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## Judiciary Committee

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### HB 1613

**Title:** An act relating to the preservation of claim rights of a contractor, subcontractor, or supplier on construction contracts.

**Brief Description:** Limiting the effect of construction contract provisions affecting the claim rights of contractors.

**Sponsors:** Representatives Haigh, Nixon, Green, Lantz, Priest and Schindler.

Brief Summary of Bill
<ul style="list-style-type: none"><li>Limiting the effect of construction contract provisions affecting the claim rights of contractors.</li></ul>



**Hearing Date:** 1/31/06

**Staff:** Bill Perry (786-7123).

**Background:**

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 five to four 2003 decision, Mike M. Johnson, Inc. v. Spokane County, 150 Wn.2d 375, the state Supreme Court 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.

**Summary of Bill:**

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.

**Appropriation:** None.

**Fiscal Note:** Not requested.

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