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2014 Annual Summary
Construction | Procurement

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A. STATUTES OF LIMITATION / REPOSE ON PUBLIC PROJECTS: THE LAY OF THE LAND AFTER THE PFD / MARINERS CASES

Safeco Field—the home of the Seattle Mariners—was completed in July of 1999. The Washington Supreme Court recently decided two cases arising out of the construction of that stadium that expand the ability of public owners to bring claims that might otherwise be barred by the statute of limitations or the statute of repose.

Public owners should have a firm understanding of these decisions and how they impact construction claims, both past and present. It is therefore worth revisiting the current public claims landscape after *Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co*., 165 Wn.2d 679, 202 P.3d 924 (2009) ("*PFD I*") and *Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co*., 176 Wn.2d 502, 296 P.3d 821 (2013) ("*PFD II*").

PFD I: The core issue in *PFD I* was whether the applicable 6 year **statute of limitations**—which does not apply to claims brought "in the name of or for the benefit of the state"—barred the PFD's Safeco Field construction claims. The answer to that question hinged on whether the PFD constructed the stadium as an exercise of its "sovereign" authority (statute of limitations would not bar the claims), or whether it constructed the stadium in its "proprietary" capacity (statute would apply).

The Supreme Court held that the stadium construction was an exercise of sovereign authority, involving the "traditional sovereign function of providing public recreational benefits …" The action was therefore brought "for the benefit" of the state, and thus exempt from the six-year statute of limitations under RCW 4.16.160.

PFD II: The core issue in *PFD II*, on the other hand, was the separate statute of repose, RCW 4.16.310. The contractor argued that the statute of repose barred the PFD's claim. RCW 4.16.310 generally provides that (1) all construction claims "shall" accrue within six years of the date of substantial completion of or termination of services on a project (whichever is later); and (2) claims that do not "accrue" within that period are barred.

The statute of repose expressly applies to claims brought by or for the benefit of the state ("The limitations prescribed in this section apply to all claims or causes of action as set forth in RCW 4.16.300 brought in the name or for the benefit of the state …"). In *PFD*

II, the parties had contractually agreed that the claims asserted under the contract would accrue at the time of Substantial Completion.

The contractor argued that this accrual clause should not be applied as written, but the Court held that this contractual accrual clause was enforceable. This meant that the PFD's claims accrued timely under the statute of repose (and were thus not barred).

> Bottom Line: First: Public projects constructed as an exercise of sovereign authority (such as parks) are not subject to the normally-applicable statute of limitations. Second: If claims on such a project timely accrue (either by discovery or by contractual agreement), public owners can bring such claims long after the expiration of the six-year period that would normally serve to bar claims on a non-sovereign or private project. *PFD II* hinged on special language in the contract. Owners wanting to take advantage of this ruling are advised to review their contract forms to assure compliance.

B. INDEPENDENT DUTY / ECONOMIC LOSS DOCTRINES: RECENT DEVELOPMENTS

We are seeing major changes in how the Washington courts may allow plaintiffs to sue in "tort" (i.e., judge-made common law) even where such claims would be barred or limited by the contract the parties execute. In 2010, the Washington Supreme Court decided two cases announcing a brave new—and largely inscrutable—legal framework for the analysis of the intersection of contract and tort claims. The new rule—the so-called "independent duty doctrine"—has generated a great deal of confusion among the lower courts and practitioners.

In late 2013, the Supreme Court issued its latest pronouncement on the independent duty doctrine in *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wn.2d 84, 312 P.3d 620 (2013). In *Donatelli*, the plaintiff property owners (the Donatellis) hired an engineer (D.R. Strong) to assist them in permitting and managing a development project through final recording of the short plats. The engineer represented to the plaintiffs that they could finish the project in a year and half, "if not less time." The project took much longer, and the preliminary plat approval expired prior to project completion. While the engineer began the approval process anew, the Donatellis suffered financial losses and eventually lost the property in foreclosure.

Plaintiffs sued, alleging breach of contract, CPA violations, negligence and negligent misrepresentation. The key issue at stake was whether the negligent misrepresentation claims were barred by the independent duty doctrine: *I.e.*, did the engineer owe any duty to the Donatellis beyond those identified in the four corners of the contract? *This was a crucial question, as the contract limited D.R. Strong's professional liability to its fees.*

The Supreme Court held that on the record presented, the independent duty doctrine did not necessarily bar the negligence claim. The Court reiterated the test it formulated in *Eastwood v. Horse Harbor Found., Inc*., 170 Wn.2d 380, 385, 241 P.3d 1256 (2010), namely that "[a]n injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract."

The majority of the Court viewed the record in *Donatelli* as inconclusive on this issue: While the Court very clearly thought that the engineer could have assumed additional obligations to the Donatellis outside of the professional services agreement, the Court thought it was "impossible to say at this point what professional obligations D.R. Strong owed to the Donatellis—contractually or otherwise." The Court remanded for further proceedings to determine the precise scope and nature of those duties.

Justice Madsen—writing for the four-justice minority—dissented and offered a scathing critique both of the result and the independent duty doctrine. Plaintiffs' claims arose out of the contract with the engineer, and they alleged no personal injuries or physical damage to property. This claim would have been clearly barred under the traditional economic loss doctrine. Justice Madsen found the majority's refusal to address the claim based on the four corners of the written contract before the Court troubling: It "fails to preserve the distinction between contract and tort when the subject matter and nature of the plaintiffs' claims and the alleged injuries or harm fall within their contractual relationship." *Donatelli*, 179 Wn. 2d 84, 118 (Madsen, J., dissenting).

> Bottom Line: The *Donatelli* decision—while shedding almost no light on the actual duties owed by the parties to a construction contract—does emphasize the importance in any contractual relationship (professional services or otherwise) of (1) clearly articulating the duties owed under the contract; and (2) attempting to strictly limit those duties to the words contained in the four corners of that agreement.

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C. UNDERGROUND UTILITY DAMAGE PREVENTION ACT

Washington's new Underground Utility Damage Prevention Act, found at RCW 19.122, became effective in 2013. In January of 2014, the Washington Utilities and Transpiration Commission ("WUTC") announced that it had issued the first fines under that statute, which generally requires companies to mark their underground utilities within two business days of receiving a request from the 811 Call Before You Dig program.

The WUTC fined Pacific Power and Light Company $1,000 for "failing to mark underground utilities before work commenced on a sewer main project in Yakima on Jan. 9, 2013." The failure caused the excavating contractor to damage electrical conduits and cables owned by the power company. The WUTC fined Frontier Communications Northwest, Inc., $1,000 "for its failure to mark the presence of underground communication equipment before excavation commenced in Everett on April 25, 2013." The excavation resulted in damage to a Frontier telecommunication facility.

> Bottom Line: These relatively small fines were the maximum amount for a first-time offense. Absent malicious conduct (in which case the statute allows for treble damages), the maximum penalty for repeat offenses is $5,000. Note, however, that the statute does not otherwise preempt other civil action for personal injury or property damage.

D. SPECULATIVE BUILDER ARRANGEMENTS: BRAVERN RESIDENTIAL, II, LLC V. STATE, DEP'T OF REVENUE, 334 P.3D 1182 (WN. APP. 2014)

In *Bravern Residential, II, LLC v. State, Dep't of Revenue*, 334 P.3d 1182 (Wn. App. 2014), Division One of the Court of Appeals addressed whether a developer could provide an extremely limited ownership interest in a project to a construction company as a means to avoid paying retail sales and Business & Occupation taxes on the construction services. The answer—at least as it relates to the arrangement at issue in *Bravern*—is no.

Bravern Residential, II, LLC ("Bravern") was a limited liability company formed for the purpose of constructing a condominium tower in downtown Bellevue. Bravern had two members: A real estate development company with 99 percent ownership interest, and PCL Construction, with 1 percent ownership interest. The parties developed this relationship at least in part to qualify Bravern as a "speculative builder", an entity that is

exempt under WAC 458–20–170(2) from retail sales and B&O taxes for construction on property that it owns.

The Court refused to sanction this arrangement, and held that the project was not exempt from retail sales and B&O tax liabilities. First, PCL acted as a separate entity: It (and not Bravern) actually performed the construction services. Second, the speculative builder exemption actually required *speculative* development: Construction services are therefore taxable if the member contractor is guaranteed a fixed amount as compensation (as opposed to sharing in the profits/losses of a joint venture). Here, there was no question that "in substance" the agreement between the developer and PCL ensured that PCL would receive full compensation for its construction service "regardless of whether the project made any profit." *Bravern*, 334 P.3d at 1189.

E. PUBLIC WORKS CONSTRUCTION

GC/CM Statute Expanded.

In 1991, the Legislature enacted the General Contractor/Construction Manager statute (RCW 39.10). Known as GC/CM, this process allows certain municipal and other public bodies to select contractors based primarily on qualifications rather than low bid price.

The GC/CM option—for the first decade or more of the statute's existence—was not widely used. This was partly due to fact that the statute made the GC/CM process unavailable or unattractive for many owners and contractors. One of the biggest limitations in the statute was that the GC/CM itself could self-perform only a fairly limited amount of the Work. In addition, there was a lack of familiarity with the process and a general conservatism among many owners.

Lately, the use of the GC/CM process has surged among a wider array of municipal and public owners, including cities, counties, special purpose districts, school districts, port districts and water and power utilities. The change has been brought about by a general legislative loosening of various restrictions that once made GC/CM unavailable or infeasible for all but the largest customers of construction services in the State.

This growth in the use of GC/CM will be advanced by the enactment in June 2014 of House Bill 2208. This bill recognizes a new category of project—called a "heavy civil construction project" —in which the GC/CM can self-perform (without subcontractor bidding) up to 50% and in some cases 70% of the Work.

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Bottom Line: This important legislative change will have a major impact on the use and availability of the GC/CM process, spurring its further growth throughout the State.

Auditor's Office takes conservative stance on Change Orders vs. Public Bidding.

The Washington State Auditor's Office recently issued an audit finding against the Orcas Island Fire Department for adding work via change order that should have been publicly bid.

The Fire Department originally sought bids for a complete fire station in 2009, but the bids came in higher than the Department wished to spend, with a low bid of over $900,000. The Department rejected all bids and created a bare-bones set of specifications to significantly reduce the cost of the project. The stripped-down fire station was re-bid in 2010 and awarded to a low bidder for $426,562. The Department then contacted the winning contractor and requested estimates on items previously removed from the initial bid in 2009. Approximately $56,000 in change orders were added to the project.

The Auditor's Office found this practice inappropriate, stating merely that "[s]ince these actions were not included in the awarded bid specifications they represent separate projects and appropriate bidding procedures should have been followed" and "[c]hange orders are only allowable if the additional work is within the bid upon scope of the project." The audit report does not identify the nature of the change order work that the auditor deemed inappropriate, nor does it identify what actions might be acceptable.

Bottom Line: The Orcas Island decision is overly restrictive and unrealistic. Whether additional work may be accomplished by change order versus separate bidding is complicated and depends on the specific circumstances. Nonetheless, the Auditor's Office regularly issues audit findings against agencies that issue change orders for work that was "not included in the awarded bid specifications." Washington agencies should be aware of this conservative position taken by the State Auditor's Office.

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Washington State Auditor issues updated guidance on federally funded projects.

In its fall 2014 Audit Connection newsletter, the Washington State Auditor's Office issued a federal procurement requirements update. As noted by the update, the Auditor's Office had previously advised that procurements using federal funds could rely solely on state bid law.

However, the Auditor's Office now advises that procurements using federal funds must meet all of the applicable federal, state, and local government-specific requirements. Where state law procurement requirements are less restrictive than federal requirements, the local government's purchasing practices must also conform to the applicable federal rules. Federal regulations require that all purchases using federal funds meet certain bidding and procurement requirements. The Circular A-102 Common Rule, currently adopted by federal agencies in their own regulations, allows non-federal entities to use their own procurement procedures that reflect applicable state and local laws and regulations, provided that the procurements conform to applicable federal law and standards.

> Bottom Line: This update by the Auditor's Office is not surprising, given that federal law often trumps local rules. With that said, local owners using federal funds will need to double check to make sure that acquisitions meet the federal standard.

School Construction in California: Lease-Leaseback Arrangements Upheld As Exempt from Competitive Bidding Requirements.

California Education Code Section 17406—enacted in 1959—has long been viewed as expressly allowing school districts to enter into so-called "lease-leaseback" arrangements exempt from the otherwise-applicable competitive bidding requirements.

In a recent court decision, this common assumption was validated for the first time. In *Los Alamitos Unified School District v. Howard Contracting, Inc.*, Case No. G049194 (September 17, 2014), a California appellate court firmly rejected a contractor's argument that the District's selection process violated competitive bidding requirements and was, therefore "unconstitutional, unconscionable, illegal and a theft of public funds."

A lease-leaseback arrangement is a construction contract formed by way of two separate lease agreements. First, the owner enters into a ground lease to the contractor for a *de-*

minimus amount (generally $1 per year). Second, the parties enter into a lease agreement for the new facility being constructed by the contractor. The lease payments are based on the contractually-agreed guaranteed maximum price, and generally tied to construction progress on the project.

According to the California state legislature, the method has proven to "deliver school facilities on time, on budget, and with a reduced level of public agency risk associated with design issues, delays and costs overruns." The lease-leaseback delivery method is particularly attractive to school districts that desire to work with a specific contractor.

The California court—relying on the plain language of the statute and a long-standing Attorney General's Office Opinion—concluded that competitive bidding was not required holding that "the statute is plain, unambiguous, and explicit, and does not impose bid requirements on school districts." To the extent that California school districts were reluctant to use the process for fear of running afoul of otherwise-applicable public works competitive bidding requirements, the court's decision in *Los Alamitos* should assuage those concerns.

> Bottom Line: California is not alone in allowing these arrangements. Washington counties and cities have lease-leaseback authority under RCW 36.34.205 (counties with 600,000 or more population) and RCW 35.42 (cities). Specifically, this authority allows any city or town, or a county with population of 600,000 residents or more, to lease a building for a period of up to 50 years. Under the statutes, a public entity may also lease a site it owns, and agree to lease back, all or a portion of a building erected on the site. The lessee's construction of the building must be made pursuant to a call for bids "upon terms most advantageous" to the public entity, but is not a Public Work subject to the more specific competitive bid requirements in RCW 39.04.

F. WORKER SAFETY

Washington Supreme Court holds that knowledge of risk of injury is insufficient to establish "deliberate intention" for worker's compensation purposes.

In September 2014, the Washington Supreme Court held in favor of employer immunity under Washington's workers' compensation program. The case, *Walston v. Boeing Co.*,

334 P.3d 519 (2014), involved employer liability for asbestos exposure. The Court's decision ended a lawsuit against Boeing that went to the heart of the workers' compensation system—a system intended to be a "grand compromise" between employers and employees that grants employers immunity from workplace injury suits by their employees in exchange for swift, fault-free benefits for employees in the event of compensable injury. Under this system, the only exception to employer immunity is for *intentional torts* by the employer, meaning injuries to the employee resulting from the deliberate intention of his or her employer to produce such injury.

The claimant in *Walston* worked in a Boeing plant from 1956 to 1995. In 1985, maintenance workers repaired overhead pipes to contain flaking asbestos insulation, creating visible dust and debris in the plant. Although the pipe repair work crew wore protective gear while cutting and handling the pipe, the regular Boeing employees on the plant floor—including the claimant—did not have protective gear. In 2010, the claimant was diagnosed with mesothelioma, a lung disease caused by inhaling asbestos fibers. He sued Boeing, claiming his workplace exposure caused the disease.

The claimant's estate argued that Boeing's knowledge at the time of exposure that asbestos was harmful amounted to "deliberate intention" to cause injury, thus nullifying Boeing's immunity from suit. Boeing responded that it had no actual knowledge that the claimant was certain to be injured and that knowledge of a risk of injury does not amount to deliberate intention. The Supreme Court ruled that the claim did not fit within the narrow exception to employer immunity. The Court emphasized that deliberate intention is a high standard, met only when an employer had actual knowledge that an injury was certain to occur. Mere risk of injury is insufficient. Because asbestos exposure creates a risk and not a certainty of disease, Boeing had knowledge only of a risk of injury resulting from asbestos. Such knowledge falls short of actual knowledge that injury is certain to occur—meaning Boeing is not liable.

Contract imposing responsibility on the subcontractor for worksite safety does not discharge general contractor's responsibility for compliance with WISHA.

In November 2013, the Washington Court of Appeals held in *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 313 P.3d 1215 (2013), that a general contractor has both direct liability for a breach of its common law duties arising from retained control, and vicarious liability for WISHA violations by a subcontractor's employees. A WISHA violation is therefore chargeable both to the subcontractor and to a general contractor—whose supervisory authority as primary employer places it in the best position to ensure compliance with safety regulations.

Important to the *Millican* court's decision was the fact that WISHA imposes a specific duty on employers to comply with WISHA regulations—a duty that employers owe to all employees at work on the jobsite as members of the protected class. Further, the *Millican* court explained that indemnification provisions allow the general contractor, if liable to the employee, to recover its defense costs and judgment liability from the culpable subcontractor, but they do *not* enable the general contractor to disavow its primary responsibility for WISHA compliance. That duty, the court emphasized, remains nondelegable.

> Bottom Line: This ruling was a fairly straight-forward application of the long-standing *Stute* doctrine. Public agencies sponsoring projects should avoid retaining control over the method of contractor work, since that retention of control can be used as a sword by injured workers to bring claims against the owner for personal injuries on the job site.

Washington Court Of Appeals clarifies standard for "infeasibility defense" to workplace safety violations.

In *Frank Coluccio Construction Co. v. Department of Labor & Industries*, 181 Wn. App. 25, 329 P.3d 91 (2014), Division One of the Washington Court of Appeals addressed whether Coluccio, a contractor, established an "infeasibility defense" to a serious WISHA violation that occurred while Coluccio was operating an excavator within 10 feet of an overhead energized power line in violation of WAC 296-155-428(20)(a). On appeal, the Court of Appeals explained that where a specific standard like the 10-foot clearance requirement exists, the standard is presumed feasible and the employer bears the burden of proving that it is not.

Coluccio argued that the specific activity it was engaged in during the WISHA violation—dragging a trench box—was not hazardous because Coluccio took precautions and further measures would not increase safety. The court rejected Coluccio's attempt to narrowly define the cited activity, concluding that "a standard that proscribes certain conditions, here the 10-foot prohibition, presumes the existence of a safety hazard." The court broadly defined the hazard as electrocution, noted that the testimony indicated that specific and feasible alternatives could have protected Coluccio's workers from the hazard, and rejected Coluccio's "infeasibility" defense.

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Bottom Line: *Coluccio* indicates that where a safety standard is specific—like the 10-foot clearance requirement at issue in the case—courts will broadly define the hazard that the standard aims to prevent. Employers are not permitted to narrow the hazard to the particular activity cited and thus avoid WISHA liability on the ground that alternative safety measures cannot prevent that limited hazard.

G. SUBCONTRACTOR ISSUES

ERISA Preemption: Trust fund suits against payment bond and retainage.

Under Washington's public works statutes, general contractors who perform public works are legally required to post payment bonds and have retainage withheld from progress payments to protect the owner from subcontractor and supplier claims against the public project.

Problems arise when union subcontractors fail to pay dues and trust fund obligations. As a general matter, the trust funds may file lawsuits directly against the subcontractor / employer in federal court under the Employment Retirement Income Security Act (ERISA) and Labor Relations Management Act (LMRA), but they may also seek recovery under state bond claim statutes by filing claims against the general contractor's bond and retainage—even if the general contractor paid the subcontractor in full and has no knowledge of the subcontractor's default in trust fund obligations.

The Washington Supreme Court held in 2000 that ERISA preempted Washington's public works lien statutes. *See Int'l Brotherhood of Elec. Workers, Local Union No. 46 v. TRIG Elec. Constr. Co.*, 142 Wn.2d 431, 13 P.3d 622 (2000). Trusts therefore could not enforce their claims against the general contractor's bond and retainage in Washington State courts. This holding protected general contractors from having to pay trust funds that were the subcontractor's obligation to pay.

In March 2014, however, the Court in *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 322 P.3d 1207 (2014) unanimously overturned its previous holding, stating that in light of a national shift in ERISA preemption jurisprudence, it should "join courts across the country and hold that this type of state law is not preempted by ERISA."

Bottom Line: As a result, general contractors are no longer protected in Washington State courts from these trust fund liens. Contractors on public works projects should take steps to protect themselves in light of this decision, including monitoring payments made to trust funds and unions and obtaining monthly proof of payments and/or lien releases directly from the trust funds and unions.

Public Works Fee Shifting Statute: Application to Trust Claims.

Most public owners and contractors engaged in public works are well aware of RCW 39.04.240, which can provide for prevailing party attorney's fees in an action "arising out of a public works contract." If utilized correctly, this statute can dramatically impact public works litigation, especially in the absence of a contractual fees clause.

The Western District of Washington (Hon. Richard Jones) recently held that the provisions of RCW 39.04.240 applied to claims brought by a workers' trust against the project bond and retainage. *See Puget Sound Elec. Workers Health & Welfare Trust v. Lighthouse Elec. Grp.*, No. C12-276 RAJ, 2014 WL 2619921 (W.D. Wash. June 12, 2014). The Court—reasoning that such claims fell squarely within the provisions of the statute—awarded the defending surety a portion of its fees and costs incurred in defending the trust claims.

The case was decided by a federal court interpreting Washington law, and it is unclear whether a Washington court would come to the same conclusion. However, parties defending trust claims should consider using the tools provided by RCW 39.04.240, especially in light of the recent Washington Supreme Court decision in *W.G. Clark Const. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn. 2d 54, 322 P.3d 1207 (2014) (holding that federal law—ERISA—does not preempt state law benefit claims).

H. SUSTAINABILITY/LEAN CONSTRUCTION/BUILT GREEN

Seattle developers face new microhousing regulations.

In October 2014, the Seattle City Council unanimously adopted legislation establishing new regulations governing microhousing, otherwise known as "aPodments." The City Council became interested in regulating microhousing in 2013, after neighborhood activists complained that developers were exploiting a loophole in land use law that allowed each floor of a building to count as a single "unit" for design review and

permitting purposes, even if that floor included up to eight individual living spaces. The new legislation requires each living space to count as an individual unit. It also divides future projects into two categories. Developers will build either "small efficiency dwelling units" or "congregate units." The first type are permitted anywhere other apartment buildings are allowed and treated much the same. They will be between 220 and 400 square feet and must contain at least two sinks. Congregate units, on the other hand, are permitted only in Seattle's densest neighborhoods and may be as small as 70 square feet as long as they are built in tandem with common kitchens. The City Council decision follows an August 2014 Superior Court ruling that individual bedrooms with private bathrooms and food preparation areas are configured for use as separate dwelling units and must be regulated accordingly, with environmental (SEPA) and design review thresholds calculated accordingly. Combined, the City Council decision and court ruling change the landscape for microhousing and may make permitting and construction more expensive and difficult for developers.

City of Seattle updates Living Building Pilot Program.

Seattle's Living Building Pilot Program allows developers to request departures from the city Land Use Code through design review for buildings attempting to meet the Living Building Challenge. The Challenge is a green building certification program that defines the most advanced measure of sustainability for buildings and landscapes currently available. In response to a Seattle City Council resolution, the Living Building Pilot Program was amended in July 2014 to (1) revise the minimum standards related to energy use to align with the new Seattle Energy code, (2) require an independent report to verify compliance, (3) modify or remove some available departures, (4) increase the maximum penalty for projects failing to demonstrate full compliance, and (5) eliminate the existing Seattle Deep Green option to allow the City to focus the pilot program on Living Buildings. The Deep Green Technical Advisory Group will eventually evaluate and develop a new pilot program for Deep Green. The updates are intended to encourage development of innovative green buildings that reduce environmental impacts, test new technologies, and serve as a model for development throughout the region.

I. ELECTRONIC BIDDING

Washington State Legislature approves electronic bidding for state public works projects.

In April 2014, the Washington State Legislature approved Substitute House Bill 1841, which authorizes state agencies to conduct public works competitive bidding processes electronically and accept electronic signatures in such processes. The new law was

codified as RCW 39.04.390 and became effective on June 12, 2014. It applies only to state agencies and departments. *See* RCW 39.04390(1). It does not apply to local governments such as cities, counties, school districts, or port districts. This is because most laws that apply to local agencies require submission of "sealed bids" for public works projects.

"State agency" for purposes of the new law includes "any state office or activity of the executive and judicial branches of state government, including state departments, offices, divisions, boards, commissions, institutions of higher education as defined in RCW 28B.10.016, and correctional and other types of institutions." RCW 39.04.390(2)(b). The law defines an electronic signature as "a signature in electronic form attached to or logically associated with an electronic record." RCW 39.04.390(2)(a). Under the new law, the state is required to develop standards and policies for electronic submission of public works bids. RCW 39.04390(3).

J. TRIBAL SOVEREIGN IMMUNITY

Washington Supreme Court confirms that contractual waiver and consent provisions are enforceable against tribal nations and entities.

In a decision that is of interest to owners, contractors, and subcontractors who do business with tribal nations and entities, the Washington Supreme Court recently held that a tribe's contractual waiver of sovereign immunity and consent to state court jurisdiction can be considered in determining whether state court jurisdiction would infringe on the tribe's right to self-govern. The case, *Outsource Services Management, LLC v. Nooksack Business Corp.*, 181 Wn.2d 272, 333 P.3d 380 (2014), addressed a contract between a tribal enterprise and a lender. In the contract, the tribe expressly waived its sovereign immunity with respect to any contract-related claims and consented to state court jurisdiction for all such claims. When the tribal enterprise failed to make a payment due on the loan, the lender filed suit in state superior court for breach of the loan agreement. The tribal entity acknowledged that it had waived sovereign immunity, but argued that nonetheless, the state court lacked subject matter jurisdiction over the case because it involved a contractual dispute with a tribal enterprise that occurred on tribal land.

The question before the Court was whether asserting jurisdiction would infringe on the tribe's right to self-rule. The Court noted that because the tribal enterprise chose to enter a contractual agreement waiving its sovereign immunity and consenting to state court jurisdiction, allowing such jurisdiction did not infringe on the tribe's right to make such

decisions. Indeed, the Court noted, the opposite is true—to disregard the tribe's own decision to waive sovereign immunity and consent to state jurisdiction would undermine the tribe's right to make those decisions.

Bottom Line: Going forward, the court indicated it would take tribes' consent into account when determining whether jurisdiction would infringe on their right to self-govern. The case did not depart from previous cases involving tribal contracts, but it did clarify an area of law that is often confusing to businesses unfamiliar with doing business with tribal entities. The case in no way changes the general rule that tribes must (1) specifically waive sovereign immunity; and (2) consent to the jurisdiction of U.S. federal or state courts. Absent such consent, any claim arising out of the contract would have to be brought in tribal court.

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