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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ARNTZ BUILDERS,

Plaintiff and Appellant,

v.

CITY OF BERKELEY,

Defendant and Respondent.

A126838

(Alameda County  
Super. Ct. No. RG03095394)

In this action, plaintiff Arntz Builders (Arntz), a general contractor, and defendant City of Berkeley (the City) have been locked in a prolonged battle over who is responsible for construction cost overruns and schedule delays that occurred in the course of the Central Library restoration and expansion project. In more than nine years of litigation, including two appeals, the parties have yet to reach the merits of the underlying disputes.

In the first appeal, we reversed the trial court's ruling that Arntz's action was barred in its entirety for failure to file a claim pursuant to Government Code section 910. (*Arntz Builders v. City of Berkeley* (2008) 166 Cal.App.4th 276 (*Arntz I.*)) In this appeal, we reverse the trial court's ruling that Arntz's action was barred in its entirety because (1) it failed to submit to the City a timely claim pursuant to the terms of the construction

contract, and (2) it failed to submit an application for leave to present a late claim, pursuant to Government Code sections 930.4 and 911.4, subd. (b).<sup>1</sup>

## **BACKGROUND**

On April 2, 1999, Arntz and the City entered into a contract for the restoration and expansion of the Berkeley Central Library (the library contract). The City retained Library Project Managers (LPM) as the City’s project manager with authority to make decisions and take actions binding the City on matters pertaining to the contract. Ron Johnson and Dan Garcia were the LPM agents managing the library project. Rene Cardinaux and John Rosenbrock were the City employees overseeing the project.

### Terms of the Contract

The contract is voluminous, but the parties have highlighted, and we here summarize, only those provisions that governed how the parties were to proceed with respect to certain disputed issues.

When questions arose about the Contract Documents<sup>2</sup> (e.g., drawings and specifications), the contractor was required to prepare and submit to the Architect/Engineer and to the project manager a Request for Information (RFI). The project manager was required to respond with a Clarification. If the contractor believed that the Clarification entailed extra work necessitating a change to the contract price or the contract schedule, the contractor was to notify the project manager and submit a Change Order Request (COR).<sup>3</sup> “[The] Project Manager [could] then deny the COR,

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<sup>1</sup> All statutory references are to the Government Code unless otherwise identified.

<sup>2</sup> “Contract Documents” is defined in the contract as including the General Conditions, Supplemental General Conditions, and Addenda, comprised of Specifications and Drawings, Tables and Schedules.

<sup>3</sup> A “Change Order” is defined as a document signed by the contractor and the City, stating their agreement on “a. a change in the Work [to be done under the contract], [¶] b. the amount of the adjustment in the Contract Sum, if any, and [¶] c. the amount of the adjustment in the Contract Time, if any[;][¶] d. or work performed on a Force Account basis. . . .”

modify or rescind the Clarification, or issue a Change Order.” It was the City’s responsibility to “maintain an RFI log to track information pertaining to the RFI and its response.” The Log was to be reviewed at each progress meeting and “copies [were to be] given to all members of the construction team on a weekly basis.”

The project manager could also initiate changes in the work by issuing a Request for Proposal (RFP), to which the contractor was to respond within 10 working days, providing a breakdown of costs, including materials, labor, overhead and profit. Upon approval of an RFP, the project manager would issue a Change Order. If the parties could not agree on the price for an RFP, the Project manager could direct the Contractor to perform the work on a “Force-Account” basis.<sup>4</sup> If unresolved price issues remained, the contractor was directed to comply with “Document 00700 (General Conditions) Paragraph 12” (Paragraph 12) for any unresolved price issues.

The Architect could also issue a “Supplemental Instruction” (ASI) to the contractor, after approval by the project manager. If the contractor believed that the ASI resulted in a change in the scope of work, the contractor could submit a COR.

If the contractor was directed to proceed with changed work that would affect the schedule, it was the contractor’s responsibility to prepare and submit a time impact evaluation (TIE) that included a written narrative and a schedule diagram describing how the changed work affected the schedule. The Contractor was also responsible for preparing TIE’s for delays caused by adverse weather, strikes, and procurement or fabrication delays. If agreement was reached on a TIE, the “Contract Times” would be adjusted accordingly. If the parties could not agree, the schedule would be adjusted in an

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<sup>4</sup> The Force-Account provisions set forth the formula by which the cost of additional work will be calculated, where it is “impracticable because of the nature of the work, or for any other reason, to fix an increase or decrease in price definitely in advance . . . ,” or where it is “not possible or practical to price out the change work prior to the start of that work.”

amount the City allowed, and “the Contractor [could] submit a claim for additional time claimed. . . .” The contractor was responsible for requesting time extensions for any time impacts on “the critical path of the current schedule update.” If the City was responsible for a delay, then, within 14 days of the discovery of the delay, the contractor was required to submit a TIE and other documentation including a schedule diagram and a breakdown of the costs that would be incurred to mitigate the delay. If the contractor did not submit the TIE within the 14-day period “it [was] mutually agreed that the Contractor [did] not require a time extension for said issue.” “If the Contractor and City [were] unable to agree on any time extension request, the Contractor [was required to] comply with . . . Paragraph 12.”

Paragraph 12 governed “Claims by Contractor.” Pursuant to subparagraphs 12.A.1 and 12.A.2, any “contract interpretation disputes” and any “work disputes” were decided by the City. “Work disputes” included “the true value of any Work performed . . . [or] of any extra Work which the Contractor may be required to perform, [any] time extensions, [any issues] respecting the size of any payment to the Contractor,” or any issue regarding “compliance with Contract procedures.” If the contractor disagreed with the City’s decision, its exclusive remedy was to “file a claim in accordance with [Paragraph 12].” Paragraph 12.A.3 defined a “ ‘Claim’ ” as “a written demand or written assertion by Contractor seeking, as a matter of right, the payment of money, the adjustment or interpretation of Contract terms, or other relief arising under or relating to the Contract Documents.”

Paragraph 12.B provided that, where a “clarification, determination, action or inaction by City or Architect/Engineer, work or any other event, in the opinion of Contractor exceed[ed] the requirements of or [did] not comply with the Contract Documents, or otherwise result[ed] in Contractor seeking additional compensation for any reason (collectively ‘disputed Work’),” the parties were required to make “good faith attempts” to resolve the disputes. Prior to commencing the disputed work or within

seven days of the City's demand regarding the work, the contractor was required to provide a written notice of disputed work to the Project manager, explaining the basis for its entitlement to additional compensation. The City was then required to review the contractor's notice and provide a decision. If, after receiving the decision, the contractor disagreed, it was required to notify the project manager in writing, within seven days of receiving the decision, that a formal claim would be submitted. Within 30 days of receiving the City's decision, the contractor was required to submit its claim in a specified form, including detailed supporting documentation. If the contractor failed to submit either the notification of claim or the claim itself, within the time limits delineated, the contractor "waive[d] its right to the subject claim." Any ongoing claims were required to be updated every 30 days, and failure to do so would result in a waiver of that claim for that 30-day period. After receiving a formal claim and supporting documentation, the City was required to conduct a review and issue a final determination. If, after completion of the project, the contractor's claims totaled more than \$375,000, the parties were required to proceed to mediation as a condition precedent to litigation. "All pending claims [were to] be submitted to the same mediator."

Paragraph 12.D provided that the claims procedure was the contractor's exclusive remedy for "the payment of money, extension of time [and] adjustment or interpretation of Contract terms or other contractual . . . relief arising from this Contract" and was a condition precedent to the right to commence litigation. It provided, further, that the contractor "waive[d] all claims of waiver, estoppel, release, bar or any other type of excuse for non-compliance with the claim submission requirements."

#### Factual History

Brian Proteau was Arntz's project manager on the library project and, according to Proteau, there were problems from the outset. First, the foundation underpinnings could not be installed as designed. This was resolved by a change order and time extension negotiated by Arntz and the City. No contract claims were submitted prior to the

issuance of this change order. Thereafter, some 200 disputes with respect to the contract arose during the ensuing months. All of these disputes were resolved by negotiations that were begun in December 2000 and culminated in Change Order No. 106 (CO #106), issued in April 2001, resulting in substantial additional compensation to Arntz and extension of the contract completion dates to June/July 2001. With respect to those disputed issues, the City and LPM never required Arntz to submit separate claims as provided in the contract, nor did they require the submission of additional documentation to support the disputed items other than what had been provided in the regular course of Arntz's dealings with LPM and the City, as described below.

According to Proteau, from the beginning of the project until June of 2001 the on-site managers for Arntz and LPM dealt with disputed issues "in the way that most . . . projects deal with these types of day-to-day matters." When Arntz encountered a problem with the plans or site conditions, Arntz (or its subcontractor) would submit an RFI that identified the issue and requested direction on how to proceed, perhaps also suggesting a repair or cost of additional work. LPM would respond with an ASI, an RFP or a Construction Change Directive (CCD). Arntz or its subcontractors would reply, providing "costs, information, suggestions, and a discussion of why the work was not in the original scope."

Each RFI, ASI, CCD, or RFP resulting in a disputed work issue was tracked in a numbered file together with all pertinent data and negotiations. The City (LPM) tracked the items by reference to the Arntz file number. Unresolved items were placed on the agenda for the weekly meetings between Arntz and LPM at which job progress and change orders were discussed and negotiated, with subcontractors attending as necessary. Notes of those negotiations would be added to the files, together with the "time and

material tags,” owner updates, sketches, drawings, change orders or other instructions. Proteau averred that the City (LPM) had copies of all of this information.<sup>5</sup>

With respect to the RFI’s, ASI’s, RFP’s and the like, if LPM granted “entitlement” (i.e., accepted Arntz’s assertion that the work was outside the scope of the contract), Arntz would proceed with the work without a change order so as not to delay the project while the change order was being processed. If, however, after negotiations, LPM denied “entitlement” (i.e., rejected Arntz’s assertion that the work was outside the scope of the contract), Arntz would notify LPM in writing of Arntz’s intent to proceed with the work and to reserve its rights to pursue a claim for the extra costs. Arntz would then keep track of the cost of the work and provide that information to the City. The City/LPM did not demand that Arntz submit separate contractual claims, pursuant to Paragraph 12, with respect to the disputed issues. As has been described, in April 2001, Arntz and the City resolved some 200 accumulated disputed items using this procedure, and the procedure continued to be used until late June 2001.

Proteau’s description of the parties’ course of dealings from 1999 until June 2001, appears to be largely uncontradicted. Dan Garcia, LPM’s construction manager, described in similar terms the process of responding to RFI’s and the ongoing meetings between LPM and Arntz at which they discussed the progress of the project, the schedule, and change orders that were either open or pending. There is no evidence contradicting Proteau’s statement that the City and LPM did not require Arntz to submit separate contractual claims with respect to any of the items of disputed work that had accumulated through February 2001, and which were resolved by negotiation.<sup>6</sup> In fact, in early June

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<sup>5</sup> It was the City’s responsibility under the contract to “maintain an RFI log to track information pertaining to the RFI and its response,” and to disseminate and review the log with the construction team on a weekly basis.

<sup>6</sup> With regard to those matters, the City asserted that “Arntz refused to comply with the claims procedure” but cites no evidence in support of that assertion.

2001, Ron Johnson of LPM sent an e-mail to Rosenbrock stating that Arntz was continuing to reserve its rights with respect to disputed change orders, and that, according to Arntz's schedule, the project time had been impacted by 93 days due to changes occurring since CO #106. Johnson stated that Arntz's "current reservation of rights to pursue a time extension and related costs" was acceptable, and it was LPM's intention, within a week, to complete its own review of the impact of changes on the schedule and then to pursue a negotiated settlement with Arntz. Johnson also discussed proceeding in some instances by way of CCD. In reply, Rosenbrock instructed Johnson to follow strict Force Account procedures in issuing CCDs and stated his preference for "reach[ing] settlement [with Arntz] on a lump sum, forward priced change order." There is no evidence in the record indicating whether the referenced negotiations between LPM and Arntz took place.

In late June 2001, LPM began advising Arntz that it must submit separate claims, in compliance with paragraph 12, in order to preserve its rights on disputed items. According to Proteau, it was also in June 2001 that LPM began "denying all change order requests or else agreeing and then renegeing on the agreements after the work was completed."<sup>7</sup> From June 25, 2001 forward, LPM consistently inserted the claims advisory in its letters or e-mails denying Arntz's change order requests.

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<sup>7</sup> In June, or in the "summer months of 2001," LPM's contract with the City was expanded to include "litigation support" for the law firm that was handling this matter on behalf of the City (the Wulfsberg firm). According to Proteau, Arntz was not informed that LPM had begun working with the Wulfsberg firm and did not know that the City, LPM and its attorneys were preparing for litigation at that time. In the trial court Arntz argued that LPM's secret retention for litigation purposes created a "conflict of interest" that caused a dramatic change in the working relationship between Arntz and LPM, since that is when LPM started to demand that a separate claim be submitted for each disputed item, even though they "knew that Arntz had provided all the documentation that was required under the circumstances." Arntz has not pursued this theory on appeal.

During the fall of 2001, the parties traded letters and e-mails. Arntz would insist that it had provided sufficient documentation to support its claims for extra work or time extensions, and that the time deadlines in the contract for providing justifications for delay claims were unreasonable and unworkable. As Tom Arntz explained, “[m]any of the delays are ongoing, interrelated and involve multiple subcontractors, and therefore, will take time to put together. The cumulative cost impact of the numerous owner caused delays is not determinable at this time and we again reserve our right to claim for these items individually and collectively.” For its part, LPM would reject Arntz’s assertions insisting that Arntz comply with the paragraph 12 claim procedures, and that it submit TIEs for time delay claims. As Ron Johnson explained, “[a]s a matter of industry practice, [Arntz] know[s] full well that construction contractors . . . provide owners with notice, documentation and calculation of costs as projects proceed. [¶] . . . [¶] The contract is clear and there is no excuse for not complying with the contract claims procedure.”

On November 19, Arntz submitted to LPM a “preliminary claim” that summarized its own requests to date plus existing and anticipated subcontractor claims. Arntz reasserted its previous position that the deadlines for submitting the time delay justifications were not achievable because “[m]any of the extra work items are in a state of transition, i.e., some are work items agreed to but no change order has been issued, some have been paid (or at least billed) without receipt of an executed change order and many are ongoing and continue to incur additional costs.” Arntz submitted the preliminary claim to provide “a ballpark estimate to work with” and indicated it was “look[ing] forward to resolving these matters with [LPM] and the City as soon as possible.” The letter included some supporting documentation. According to Tom Arntz, the submittal was intended to generate negotiations on the unresolved issues.

The City Attorney wrote a letter to Arntz alleging that some portions of the claim included matters that had been settled and released in CO #106, and therefore were in

violation of the False Claims Act.<sup>8</sup> So far as can be determined from the record, the City made no response to the “preliminary claim” and took no action under the False Claims Act.

In December 2001, after encountering more rejections to its change order requests, Arntz wrote to LPM stating: “It is apparent that the Owners are unwilling or unable to fund the changes and design corrections that Arntz Builders is having to deal with. Rather than belabor these issues now, we are proceeding as quickly as possible to completion with the intent of submitting a claim for all Owner caused impact costs at a later date.” The record contains no response from the City.

The Library reopened in March 2002 and since that time has been in use seven days a week. In April, LPM wrote to Arntz and expressed its concern, “[a]s the [project] nears contract close out, we are concerned about the status of claims purported to be presented by Arntz and its subcontractors.” In the letter, LPM stated that it did not “recognize [previous] letters received from Arntz and its sub-contractors as in compliance with the claims procedure” and reminded Arntz that its failure to comply with the contract claims presentation requirements operated as a waiver of claims. LPM then inquired “what course of action Arntz is expecting to take . . . in regards to the purported assertion of claims . . . as to facilitate the close-out of [the] project so that we may be able to plan for future discussion.”

At this point, the subcontractors began filing lawsuits against Arntz, the City and the surety to enforce their stop notices and secure payment under the subcontracts. Between March 2002 and February 2003, four such actions were filed.

On May 13, 2002, LPM again wrote to Arntz stating it had received “several letters” from Arntz dated April 25, and “numerous other letters and e-mails from Arntz

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<sup>8</sup> Tom Arntz testified it was not his intent to request payment for items that had already been resolved by CO #106 and that is why he did not certify the subcontractors’ claims, as would be required by paragraph 12.C of the contract.

Builders regarding disputes, claims and potential claims,” but had not received a claim in compliance with the contract claims procedure. LPM also stated that if Arntz wished to submit an application to present any late claims pursuant to Sections 930.4 and 911.4, subd. (b), the City did not commit to any particular determination on the application.<sup>9</sup> Finally, LPM stated that the City “remains interested in negotiating a fair resolution of any outstanding issues” and would “welcome mediation of a contractually compliant claim” while reserving the right to “deny” or to “reject any claims submitted that do not comply with the claims procedure.”

From January through May of 2002, there was an unusually high number of letters and e-mails in which LPM rejected Arntz’s requests for additional costs. On May 22, Proteau sent an e-mail directly to Rosenbrock. In it, Proteau pointed to LPM’s May 13 statement that the City “remains interested in negotiating a fair resolution,” and contrasted that with LPM’s actions—rejecting the change order requests and then refusing to allow meetings so the issues could be negotiated. Proteau stated that the files created to track each disputed issue contain enough information for “research and negotiations” and that “resubmitting each file per the claims procedure that C[ontract] M[anagers] live for is nothing but a waste of time and money for both the City and the contractors.” Proteau pointed out that the parties had successfully negotiated hundreds of disputed matters in January 2001 without formal claims, and he requested that a meeting

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<sup>9</sup> Section 930.4 governs late claims for contractual claimants. It provides, in pertinent part, “[a] claims procedure established by agreement . . . exclusively governs the claims to which it relates, except that if the procedure so prescribed requires a claim to be presented within a period of less than one year after the accrual of the cause of action and such claim is not presented within the required time, an application may be made to the public entity for leave to present such a claim.” Section 911.4, subd. (b) provides, “[t]he [late claim] application shall be presented to the public entity . . . within a reasonable time not to exceed one year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim. The proposed claim shall be attached to the application.”

be scheduled as soon as possible to resolve the outstanding issues. Rosenbrock responded by stating that the City supports LPM's positions, and that the claims process is not a waste of time but, rather, is "very valuable in helping to focus in on the real issues and costs associated with [Arntz's] request." Rosenbrock expressed concern about Arntz's apparent refusal to follow the contract claims procedure and advised that the City expects Arntz to "follow the contract."

On May 31, 2002, LPM responded to letters purportedly sent by Arntz—but which are not in the record—"regarding contract payments." LPM's letter discusses various categories of disputes, including change orders quoted and not responded to, agreed-to change orders, delinquent payments for January and February, bonds held in lieu of retention, prompt payment penalties, and punch list work. LPM denied there were any open change orders without response (except for one) and disputed the amount due to Arntz under the change orders. LPM further stated that, as to any COR's for which entitlement was denied more than 30 days earlier, Arntz has waived its rights to compensation, in accordance with paragraph 12, and "[a]t this point on those issues, Arntz Builders can only request permission to file a late claim in accordance with Government Code Section 930.4." With respect to the remaining disputed issues, LPM made no reference to paragraph 12, but merely explained the City's position, viz., that Arntz was not entitled to any of the asserted payments, that the City was entitled to liquidated damages for the delays in completing the project, and that the City was entitled to recover the costs of completing the punch list.

On June 17, 2002, Arntz submitted a "Notice of Government Claims." The Wulfsberg firm wrote a letter rejecting the claim as non-compliant with the requirements of the applicable claims procedure "set forth in the construction contract, and enforceable under . . . Government Code, Section 930.2 et seq." Counsel requested that Arntz "submit a claim in a format recognized by the construction contract."

On July 2, 2002, Arntz submitted a document entitled “Arntz Builders Request for Time Extension and Compensation.” It was described as Arntz’s “Summary Claim” for contract adjustments on behalf of itself and its subcontractors and requested mediation as provided by the contract. The “summary claim” contained a narrative with respect to each category of disputed issues and attached a number of supporting exhibits. The exhibits are not included in the record except for a line item summary of each component of the claim.

This July 2 submittal generated a meeting between Arntz and the City on July 11, 2002. According to Rosenbrock, the parties reviewed their positions, and discussed the July 2 claim as a “work in progress.” Rosenbrock told Arntz that the City would be willing to look at “whatever [it] had” but that Arntz needed to provide a schedule analysis and detail justifications for the change requests that had been denied; if Arntz provided that, Rosenbrock stated, the City would take a look at it. According to Rosenbrock, Arntz balked at securing a Critical Path Method diagram due to the expense, but stated he would do so if necessary. Rosenbrock asked Arntz “for the umpteenth time” to follow the claims procedure in the contract so that the City could review LPM’s decision and the contractor’s position and “decide which one was correct.” Rosenbrock also indicated there was concern that Arntz was not following the contract procedure, and that, under a strict reading of the contract, all of its claims that had not been appealed 30 days earlier were effectively waived. Rosenbrock felt this was a severe penalty and indicated that the City would be willing to consider a late claim if Arntz could show that there was a reasonable justification and the City would not be prejudiced. In a letter to Arntz following the meeting, Rosenbrock confirmed Arntz’s statement that its July 2 submittal was not a “formal claim.”

On August 1, 2002, Rosenbrock wrote to Arntz, stating the City had not yet received the formal claim, asking that Arntz expedite the preparation and submittal of the materials, and asking Arntz to present an application to submit a late claim. “Upon

receipt of the Arntz formal claim and application, the City will review the claim [and] . . . will make a final determination based upon the information supplied, as provided in the project contract.” Rosenbrock reminded Arntz to include sufficient detail—cost and schedule analysis and “logic linking specific costs to specific events”—so that the City could make a fair and informed decision.

On August 20, 2002, Kris Cox of the Wulfsberg firm wrote to Arntz’s attorney, William Staples of the Archer Norris firm. Cox stated that the City did not “recognize” the July 2 submission as a proper time extension request or claim under the Contract because it failed to contain the information required under paragraph 12, failed to provide an explanation of the critical path impact of the changes, and was not timely. Cox went on to state: “The City will consider, however, a proper Claim, compliant with the Contract if submitted on or before October 15, 2002. . . . [T]he City reserves all rights to assert the Claim is not timely, to enforce the contract claim procedure requirements, and to deny any Claim that fails to meet those requirements. We would expect that any . . . submission . . . would present a rationale why it was timely under the Contract. At no time has the City waived or asserted that it would not enforce the timing provisions of the claims and time extension request in the Contract. Any failure to provide an indication of why the claim is timely will result in the denial of the claim by the City. Any failure to meet the Contract requirements for the presentation of a claim or time extension request will, similarly, cause the claim or request to be rejected. Pursuant to California Government Code § 930.4, the City advises Arntz of its right to request consideration of a late claim.”

On October 14, 2002, Arntz submitted a certified claim and supporting documentation.<sup>10</sup> In its introductory paragraph Arntz explained: “We have made every

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<sup>10</sup> So far as we can ascertain, none of the supporting documentation was included in the record on appeal, except, perhaps, the contents of “File #447” which was an excerpt of Trial Exhibit 49.

attempt to make this Claim as complete as possible, however, due to the City's continued issuance of Change Orders, and reversal of previously approved Change Orders, it is not possible to affix an unqualified dollar amount. Furthermore, the totality of our Claim is contingent upon a complete delay analysis inclusive of all Change Orders, RFIs, etc. It was conveyed to [Arntz] that the City would 'only be writing Arntz one check' and therefore, the City would not negotiate Change Orders without final resolution as to delay. This being the case, it has taken time to compile all of the outstanding issues into one Claim, in fact it is a 'work in progress' since the City is continuing to issue Change Orders unilaterally as of this date." The October claim contained five categories: "1. Past Due Payments and Retention" (including release of all monies being withheld as Liquidated Damages); "2. Outstanding Change Order Work"; "3. Delay Related Extra Costs"; "4. Subcontractor Claims"; and" 5. Interest." Arntz provided a narrative for each of the five categories, supported by reference to various exhibits.

On the following day Arntz submitted a "Notice of Demand for Mediation," in which it stated: "In order to comply with the terms of the Agreement, and to continue to meet and confer on the issues presently being discussed by the principals . . . Arntz Builders hereby demands mediation pursuant to the terms of the Agreement. . . . Under the circumstances, Arntz Builders is required to demand mediation in order to resolve these claims. The individual and aggregate claims are identified in the [October 14] letter, exhibits and binders that accompany this demand."

The claim was delivered to Cardinaux, who sent it on to Rosenbrock. Rosenbrock spent at least two hours reviewing the claim. The record does not show that the City provided a "final determination" on the claim, to the extent such was required pursuant to paragraph 12.B.3 of the contract. According to Proteau, the City never advised Arntz that the claim was insufficient, deficient, or defective. No one from the City or in the City Attorney's office knew of anyone that informed Arntz that its claim was late, defective,

invalid, or contained any omissions, or required additional information.<sup>11</sup> So far as it appears from the record, the claim was never formally rejected or denied; and there is no evidence the City ever informed Arntz that the claim was rejected because it did not include an application for leave to file a late claim, pursuant to the Government Code. Tom Arntz testified Arntz never submitted such an application because he did not think the claim was late. Proteau testified Arntz did not file a late claim application because the “October claim was accepted.”<sup>12</sup>

About five weeks after receiving the October claim the City responded to the claim and mediation demand with a letter from the Wulfsberg firm. First, the letter

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<sup>11</sup> At trial Rosenbrock testified that Tom Arntz called him in early 2003, “probably January,” to discuss closing out the project, and they briefly discussed the claim materials Arntz had submitted. Rosenbrock gave Arntz his “opinion about the claim and that it did not appear to be justified” because it did not add the Critical Path Method diagram needed to evaluate the time extension request, and it did not include the backup necessary on the individual disputes. He also told Arntz “we thought [the claim] did not have merit based on what was submitted.” Rosenbrock did not, however, tell Tom Arntz that he needed to “resubmit the material” or that the claim was being denied, and he does not recall whether he said the claim was late. Rosenbrock’s opinion was based on his “initial review, which was not a complete analysis.” This conversation occurred approximately six weeks after the Wulfsberg firm provided a formal response to the claim, as described, *post*.

<sup>12</sup> According to Firstman (of the Wulfsberg firm), he had a number of conversations with McGill in late 2002 and early 2003 in which he expressed the City’s position that Arntz had not complied with the claims procedure and that the “claims were late” and if the case did not settle that was a defense. The record does not, however, reflect any statement by Firstman that the City would defend based on Arntz’s failure to submit a Government Code late claim application.

addressed that portion of the claim seeking “prompt payment statute interest.”<sup>13</sup> The letter laid out the City’s position on this issue, which was: the statute permits the City to withhold 150 percent of any disputed payment amount; Arntz owes the City nearly \$2 million (for liquidated damages, punch list items, etc.) *plus* the amounts being claimed by the subcontractors; therefore, the City is entitled to withhold more than \$5 million. The letter went on to state that no further payments would be made to Arntz “until the Stop Notices, punch list, liquidated damages, substitute library facility rental costs and daily report matters have been resolved.” The letter concluded, “[t]he City of Berkeley would like to promptly resolve these matters. Please contact [Firstman] with your response to these issues, or any proposed resolution strategy you may have in mind. We will correspond separately regarding proposed mediators and mediation protocol.” The letter did not reject the claim, nor did it state that the claim was late, that the claim was deficient for failure to include an application for a late claim under the Government Code, or that the claim failed to comply with the contract.

The following week, Firstman sent a second letter to Arntz’s counsel stating: “In follow up to Arntz Builders claim and mediation demand dated October 14 and 15, 2002, this letter will set forth the proposal for mediation by and between the City of Berkeley, Arntz Builders and project subcontractors. . . .” Firstman went on to propose the name of a mediator, that costs of mediation be shared among all the parties, that decision-makers with settlement authority be in attendance at the mediation, and a limited discovery protocol.

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<sup>13</sup> A public entity/owner is entitled to retain a certain percentage of the contract sums earned in order to ensure the contract’s completion. (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 55–56; and see, Pub. Contract Code, § 10261.) The owner is required to release any retained earnings to the contractor within 60 days after completion of the work, and is subject to a charge of two percent per month on any improperly withheld amount. (Pub. Contract Code, section 7107, subd. (c).) If, however, there is a dispute between the owner and the contractor concerning the work, the owner may withhold up to 150 percent of the disputed amount. (Section 7107, subd. (c).)

The City and Arntz were unable to secure the voluntary cooperation of all the subcontractors with respect to document exchange and mediation, so Arntz suggested that the City waive the contract's requirement of mediation as a condition precedent to the filing of a lawsuit; in this way, the subcontractors' actions could be consolidated with an action filed by Arntz, and mediation among all parties could be compelled.

On May 1, 2003, Arntz's attorney, John McGill, sought clarification from the City regarding its position on Arntz's complaint. McGill noted that one of the subcontractors was "objecting to anything and everything that we are trying to do to expedite the matter," and expressed an urgent need to learn the City's position with respect to the "condition precedent mediation requirement," recommending that a consolidated action and trial date would serve all the parties' interests. McGill also responded to Firstman's suggestion that Arntz and the City meet without attorneys to resolve the outstanding change orders, stating that "Arntz is interested in working out these remaining issues."

On May 6, 2003, the City's attorneys agreed to waive the mediation requirement "for the limited purpose of allowing Arntz to file its lawsuit and consolidate the actions." In a letter to McGill, Kris Cox stated, "[t]he City only waives the mediation requirement and no other notice, substantiation, or other process contained in the claims provision or otherwise in the Contract that is a condition precedent to the contractor filing suit as against the City."

#### Procedural History

On May 7, 2003, Arntz filed a complaint against the City for, inter alia, breach of contract, and against LPM for negligence. On July 6, 2005, Arntz filed a second amended complaint containing six causes of action: Against the City, Arntz alleged breach of contract, breach of contract due to subcontractor pass-through or indirect claims, and breach of implied duty to provide complete and accurate plans. Against LPM, Arntz alleged causes of action for negligent misrepresentation, negligent interference with prospective economic advantage, and breach of duty to Arntz as third

party beneficiary of the LPM contract. Arntz also included alternative allegations that it complied with the claim presentation provisions of the contract, that it substantially complied with the claims presentation provisions, or that the City is estopped to require any further compliance with the contract claim procedures because the City's actions led Arntz to believe that no claim other than that submitted on October 15, 2002 was required.

The City answered the second amended complaint on June 29, 2005, asserting as two of its 19 affirmative defenses that the complaint was barred because (1) Arntz "failed to perform all the conditions, covenants, and promises required to be performed" under the contract ; and (2) Arntz failed "to comply with its obligations under . . . Government Code [Sections] 900, *et seq.*, including but not limited to, (i) Plaintiff's failure to serve a Government Code Claim in compliance with . . . Sections 910, 911.2, 915[], and (ii) Plaintiff's failure to comply with contractual claim administration and non-judicial settlement procedures prior to the service of any purported Government Code Claim, resulting in the failure of Plaintiff to serve any such Government Code Claim that encompassed a cause of action prior to commencing this litigation (see, e.g., Government Code Sections 910, 945.4.)."

The court granted Arntz's motion to consolidate the complaint with the subcontractor actions. Mediation in the consolidated actions took place in June and July of 2004, and again—according to Arntz's complaint—on November 24, 2004, but the case did not settle. All parties thereafter entered into a stipulation and order to conduct the trial in four phases: (Phase 1) a bench trial between Arntz and the City "with regard to compliance with any applicable Government Code Claim requirements," including whether Arntz "compl[ied] or substantially compl[ied] with any applicable Government Code Claim requirements before filing its lawsuit," and if not, whether Arntz was excused from complying based on statutory waiver, equitable estoppel or implied waiver; (Phase 2) a bench trial on the issues of what claims were compromised and released in

CO #106 and subcontractor issues; (Phase 3) a bench trial on the issue of whether Arntz complied with contract claims procedures, and if not, to what extent the causes of action are, nevertheless, not barred due to excuse, defense or waiver; and (Phase 4) a jury trial on the breach of contract issues. The order does not discuss Arntz's claims against LPM.

In November 2004, the City filed a motion for summary judgment or summary adjudication with respect to the Phase 1 issues, contending that Arntz's breach of contract cause of action was barred because Arntz did not timely file a Government Code claim pursuant to section 910. Arntz also moved for summary adjudication, arguing that the City was estopped from asserting that it had not complied with the Government Code's claim requirements. The court denied the motions. After a bench trial, the court ruled that Arntz was required to submit a statutory claim and failed to do so, thus barring the action.

Arntz appealed. We disagreed with the trial court's conclusion and held that "if a claim is governed by a claims procedure prescribed by contract, the presentation of an additional, statutory claim pursuant to sections 905 and 910 is not required prior to filing a lawsuit unless it is expressly mandated by the contract." Because the library contract contained a claims procedure and did not mandate the filing of a statutory claim for disputed amounts exceeding \$375,000 (and Arntz's claim far exceeded that sum), we reversed the trial court's Phase 1 ruling. The matter was remanded for further proceedings.

In April 2009, the City moved for summary judgment with respect to the Phase 3 issues. As we have noted, the parties agreed that in Phase 3 they would litigate the issues of whether Arntz complied with contract claims procedures, and if not, to what extent its causes of action are, nevertheless, not barred due to excuse, defense or waiver. The City's motion, however, focused narrowly on whether Arntz's action was barred because

its October claim was late under the contract provisions, and Arntz failed to file an application for leave to present a late claim, pursuant to Section 930.4.<sup>14</sup>

The City's motion was premised primarily on *Dixon v. City of Turlock* (1990) 219 Cal.App.3d 907 [*Dixon*] which, the City argued, stood for the following proposition: If a public entity rejects a claim as untimely, and the claimant later revises and refiles the same claim, the second claim is a "nullity" unless it is accompanied by a late claim application pursuant to Section 911.4, and moreover, the public entity has no obligation to "re-deny" the claim as untimely. The City argued that Arntz's October claim was "late" because its first purported claim was submitted in July 2002; the July claim was denied as not in compliance with contract procedures and as untimely; thereafter, in at least two letters, Arntz was advised to include in any subsequent claim an application for leave to present a late claim; Arntz's October 15, 2002 claim contained no late claim application; therefore the October claim—which was merely a revised version of the July claim—was a "nullity," and the City had no obligation to deny it as untimely. The City applied the same analysis to Arntz's subcontractor "pass-through" claims.

In opposition, Arntz argued, among other things, that (1) the City did not make a prima facie evidentiary showing that Arntz's claims, including all components of the October claim, were untimely, and, (2) the evidence could support a finding that the contract had been modified by the course of dealing between the City and Arntz.

Arntz cross-filed for summary adjudication of the City's sixth affirmative defense, which alleged that Arntz's action was barred due to its failure to perform all the "conditions, covenants, and promises required to be performed" under the contract.

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<sup>14</sup> Neither party explains why this latter issue was not presented in Phase 1, during which the parties were to litigate the issue of whether "Arntz Builders compl[ied] or substantially compl[ied] with *any applicable* Government Code Claim requirements before filing its lawsuit. . . ." (Emphasis added.) Also, the parties do not inform us when or whether the Phase 2 issues were adjudicated.

Arntz contended that in the August 20 letter, the City invited Arntz to submit a contractually compliant claim on or before October 15; Arntz submitted its claim, and the City accepted the claim by not rejecting or denying the claim for any reason, despite its express reservation of rights to do so; Arntz relied on the City's conduct; therefore, the City either modified the contract to permit the claim, or, the City waived its right to raise—or was estopped to raise—an affirmative defense of noncompliance with the contract.

The City opposed Arntz's motion on numerous grounds, including (1) that “[i]ssues of fact abound” as to whether the City modified the contract, and (2) that the library contract contained a waiver of Arntz's defenses of waiver or estoppel with respect to the claims procedure.

The trial court granted the City's motion and denied Arntz's motion. The court concluded that Arntz could not proceed based on its contractual claim because (1) Arntz did not comply with the contract claim presentation procedures that required the presentation of a formal claim within 30 days after the City refused to pay for disputed work; (2) Arntz cannot rely on “substantial performance” of the contract claim procedure because Arntz knowingly and “on purpose” refused to comply and also because the contract required full compliance; (3) the parties did not—and attorney Cox could not—modify the terms of the contract by his August 20 letter; and (4) Arntz's theories of waiver and estoppel were waived by Arntz in the contract. The court also concluded that Arntz could not proceed based on a statutory late claim or substantial compliance with the late claim procedure because Arntz did not submit any application for leave to file a late claim and, in its absence, the City had no discretion to permit the late claim.

Arntz filed this timely appeal.

## DISCUSSION

### Standard of Review

“We review a grant of summary judgment de novo. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142 . . . .) In performing our de novo review, we employ a three-step analysis. ‘First, we identify the issues raised by the pleadings. Second, we determine whether the movant established entitlement to summary judgment, that is, whether the movant showed the opponent could not prevail on any theory raised by the pleadings. Third, *if the movant has met its burden*, we consider whether the opposition raised triable issues of fact.’ [Citations.] To shift the burden, the defendant must conclusively negate a necessary element of the plaintiff’s case or demonstrate there is no triable issue of material fact requiring a trial. [Citation.] If the evidence does not support judgment in the defendant’s favor, we must reverse summary judgment without considering the plaintiff’s opposing evidence. [Citation.] Any evidence we evaluate is viewed in the light most favorable to the plaintiff as the losing party; we strictly scrutinize the defendant’s evidence and resolve any evidentiary doubts or ambiguities in the plaintiff’s favor. [Citation.]” (*Barber v. Chang* (2007) 151 Cal.App.4th 1456, 1462–1463 (*Barber*).

Resolution of this appeal requires us to interpret the contract between the parties. In such a case, “[u]nless resolution depends on the credibility of conflicting extrinsic evidence, the interpretation of a writing involves a question of law for de novo review by the appellate court.” (*Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 57.) In carrying out this review, we are mindful that “ ‘[a]s a rule, the language of an instrument must govern its interpretation if the language is clear and explicit. [Citations.] A court must view the language in light of the instrument as a whole and not use a “disjointed, single-paragraph, strict construction approach” [citation].[] If possible, the court should give effect to every provision. [Citations.] An interpretation which renders part of the instrument to be surplusage should be avoided. [Citations.]’ ” (*City of El Cajon v. El*

*Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 71 (*El Cajon*.) Ambiguities that cannot be resolved by application of the rules of contract interpretation are resolved against the drafter of a standardized contract. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 798; see also Civ. Code, § 1654.)

#### Timeliness of Contract Claim(s)

Arntz contends, first, that the trial court erred in concluding that its lawsuit was barred in its entirety due to Arntz's failure to file a timely claim under the contract and failure to file a Government Code application for leave to file a late claim. According to Arntz, the bulk of its October 2002 claim was not "late" under the contract provisions, because the time-limited procedures set forth in subparagraph 12.B of the contract govern only certain types of disputes.

To reprise: Subparagraph 12.B of the contract provides, "[s]hould any clarification, determination, action or inaction by City or Architect/Engineer, work or any other event, in the opinion of Contractor, exceed the requirements of or not comply with the Contract Documents, or otherwise result in Contractor seeking additional compensation for any reason (collectively 'disputed Work')" the parties must try, in good faith, to resolve the dispute. If it is not resolved, then prior to commencing the work or within seven days of the City's demand, the contractor must provide a written notice of disputed work to the project manager, explaining the basis for its entitlement to additional compensation. The City must then review the contractor's notice and provide a decision. If, after receiving the decision, the contractor disagrees, it must notify the project manager in writing within seven days of receiving the decision, that a formal claim will be submitted. Within 30 days of receiving the decision, the contractor must submit its claim in the form specified by the contract, including extensive supporting documentation. If the contractor fails to submit either the notification of claim or the claim itself, within the time limits delineated, the contractor "waiv[es] its right to the subject claim."

Arntz contends the deadlines and procedures set forth in subparagraph 12.B do not apply to claims that do not meet the definition of “disputed Work.” According to Arntz the provisions of subparagraph 12.B apply to RFI’s, RFP’s, ASI’s and the like, resulting in COR’s by which Arntz was requesting “additional compensation,” but do not apply to other facets of Arntz’s claim, such as the City’s unilateral changes to agreed-upon prices for change orders, unpaid progress payments due under the contract, or withholding of Arntz’s bonds in lieu of retention. For those claims, Arntz contends, the more general provisions of paragraph 12 apply. Subparagraphs 12.A.1 and 12.A.2 provide that any matters involving any “Contract Interpretation Disputes” or any “Work Disputes” including “the true value of any Work performed . . . [or] of any extra Work which the Contractor may be required to perform, [any] time extensions, [any issues] respecting the size of any payment to the Contractor” or any issue regarding “compliance with contract procedures,” are to be decided by the City, and if the contractor disagrees, its exclusive remedy is to “file a claim in accordance with this Paragraph.” Paragraph 12.A.3 defines a “Claim” as “a written demand or written assertion by Contractor seeking, as a matter of right, the payment of money, the adjustment or interpretation of Contract terms, or other relief arising under or relating to the Contract Documents.” Paragraph 12 contains no deadlines for claims other than claims for “disputed Work” which claims are specifically defined in subparagraph 12.B. Therefore, Arntz contends, any claims contained in the October 14 claim other than “disputed Work” claims were not late.

We think Arntz’s contention has merit.

In granting summary judgment the trial court concluded as follows: “Arntz argues that Paragraph 12 differentiates between requirements for bringing different types of claims. Specifically, Arntz attempts to differentiate between ‘disputed work’ and ‘claims’ as though they run along two entirely separate procedural tracks. Arntz is incorrect. The Contract calls for Arntz to turn disputed work into claims.” The trial

court, however, appears to misapprehend the issue.<sup>15</sup> The question is not whether Arntz was required to turn “disputed Work” into claims. The question is whether the “Procedure” set forth in subparagraph 12.B is limited to a specific subset of disputes for which the seven-day and 30-day time limits apply. We think it is reasonable to read subparagraph 12.B as applying only to that subset of matters defined therein as “disputed Work”, i.e., anything that the contractor believes exceeds or is not in compliance with the contract or otherwise results in the contractor seeking additional compensation. Although there appears to be some overlap, the subset of disputes defined in 12.B is not co-extensive with the broader categories of disputes set forth in subparagraphs 12.A.1 and 12.A.2. Indeed, if the two were co-extensive, there would have been no need for the contract to provide a separate definition for “disputed Work” issues in subparagraph 12.B, to which its timelines apply. (*El Cajon, supra*, 49 Cal.App.4th at p. 71 [court should give effect to every provision in contract and avoid interpretation which renders part of the contract surplusage].)

In similar cases, courts have held that this type of time-restricted claim procedure can work a forfeiture, and, accordingly, is to be narrowly construed to apply to the type of dispute described. Thus, for example, a contractual requirement that any claim for additional compensation for extra or additional work must be submitted within 10 days or be deemed waived, would not apply to claims for cost increases resulting from the breach of an obligation by the other party. (*D.A. Parrish & Sons v. County Sanitation Dist.*

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<sup>15</sup> Arntz filed a motion for reconsideration (and a request for the court to reconsider its ruling, *sua sponte*). It pointed out that the trial court was under the misapprehension that all of Arntz’s claims related to “disputed Work.” In those motions, Arntz explained that its claims for unpaid progress payments, final payment, release of retention or any other payment obligations under the contract are not claims for “disputed Work” and therefore are not subject to the time limitations of sub-paragraphs 12.B and 12.C. The trial court denied Arntz’s motion for reconsideration and its request that the court reconsider its decision *sua sponte*.

(1959) 174 Cal.App.2d 406, 413, 414 (*D.A. Parrish*); and see, *United States v. John A. Johnson & Sons* (D. Md. 1945) 65 F.Supp. 514, 527.)

Additionally, as we noted in the unpublished portion of *Arntz I*, to the extent there is any ambiguity in Paragraph 12, it must be construed against the party who created the uncertainty. (Civ. Code, § 1654.) “In this case it was the City that inserted the claims procedure as part of its ‘front-end documents’ put out for bid. There is no evidence these terms were or could be the subject of negotiations.” *Arntz Builders v. City of Berkeley* (August 25, 2008, A116078) [nonpub. part of partial pub. opn.] fn. 12 at p. 22.

The City asserts that the cited cases are inapposite because they do not “involve[] the contract language here” but instead use “very different and far narrower language and the contract terms had very different purposes.” The City argues that using those cases to “nullify the plain language of the contract here would also nullify sections 930.2 and 930.4 and this court’s prior decision.” The City, however, provides no actual comparison of the contract language in the cited cases to the contract language here, provides no discussion of how the contract terms in those cases had “different purposes,” and provides no explanation as to why the application of the cited cases would “nullify” the contract language, the statutes, or this court’s prior decision. Accordingly, this argument has been waived. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 [if

a party asserts a point but fails to support it with reasoned argument and citations to authority, it is deemed waived].)<sup>16</sup>

The City also counters with the argument that *all* disputed issues are governed by the claims procedure set forth in subparagraph 12.B. They contend, first, that any request for a progress payment (or failure to return bonds in lieu of retention) that is denied “would have to be included in a proper formal claim, within the time period established in Paragraph 12.B, if Arntz disagreed with the City’s initial position.” The City does not, however, explain why this is so. Subparagraph 12.B by its terms is limited to actions or events for which the contractor is claiming additional compensation. Subparagraph 12.A.2, however, refers to issues “respecting the size of any payment to the Contractor” or any issue regarding “compliance with Contract procedures.” These are distinct from issues of “disputed Work” as specifically defined in subparagraph 12.B, and, it appears LPM also applied these distinctions. In its May 31, 2002 letter to Arntz responding to a number of disputed matters (with copies to Firstman, Rosenbrock and others), LPM recites the standard warning concerning the paragraph 12 claim procedure and its time limits only in connection with a dispute regarding unresolved change order requests (which are requests for “additional compensation”); concerning the other disputed items (amounts owed under negotiated change orders, delinquent contract payments, disputed

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<sup>16</sup> It appears to us that the contract language in *D.A. Parrish* is similar to that contained in the Library contract: “ ‘57. *Extra, Additional or Omitted Work—Payment* . . . If the Contractor shall claim that any instruction, request, drawing, specification, action, condition, omission, default, or other situation obligated or may obligate the Owner to pay additional compensation . . . , he shall notify the Owner in writing of such claim within ten (10) days from the date he has actual or constructive notice of the factual basis supporting the claim. The Contractor’s failure to notify the Owner within such ten (10) day period shall be deemed a waiver and relinquishment of any such claim against the Owner.’ [Emphasis removed.]” (*D.A. Parrish, supra*, 174 Cal.App.2d at p. 413.) The court described this as a “forfeiture clause [to] be strictly construed,” (*Id.* at p. 414) and held that the language “refers to additional or extra work, not to damages incurred by appellant’s frustration of respondent’s ability to perform the prescribed work.” (*Id.* at p. 413.)

liquidated damages, open punch list items) there is no mention of paragraph 12 or any time-limited claim procedure.<sup>17</sup>

The City next points to the broad language of subparagraph 12.D, which states: “Contractor’s performance of its duties and obligations specified in this Paragraph 12 and submission of a claim as provided in this Paragraph 12 is Contractor’s sole and exclusive remedy for the payment of money, extension of time, the adjustment or interpretation of Contract terms or other contractual or tort relief arising from this Contract.” The City contends this language demonstrates that every element of Arntz’s claim was governed by the claim procedure. But this argument does not address Arntz’s contention. Arntz does not dispute that every element of its claim falls within Paragraph 12. What Arntz contends is that the claim procedures for additional compensation contain specific timelines, while other claims (e.g., for compensation due and not paid under the contract) are governed by subparagraph 12.A, which contains no time requirements. We have

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<sup>17</sup> The court is cognizant that in *Arntz I* we stated, “there can be little doubt that the contract intended all claims to be presented within specified time periods and in a specified format . . . .” In its motion before the trial court, the City relied on that statement in contending that all of Arntz’s claims were governed by the strictures of subparagraph 12.B. Our statement, however, did not purport to parse the application of the various parts of Paragraph 12, as there was before us then no question whether specific claims were governed by different time requirements. Rather, the statement was made in reference to the fact that the contractual claims procedure was comprehensive and did not require the submission of a section 910 claim. The City having not repeated its contention on appeal appears to acknowledge the statement’s inapplicability here.

concluded the contract is susceptible to this interpretation and the City has not shown otherwise.<sup>18</sup>

The City also argues, more narrowly, that the change order disputes, the subcontractor pass-through disputes, and the liquidated damages dispute are all covered by the time limitations of subparagraph 12.B. But in making this argument the City does not indicate the nature of the subcontractor pass-through claims, e.g., whether all, some or none of those claims involve claims for “disputed Work” as defined in subparagraph 12.B. And, with regard to the change order disputes, the argument does not distinguish between claims arising out of rejected change orders requests—which appear to fall within the claims procedure requirements of subparagraph 12.B—and claims arising out of the City’s unilateral reductions of agreed-upon change orders, which arguably do not.

With respect to liquidated damages, the City contends that its “determinations, actions and inactions” to withhold money from Arntz as liquidated damages for Arntz’s delay in completion of the project were “clear triggers for Arntz to file a claim for ‘additional compensation’ by converting the dispute into a timely formal claim to include a critical path schedule analysis, so that the City could investigate the claim thoroughly at the time.” The City, however, does not point to anything in the contract indicating that a dispute over the City’s claim for liquidated delay damages is a “trigger” for Arntz to file

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<sup>18</sup> The City also argues that “most components” of the October claim had been “formally denied” on May 31, 2002 and were merely a revised and amended version of the July 2002 submission. We have been unable to locate in the record the purported “claims” to which the May 31, 2002 letter makes reference, and, as we have noted, the May 31 letter itself made no mention of any requirement to submit a claim under paragraph 12 except with respect to change order requests that had been denied. Additionally, the City’s argument merely lists various categories of disputes discussed in these documents and does not show that they are subject to any specific time limits.

a claim for additional compensation.<sup>19</sup> For example, among Arntz's claims is the assertion that the City could have and should have moved into the library in October 2001, but chose not to do so while improperly assessing liquidated delay damages against Arntz until March 2002. The City does not explain how its decision in this regard would have triggered a duty on the part of *Arntz* to file a "disputed Work" claim when it was *the City* that was claiming delay damages allegedly based on its own refusal to take possession of the property. Moreover, the City's conduct after receiving the October claim did not suggest that it believed Arntz had missed the boat on this issue; far from rejecting the claim as waived the City provided a substantive response on the merits, invited a dialogue and asked Arntz for a "proposed resolution strategy" to the issues of "liquidated damages, [and] substitute library facility rental costs." The record simply does not support the City's contention that all of Arntz's claims relating to liquidated damages were untimely.

In sum, we have concluded the trial court erred in barring litigation of the October claim in its entirety as untimely under the contract. We next consider the City's contention that the October claim was nonetheless fatally defective because it was not accompanied by a late claim application.

#### The Absence of a Late Claim Application

The City contends here, as it did below, that *Dixon v. City of Turlock* (1990) 219 Cal.App.3d 907 (*Dixon*), stands for the following proposition: If a public entity rejects a claim as untimely, and the claimant later revises and refiles the claim without a late claim

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<sup>19</sup> We recognize that Paragraph 1.09 et seq. of the General Conditions requires the contractor to prepare and submit a time impact evaluation (TIE) if changed work or some other action by the City will affect the schedule, and that these provisions include a separate set of time limits for submitting TIE's. Disputes concerning the time schedule are subject to Paragraph 12.A.2. The parties, however, have not focused on this aspect of the claim, and we do not express any view concerning the effect of those time restrictions on the claim.

application, the second claim is a “nullity,” the public entity need not “re-deny” the claim as late, and the claimant’s action is barred for failure to comply with the Government Claims Act (citing *Dixon, supra*, 219 Cal.App.3d at p. 912). Applying these principles, the City argues: Arntz’s submittal dated July 2, 2002 was its “first . . . attempt to file a claim;” that claim was “specifically denied” on the ground, inter alia, that it was not timely; Arntz’s subsequent October claim was a “revised and amended” version of the July claim but it did not include an application for leave to submit a late claim; therefore, Arntz did not comply with the Government Claims Act and its action is barred. We are not persuaded.

First, the holding in *Dixon* is not so general. In *Dixon*, an individual was injured in a fall on a public sidewalk in the City of Turlock. Section 911.2 governs claims against governmental entities for personal injuries and requires such claims to be submitted within six months of the injury. The individual did not submit his claim until more than one year after the incident. (*Dixon, supra*, 219 Cal.App.3d at pp. 908–909.) The city returned the claim as untimely; the notice included language prescribed by Section 911.3. (*Id.* at p. 912.) That section provides that when a claim pursuant to section 911.2 is submitted late, the public entity may provide notice to the claimant that the claim is “being returned” as untimely and that the claimant’s “only recourse . . . is to apply without delay to [the public entity] for leave to present a late claim.” If the notice is not given, the public entity waives its defense as to the time limit for presenting a claim. (§ 911.3.)

After receiving the 911.3 notice, the claimant in *Dixon* submitted an amended claim, which the city also rejected, this time with a Section 945.6 statutory notice stating the claimant had six months in which to file a court action. The claimant filed suit, which was dismissed on demurrer. (*Id.* at p. 909.) On appeal, the claimant argued that because the city failed to reject the amended claim as untimely in accordance with Section 911.3, the city waived its defense of untimeliness. The court rejected that contention. It held

that, when a claim filed pursuant to Section 911.2 is late, if the public entity issues a formal rejection that includes a statutory notice and warning pursuant to Section 911.3, the public entity is not required to repeat that warning when it receives and rejects a subsequent amended claim from the same claimant. (*Dixon, supra*, 219 Cal.App.3d at p. 912.) The court also concluded the city was not required to respond at all to the amended claim after it had rejected the original claim with full statutory warnings, because there was no active claim to amend, and therefore the amendment was a “nullity.” (*Id.* at p. 913.)

As Arntz and the City correctly point out, the City did not provide any notice pursuant to section 911.3 because that section applies only to personal injury claims having a six-month limitation period for filing a government claim. Thus, to the extent that *Dixon* relies on Sections 911.2 and 911.3, it is inapplicable.

In any event, the City’s argument fails because it is built on the assumptions that Arntz’s July submittal was a formal claim and that the October claim was the same claim, only “revised and amended.” The record, however, shows that the July claim was not intended as a formal claim, so the October claim was not an “amended claim,” in contrast to that which was presented in *Dixon*.

Further, in this case, the City did not summarily reject the original (July) “claim” on the ground it was untimely, as was done in *Dixon*. Here, after receiving the July 2 submittal, the City had a meeting with Arntz at which the parties reviewed their positions, and discussed the July 2 “summary claim” as a “work in progress.” Although the City’s lawyer did state that the July submittal was not timely, the City refused to consider the submittal primarily—and repeatedly—because it was not in the proper form. Indeed, the City told Arntz it would be “unable to properly respond to [Arntz’s] submitted request until it was in a proper claim form.” In three separate letters after July, the City invited Arntz to submit a contractually compliant claim (reserving, of course, its right to reject the claim as untimely). When Arntz did submit the claim in October, the City did not

reject the claim (as was done in *Dixon*), but replied to it, and invited a dialogue. For all of these reasons, we reject the City’s contention that the October claim, like the amended claim in *Dixon*, was a “nullity.”<sup>20</sup>

The City also asserts that the October claim merely “recast prior issues the City had repeatedly denied” and that “Arntz delayed submitting [a claim] with documentation as part of its litigation strategy” which was designed to “prejudice the City and force an avoided defense cost settlement.” Indeed, it is a central theme of the Respondent’s Brief that Arntz “purposefully and willfully violated the contract and the Government Code for its own strategic litigation purpose” by submitting a claim covering numerous disputes that were “years old [*sic*] and difficult to investigate or defend without expending significant legal fees and forensic expert costs.” These bold pronouncements, however, are unsupported by a single citation to the record. We are not aware of any evidence indicating that Arntz had a “litigation strategy” of delaying the submission of a documented claim, or that the City would have to expend “significant legal fees and forensic expert costs” to investigate the October claim, or that the City was otherwise prejudiced in any way by the delay in the claim submittal. These bald assertions not only elide the fact that the City *invited* submission of the so-called “delayed” October claim, but also ignore Arntz’s contentions that the City all along had the information it needed to resolve the time-constrained “disputed Work” issues, and that Arntz was, at least until late June 2001, acting in conformance with a two-year course of dealings with the City. On this record, we soundly reject the City’s unsupported charge that Arntz purposely

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<sup>20</sup> The City also cites *Dixon* as establishing, as a general proposition, that “a public entity has no discretion to waive the timing requirements of the Government Claims Act.” In fact, the court noted only that a late claim application filed beyond the one-year time limit is untimely and section 911.4 does not permit the public entity to waive that limitation. (*Dixon, supra*, 219 Cal.App.3d at pp. 912; 913.)

withheld information in order to prejudice the City, or that the City was prejudiced by Arntz's course of action.

### Conclusion

We conclude that the trial court erred in ruling as a matter of law that (1) Arntz's entire claim failed to meet the time requirements of the contract claim procedures, and (2) that Arntz's entire claim is barred because it failed to include a statutory application for leave to file a late claim. We, accordingly, will reverse the judgment and remand this case for further proceedings.

Because we are reversing the judgment in its entirety on these grounds, we need not address the other issues raised and briefed by the parties. Upon remand all issues are open for relitigation, consistent with the conclusions set forth in our opinions. (*Gapusan v. Jay* (1998) 66 Cal.App.4th 734, 743 [unqualified reversal remands the cause for a new trial and places the parties in the same position as if the cause had never been tried, except insofar as the opinion of the court on appeal applies].) We express no views as to any matters not decided in this opinion.

In remanding this matter, we express our profound hope that the parties will redouble their efforts to resolve any issues that might be resolved by agreement before embarking on the next round of litigation.

**DISPOSITION**

The judgment is reversed, and the matter is remanded for further proceedings consistent with this opinion.

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RIVERA, J.

We concur:

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RUVOLO, P.J.

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REARDON, J.