recover in quantum meruit when changes on a project could not reasonably have been anticipated by either party. The contractor's failure to comply with the contractual notice requirements does not absolve the owner of liability to cover such additional costs.



In 2003, the court issued its decision in *Mike M. Johnson v. County of Spokane*. While the court did not expressly overrule Bignold, it announced certain legal principles that appeared to be in stark opposition: Washington law requires contractors to strictly follow contractual notice provisions, unless those procedures are waived. A contractor's claim for extra work will be denied where notice provisions are not strictly followed. Actual notice to an owner is not enough.

### Reconciliation attempt

The General Construction lawsuit arose out of a public works project to build a fish ladder at Wanapum Dam near Vantage. The owner of the project, Public Utility District No. 2 of Grant County, awarded the contract to General Construction. The contract broadly required General Construction to perform "all work necessary for the construction of (the) Wanapum Future Unit Fish Bypass."

The parties' contract contained two common clauses that were ultimately influential to the Court of Appeals' decision:

- All requests for additional compensation from General Construction to the PUD must be in writing.
- General Construction's failure to submit a written request for additional compensation within 10 days waived the right to payment for that claim.

As construction progressed, there were a large number of changes on the project, including the sequence in which the PUD directed General Construction to perform its work. These changes, the Court of Appeals noted, delayed the project and increased the costs of the work.

While General Construction submitted timely claims for some of the changes, it neglected to do so for others. After the project was completed, General Construction filed suit against the PUD to recover amounts for changes that were not previously approved.

The parties' respective positions at the trial court level presented a familiar juxtaposition: General Construction argued that, under the Bignold decision, it could recover for the reasonable value of its work, regardless of whether it provided

timely notice. The PUD argued that under Mike M. Johnson, General Construction waived its claims by failing to timely submit its written claims. Uncertain over how strictly to apply the contract's notice requirements, the trial court urged the Court of Appeals to grant review to resolve that specific legal issue.

Further fueling the conflict, the Court of Appeals ruled that the legal principles in Bignold and Mike M. Johnson could live in harmony.

Where work was "within the scope of the contract," Mike M. Johnson required General Construction to strictly comply with notice provisions unless the PUD waived compliance.

For work "outside of the contract," Bignold allowed General Construction to recover in quantum meruit for the reasonable value of the services provided.

As the Court of Appeals explained, Bignold provides a supplemental — not alternative — means of recovery. Because General Construction's contract broadly required it to perform "all work necessary" to construct the fish bypass, the court ruled that certain work — including hiring additional supervisors — was within the scope of the contract, and thus only recoverable under the Mike M. Johnson standard of strict compliance.

### Takeaways

Until the General Construction decision, contractors could rely on Bignold as the response to a Mike M. Johnson "failure to strictly" comply argument. However, now that the Court of Appeals has reconciled those decisions, this largely takes the wind out of the sails of such an argument, allowing a contractor to pursue a Bignold quantum meruit claim only for changes outside the scope of the contract.

Without any guidance as to when work is considered "inside" or "outside" that scope, contractors should proceed with caution, particularly where the scope of the contract is ill-defined.

Because General Construction did not provide relief from the harsh Mike M. Johnson implications the construction industry was hoping for, contractors should continue to strictly follow their contract claim procedures.

Grumbings of the need for legislative action to overturn Mike M. Johnson are louder than ever. However, until that time, contractors still bear the heavy burden of strictly complying with contractual notice requirements, or else risk waiving the right to claim additional time or money.

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