



## CASE REPORT

**CONSTRUCTION CONTRACT NOTICE, PROTEST AND CLAIM REQUIREMENTS – MUNICIPALITY MAY WAIVE STRICT COMPLIANCE BY CONTRACTOR WHEN IT FAILS TO EXPRESSLY RESERVE ITS RIGHTS.** Summary judgment for municipality reversed because it failed to expressly reserve the right to demand strict compliance with the notice, protest and claim provisions in a construction contract. **American Safety Casualty Ins. Co. v. City of Olympia**, \_\_\_\_\_ Wn. App. \_\_\_\_\_, June 27, 2006 (Wn. App. Div. II)

**I. Facts.** The City of Olympia contracted with Katspan to construct sewer lines. The contract required Katspan to follow specific notice, protest and claim procedures in requesting additional compensation or time under the contract. The contract further provided that failure to file suit within 180 days of final acceptance barred suit.

Katspan encountered delays on the project and it failed to follow the contractual notice and protest procedures. Katspan became insolvent and its bonding company American Safety assumed its rights to pursue a claim against the Olympia for cost overruns and delay. Olympia accepted the project as complete and within 180 days American Safety presented a claim containing some, but not all of the documentation required by the contract. The parties engaged in correspondence wherein Olympia demanded additional documents to analyze the claim.

Olympia's correspondence only intermittently indicated that it was not waiving strict compliance with the notice, protest and claim requirements of the contract. Well after 180 days from Olympia's acceptance of the project, Olympia denied the claim and American Safety filed suit. Olympia successfully moved for summary judgment because the suit had been filed more than 180 days after final acceptance. American Safety appealed.

**II. Applicable Law and Analysis.** At issue in the case is whether the City waived strict compliance with the notice, protest and claim provisions of the contract. The Court of Appeals reversed the trial court's summary judgment, holding that Olympia's conduct in continuing to request information more than 180 days after final acceptance raised an issue of fact as to whether it had intended to waive its right to demand strict compliance with the contract.

The court distinguished this case from Mike M. Johnson v. Spokane County, 150 Wn.2d 375 (2003), where our Supreme Court held that a municipality did not waive strict compliance with notice, protest and claim provisions when it continued to seek additional information from a contractor. The key distinction between the two cases was the fact that the Spokane County frequently noted in its correspondence with the contractor that it did not intend a "waiver of any claim or defense." In contrast, the City of Olympia's correspondence to Katspan and American Safety expressly reserved the right to require strict compliance on only three occasions.

**III. Conclusion.** Municipalities seeking to reserve the right to demand strict compliance with notice, protest and claim provisions in construction contracts must be careful not to waive these rights when gathering information to analyze claims. In particular, requests by construction managers and project engineers for additional documentation may waive the municipality's right to demand strict compliance unless those requests clearly state that the request is not intended as a waiver of any claim or defense. If you have any questions, please contact your City Attorney.