
Judiciary Committee

PSHB 2059

Title: An act relating to preservation of claim rights in construction disputes.

Brief Description: Addressing the preservation of claim rights in construction disputes.

Sponsors: Representatives Springer, P. Sullivan, B. Sullivan and Wallace.

Brief Summary of Proposed Substitute Bill

- Makes a contract provision that bars a contractor's claim if the contractor fails to submit a specific claim notice, enforceable to the extent that the failure harms the party entitled to the notice.
- Makes the builder's right to cure statute apply prospectively only, and tolls the statute of limitations if a homeowner files a suit before giving the builder the required notice of an opportunity to cure.

Hearing Date: 2/22/05

Staff: Bill Perry (786-7123).

Background:

Notice of Contractors' Claims.

Construction contracts may contain mandatory protest and claim provisions covering certain situations that may arise during the course of construction. Such clauses generally require the contractor to follow specific notice requirements when seeking additional payment for increased expenses incurred. Such clauses may be used in public works contracts as well as private contracts.

In a 2003 decision, *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375, the state Supreme Court, by a five to four majority, construed such a protest and claim clause to require strict adherence to a notice requirement. In that case, a contract for sewer construction authorized the county to change work within the general scope of the contract. The contract also provided that the contractor bore all risks associated with the mislocation of utilities on the plans. The county submitted revised design plans and change orders, including proposed increases in the contractor's compensation and extensions of the construction deadlines. The contractor did not object to these changes. When the contractor began work, however, it encountered buried phone lines that caused delay. The contract contained specific and detailed procedures for the contractor to follow in making a claim for additional compensation for the delay caused by the underground phone

lines. The contractor did not provide the required written notice and documentation, although it did send a letter stating that the phone lines were causing the contractor to incur additional expenses. The county notified the contractor that the letter did not satisfy the contract's notice requirements. The county's attorney informed the contractor that the county did not intend to waive any defense it might have against a claim by the contractor. The contractor never complied with the formal requirements of the contract for making a claim.

The Supreme Court noted that as a general matter of contract law, procedural contract requirements must be enforced absent either a waiver by the benefitting party or an agreement between the parties to modify the contract. The Court held that as a matter of summary judgment, the contractor did not meet the requirement of the contract for making a claim for additional payment. It likewise held that actual notice of the claim did not satisfy the contract and the county's actions did not constitute a waiver of the county's right to assert the contractor's non-compliance as a defense to the claim.

The dissent in *Mike M. Johnson* agreed that actual notice is not an exception to contract compliance. However, the dissent asserted that the real issue is whether the county's actual notice plus its direction to the contractor to proceed amounted to compliance with the contract by the contractor or waiver of the notice requirement by the county. The dissent asserts that the rule should be that when an owner directs a contractor to do work outside the original contract, and then observes the work being done, the owner cannot then rely solely on technical non-compliance with a claim provision to deny reasonable compensation, especially when the owner has not been prejudiced by the non-compliance.

Standard form contracts used by some public agencies, at least, contain protest and claim provisions that may allow a contractor to pursue a claim even though the contractor has failed to make the required notice. These provisions state that failure to give the required notice constitutes a waiver of the contractor's rights *unless* the contractor can prove the owner's interest was not prejudiced in any way.

Notice of Homeowners' Claims.

In 2002, the so-called "contractor's right to cure" law was enacted. This law applies to alleged defects in the construction of residential buildings, including single family dwellings, multiplexes of up to four units, and condominiums. The law gives a builder an opportunity to fix an alleged problem before being sued over it. Before a lawsuit can be filed alleging a defect in construction or substantial remodeling, the homeowner must serve notice on the construction professional alleged to be responsible for the defect.

The claimant's notice must be given at least 45 days before a suit is filed and must describe the claim in reasonable detail. The notice must be served by personal service or registered mail. This notice requirement applies to any property damage claim by a homeowner against a construction professional.

Within 21 days of receiving the notice, the construction professional must respond to the homeowner.

Service of the 45-day right to cure notice tolls any applicable statute of limitations or repose during the right to cure period and until 60 days after the end of that period.

The act requires that for construction undertaken after the act's effective date (June 13, 2002), the builder must give the owner notice of the requirements of the right to cure provision. The act also contains a provision that says it "shall not preclude or bar any action if notice is not given to the homeowner as required."

In a recent decision, the state Court of Appeals considered a situation in which homeowners sued a builder without giving the builder the required 45-day notice of the right to cure. The alleged defect occurred as a result of construction undertaken years before the right to cure law was enacted. In a split decision, the Court held that the 45-day right to cure notice requirement applies retroactively and that the homeowners' suit should be dismissed. The majority pointed to portions of the act that require the 45-day notice in "every" case, and to requirements that subsequent purchasers must also give the 45-day notice before suing, as indications that the 45-day notice requirement was meant to apply whether or not an owner has been made aware of the requirement. The majority also reasoned that to apply the law only prospectively would delay its impact on construction defect lawsuits and would frustrate the Legislature's intent to reduce the expense of such suits. *Lakemont Ridge Homeowners' Association v. Lakemont Ridge LP*, Docket Number 52135-7-I, filed January 3, 2005. This decision means that if the 45-day right to cure notice was not given and the statute of limitations has run out before the suit is dismissed for the failure to give that notice, the lawsuit is barred and may not be refiled, even though the lawsuit was originally filed before the statute of limitations had expired. The dissent in the case argued that the 45-day notice requirement should not be applied retroactively and that the right to cure law sets up a trap for the unwary homeowner.

Summary of Proposed Substitute Bill:

Changes are made to laws relating to notice requirements for contractors and homeowners in construction disputes.

Notice of Contractors' Claims.

A clause in a construction contract that bars claims of a contractor based on the contractor's failure to submit a claim notice within a specified time or in a specified form is enforceable to the extent that the failure prejudiced the party who did not get the notice.

Notice of Homeowners' Claims.

The 45-day notice requirement of the right to cure law does not apply to lawsuits filed before June 13, 2002. The right to cure law does not apply to homeowners who did not receive notice of the right to cure law's requirements from the builder. If an action is dismissed because the homeowner failed to give the required 45-day right to cure notice, and the statute of limitations or repose leaves fewer than 10 days to give that notice, the claimant is allowed 10 days to submit the 45-day notice and get an additional 60 days following the right to cure period to refile the action.

Proposed Substitute Bill Compared to Original Bill:

The proposed substitute makes no changes with respect to the portions of the bill that deal with a contractor's right to make a claim despite having failed to submit the proper notice. With respect to a homeowner's claim under the right to cure law, the proposed substitute adds the provisions that make the right to cure law prospective only and that make the right to cure law inapplicable where a homeowner did not receive notice of the provisions of the right to cure law. The proposed substitute also makes technical changes with respect to the provision in the original bill

that allows an extension of the time to file an action following dismissal for failure to give the 45-day right to cure notice.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.