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## Judiciary Committee

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### HB 1574

**Title:** An act relating to construction contracts.

**Brief Description:** Concerning construction contracts.

**Sponsors:** Representatives Rodne and Kilduff.

#### Brief Summary of Bill

- Makes void and unenforceable any clause in a construction contract which purports to waive, release, or extinguish claim rights to damages or an equitable adjustment for failure to submit a claim notice in a particular time frame or in a particular form, absent material prejudice to the party seeking to enforce the clause.

**Hearing Date:** 2/1/17

**Staff:** Cece Clynch (786-7195).

#### Background:

Construction contracts sometimes include mandatory protest and claim clauses, covering unanticipated situations that may arise during the course of construction. Such protest and claim clauses generally require the contractor to follow specific notice requirements when seeking additional payment for extra work done or increased expenses incurred. These clauses may be found in public works contracts as well as private contracts.

In a 2003 Washington Supreme Court case, *Mike M. Johnson, Inc. v. Spokane County*, the majority construed such a protest and claim clause to require strict adherence to the notice requirement. In that case, a contract for sewer construction authorized the project owner, Spokane County, to order work changes within the general scope of the contract. The contract also provided that the contractor bore all risks associated with any mistakes in the location of utilities as shown on the construction project plans. The county submitted revised design plans and change orders, including proposed increases in the contractor's compensation and extensions

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of the construction deadlines. The contractor did not object to these changes. When the contractor began work under the change order, 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 majority 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 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 noncompliance 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 was 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 would have ruled 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 noncompliance with a claim provision to deny reasonable compensation, especially when the owner has not been prejudiced by the noncompliance.

### **Summary of Bill:**

Any clause in a construction contract which purports to waive, release, or extinguish the claim rights of a contractor, subcontractor, or supplier to damages or an equitable adjustment for failure to submit a claim notice in a particular time frame or in a particular form is void and unenforceable absent material prejudice to the party seeking to enforce the clause. Excepted from this is any requirement that a suit, arbitration, or alternative dispute resolution procedure be commenced within a reasonable time period. For purposes of this express exception, a reasonable time period shall be no fewer than 180 calendar days following the completion or termination of a contract.

"Construction contract" means any contract or agreement for the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith.

"Claim" means any demand or assertion by a party to a construction contract seeking, as a matter of right, adjustment, or interpretation of contract terms, payment of money, extension of time, or other relief with respect to the terms of the contract. The term includes other disputes and matters in question between the parties arising out of, or relating to, the contract. The claimant has the responsibility to substantiate a claim.

**Appropriation:** None.

**Fiscal Note:** Not requested.

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