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Sound Transit case reaffirms the need to meet contract deadlines

- *Northwest Infrastructure got into a bind when it finished site excavation for the Federal Way Transit Center. Despite notice issues, the court rules the claim survives.*

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The Washington Court of Appeals in *Northwest Infrastructure Inc. v. PCL v. Sound Transit* recently reaffirmed a contractor's obligation to meet contractual notice deadlines relating to a claim on a public job.

However, the court ruled that the owner's issuance of a unilateral change order created a new deadline that the contractor actually met. The court also allowed the owner to pursue claims against the contractor for fraud and violation of Washington's Consumer Protection Act.

The court's decision sheds light on critical issues contractors and owners regularly deal with on construction projects throughout the state.



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Background

The project at issue was the Federal Way Transit Center owned by Sound Transit. PCL was the general contractor, and Northwest Infrastructure was the site excavation subcontractor. NWI began work in July 2004 and filed a claim for additional compensation related to its work in June 2005. However, NWI had finished its work in the fall of 2004.

NWI claimed the earthwork quantities represented in the bid documents, and in particular on one of the drawings, significantly underestimated the actual quantities encountered during construction. PCL passed NWI's claim through to Sound Transit, and Sound Transit agreed NWI was entitled to additional compensation. Since the parties could not agree to the payment amount, Sound Transit issued a unilateral change order in January 2006, which it paid.

NWI submitted a notice of intent to claim following receipt of the unilateral change order and related compensation. Sound Transit then obtained NWI's original bid documents. Sound Transit ultimately denied the claim, and sought a refund of some of the money paid under the unilateral change order.

NWI sued PCL for the additional money it believed it was owed, and PCL joined Sound Transit in the lawsuit. Sound Transit filed counterclaims for fraud and violation of Washington's Consumer Protection Act. The trial court dismissed NWI's claim for additional compensation and Sound Transit's claims for fraud and violation of the Consumer Protection Act. Both sides appealed.

Notice

The appellate court, relying on the infamous Mike M. Johnson decision, confirmed notice requirements in construction contracts are strictly enforced by Washington courts. Absent waiver, the failure to comply with procedural notice deadlines is fatal to a claim, regardless of its substantive merit.

Sound Transit argued that NWI failed to comply with the contract's separate 10- and 20-day deadlines since it first filed its claim months after NWI finished its work.

However, the court rejected Sound Transit's arguments and reinstated NWI's claim. The court focused on the issuance of the unilateral change order, which NWI timely protested within 10 days per the contract. Had Sound Transit not issued the unilateral change order, it is highly likely NWI's claim would have been dismissed for failure to meet the contract's notice requirements.

Consumer Protection Act

Sound Transit argued it issued the unilateral change order based on certain NWI representations that Sound Transit claimed it later learned were false. The trial court dismissed Sound Transit's fraud and Consumer Protection Act claims on summary judgment, finding those claims were either not supported by the evidence or untimely. The appellate court disagreed and reinstated the claims.

Regarding the Consumer Protection Act, the court stated:

Sound Transit is a public agency created by Puget Sound voters, and one of its primary functions is to plan and build mass transportation projects for the benefit of the public with taxpayer dollars. It contends that public tax dollars paid for NWI's work, and the public stood to benefit from the work or bear injury as a result of any unfair or deceptive act.

The court ruled the Consumer Protection Act claim, like the fraud claim, should not have been dismissed.

Key takeaways

The court's decision makes clear that procedural deadlines in construction contracts must be met. Unless these deadlines are waived, which rarely occurs, claims are subject to dismissal regardless of their merit.

Every project has its own unique contract language. Careful review of the applicable contract language, both before and during the performance of work, is essential for a contractor to be able to know when and how to make a successful claim.

The case also highlights some of the more recent tools used by owners to fight contractors' claims, namely, allegations of fraud and violation of the Consumer Protection Act. For contractors who expect to be paid the money they deserve: Read your contracts, do your homework and be prepared.

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