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2018 Annual Summary
Construction | Procurement

We are pleased to offer this comprehensive summary of the major construction and procurement developments in 2018 that have an impact on public and private owners, contractors and developers. Topics include:

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A. CONTRACTOR NOTICE OBLIGATIONS ENFORCED BY WASHINGTON SUPREME COURT

The Washington Supreme Court recently upheld dismissal of a Contractor's claims for failing to comply with contractual notice provisions. *Nova Contracting v. City of Olympia,* 426 P.3d 685 (2018).

This dispute, in which the Contractor alleged that the Owner wrongfully rejected submittals and wrongfully terminated the Contractor before physical work had commenced, arose from a contract to replace a deteriorating culvert. The prime contract contained WSDOT standard specification Section 1-04.5, the "Notice of Protest" provision that has been the subject of numerous cases including *Mike M. Johnson, Inc. v. Spokane Cty,* 150 Wn. 2d 375, 78 P.3d 161 (2003). The City of Olympia (Owner) awarded the contract to Contractor Nova (Contractor) in May 2014. In September 2014, the Owner terminated the Contract before the Contractor performed any physical work on the Project. Between the award and termination of the Contract, the Contractor submitted various submittals for Owner review. By August 2014, project communications had degenerated into hostile accusations by the Contractor (i.e., that the perceived inadequacy with submittals resulted from the Owner's design flaws) and by the Owner (i.e., that the Contractor's performance was delinquent and subjected the Contractor to potential termination due to inadequate project schedules and insufficient documentation regarding how the trenchless pipe bursting work would be carried out).

After the Owner issued a Notice of Default, the Contractor filed a formal protest on September 9, 2014. The Contractor again formally protested when the City terminated the Contract on September 24. But the Contractor had not formally protested the prior Owner actions in rejecting submittals. The Contractor later sued in Thurston County Superior Court, bringing a claim for the Owner's alleged breach of the "covenant of good faith and fair dealing" by wrongfully rejecting numerous submittals. In response, the Owner made a motion to dismiss the action based on the Contractor's failure to submit a timely "protest" under Section 1-04.5, arguing that the Contractor had waived all claims related to the City's rejection of submittals by failing to comply with Section 1-04.5's written Notice of Protest requirement. The Supreme Court agreed with this argument, holding that Section 1-04.5's protest requirement applied to claims for consequential or expectancy damages (i.e., not just claims for extra costs of work) and that Section 1-04.5 applied to equitable claims such as a claim for violation of the covenant of good faith and fair dealing.

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B. Continuing Validity of *Bignold v. King County* at Issue in Fish Bypass Renovation Dispute

Grant County PUD contracted with General Construction to build certain improvements, including a fish bypass, on the Wanapum Dam in the Columbia River. Changed work led to a partial settlement in 2007 in which the PUD paid General Construction for some changes and denied payment for other alleged changes. General Construction sued, seeking extra compensation for claims not resolved by the partial settlement. In litigation, which the Court of Appeals described as "unduly convoluted and overly-lawyered," the Owner (PUD) moved for summary judgment based largely on the *Mike M. Johnson* case, arguing waiver by the Contractor due to the lack of timely claim notice. The Contractor (General Construction) relied on the previous Washington Supreme Court decision in *Bignold v. King County*, 65 Wn.2d 817, 399 P.2d 611 (1965) for its argument that the notice requirement is satisfied when Owner has actual knowledge of the complained-of condition and orders the Contractor to proceed with the extra work.

In rejecting this argument, Division III of the Court of Appeals held by a vote of 2-1 that General Construction's claim was more akin to the claim made in *Mike M. Johnson* and therefore was subject to that case's strict interpretation of the written notice. *General Constr. Co. v. Public Utility District No. 2 of Grant Cty*, 195 Wn. App. 698 (2016). Specifically, the majority opinion fashioned a rule that sought to reconcile *Mike M. Johnson* with *Bignold* (and thereby preserving what the court considered to be the distinctive attributes of both cases). The majority opinion's approach hinged on whether the work at issue can be said to be "within the scope of the contract" or not. For work within the scope of the contract, the court held that the strict *Mike M. Johnson* requirement applies. For work "outside" the scope of the contract, the majority opinion seems to have held that *Bignold* continues to provide a supplemental means of recovery because (in its view) the contract is not applicable to claims sounding in quantum meruit. Based on this distinction, the majority opinion nonetheless rejected General Construction's claim, considering it to be more in the nature of a claim based on work within the scope of the contract than a claim for quantum meruit. The dissenting judge rejected this test, concluding that *Mike M. Johnson* "silently overrules" *Bignold*'s apparent holding that compliance with formal written claim procedures is not necessary if the owner is aware of the changed condition and orders the contractor to proceed with the extra work. The dissenting judge thus found *Bignold* "irreconcilable" with *Mike M. Johnson.*

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C. First Breach Doctrine Prevents Strict Enforcement of Notice Requirement

Subcontractor claims arising from a high school project recently led the Court of Appeals to hold that a party who is in material breach of a contract may be barred from asserting a notice-based affirmative defense (here, the general contractor defending against claims brought by subcontractors). *Kenco Constr., Inc. v. Porter Bros. Constr., Inc.*, 74069-5-1, Court of Appeals (Div. I, June 11, 2018) (unpublished).

The jury had awarded $1.8 million and $1.1 million to the roofing and electrical subcontractors, respectively, based on claims of cumulative impact, inefficiency and improper withholding of contract sums. The general contractor appealed on various grounds, including its argument that the subcontractors had not complied with the timely notice requirements in the subcontract and prime contract. The general contractor, relying on the *Mike M. Johnson* rule, argued that the subcontractor claims were barred.

The Court of Appeals distinguished *Mike M. Johnson* on the ground that "there was no discussion of the party claiming lack of notice being in breach of contract" and went on to state a general rule that "a party is barred from enforcing the contract that it has materially breached." The general contractor withheld the subcontractors' progress payments on the theory that the subcontractors were responsible for delays and disruptions on the project. The jury disagreed with that theory, finding that the subcontractors were not responsible for delays and interferences. Consequently, the general contractor had no basis for withholding the progress payments and therefore was in material breach of the contract by doing so. On that basis, the Court of Appeals turned away the general contractor's notice defense.

The Court also addressed the electrical subcontractor's argument that its duty to provide notice was excused by the doctrine of impossibility. The electrical subcontractor's impossibility theory was that its duty to provide detailed costs of anticipated disruptions was made impossible by virtue of the general contractor's failure to provide a recovery schedule. Without a recovery schedule, the electrical subcontractor argued it could not provide a reasonable projection of anticipated impact costs, excusing it from the notice obligation. The Court of Appeals generally agreed, stating "Only [general contractor] could control the work of other trades or provide an updated recovery schedule. But [general contractor] did not provide the schedule updates or recovery plan that [electrical subcontractor] requested. From this evidence, a jury can find that [general contractor] prevented [electrical subcontractor] from complying strictly with the notice requirements,

and therefore could conclude that [electrical subcontractor] was excused from the condition precedent to making its claim."

D. King County Superior Court Interprets GC/CM Statute

Skanska-Hunt's injunction suit to stop the Washington State Convention Center PFD (PFD) from terminating a Preconstruction Services Agreement provided the King County Superior Court with a recent opportunity to interpret and apply the GC/CM statute, RCW 39.10.340. Approximately eight months into preconstruction work, the PFD's Board of Directors held a special meeting and voted to terminate the Preconstruction Services Agreement with Skanska-Hunt. Skanska-Hunt was of the opinion that the real reason for the termination was a desire to find a GC/CM willing to provide services at a lower price. Skanska-Hunt therefore filed suit to enjoin the PFD from terminating its Preconstruction Services Agreement or from reissuing the RFQ for a new GC/CM.

In a motion for injunction, the moving party such as Skanska-Hunt must demonstrate that (1) it has a clear legal or equitable right (2) it has a well-grounded fear of immediate invasion of that right and (3) it is at risk of actual or substantial injury. On the first element, the PFD argued that Skanska-Hunt had no clear legal or equitable right because the PFD had the right to terminate the Preconstruction Services Agreement for convenience (i.e., for no reason). The King County Superior Court held that "public owners have the discretion to terminate any contract for convenience as long as the decision is not arbitrary or made in bad faith, and the public owner has found termination to be in the public interest." Faced with dueling stories from the Owner and Contractor, the Court ruled that "significant disputed facts" precluded any finding (as a matter of law) that the termination was or was not in good faith; instead, the issue of arbitrary conduct "must be resolved at trial." Consequently, because Skanska-Hunt failed to demonstrate a clear likelihood of prevailing on the merits of its wrongful termination claim, the Court did not enter an injunction requiring the PFD to revive the previously terminated Preconstruction Services Agreement.

However, the Court went on to address Skanska-Hunt's separate injunction claim that the PFD should be enjoined from starting a "new competitive GC/CM solicitation process" based on its argument that RCW 39.10.360 does not allow the Owner to take such steps if it has terminated the highest scoring GC/CM firm for convenience. The King County Superior Court ruled that the GC/CM had a "vested right" to negotiate a mutually acceptable MACC once it is selected as the GC/CM, meaning that the Owner cannot declare a "do over" until MACC negotiations have been concluded and/or a "material change" to the project occurs.

E. Design / Build Statute Changes Under Consideration in 2019

The Washington State Capital Projects Advisory Review Board (CPARB) plans to offer proposed legislation in 2019 to modify several provisions of the Design / Build statutes. Key changes that would be carried out by this draft legislation, per its current wording, are as follows:

- Reduces from $10 million to $2 million the project cost threshold that must be satisfied for certified and noncertified bodies
- Eliminates the 15 project lid currently imposed by RCW 39.10.250(3) (this lid currently limits the PRC's authorization to approve design / build projects having a total project cost of between $2 million and $10 million)
- Eliminates the 5 project lid currently applicable to certified bodies per RCW 39.10.270(1)
- Explicitly authorizes use of "progressive" design /build
- Adds a new definition of "price – related factor"
- Clarifies the disclosure exemption for proposer's final and technical information
- Makes several clarifying edits to the selection criteria and process in both the RFQ and RFP phase

F. From the Vault: Beware of Contractual Insurance Requirements

An important case decided in 2007 held that if a party to a construction agreement promises to obtain insurance, and then fails to obtain the insurance required by the contract, that party steps into the shoes of the insurer and is liable for the full amount that would have been covered had the required policy been obtained. Specifically, the Court's holding was as follows:

> Where a party fails to provide insurance in accordance with the terms of a contract, the breaching party assumes all risk of loss. Damages recoverable for such a breach are the full amount that would have been covered by insurance, had the breaching party performed as specified.

Frank Coluccio Constr. Co., Inc. v. King County, 136 Wn. App. 751 (2007).

We bring up this case as a reminder to be vigilant about two things: (1) that you negotiate coverages that you believe are in fact obtainable and (2) that you then actually obtain the coverages that you have contractually promised to obtain.

In the *Coluccio* case, King County promised to obtain a Builder's Risk policy on an "all risk" policy form to cover property damage to the work. King County did not purchase the Builder's Risk policy mandated by the contract. The project involved a utility tunnel under the Duwamish Waterway that required an access shaft to be constructed on the east side of the project. During construction of the shaft, a "blow in" occurred, filling the shaft with water, soil and debris resulting in delays, repair costs and extended overhead. The Contractor sued King County for breach of its duty to procure an All Risk policy. The Court held the blow-in and resulting cost would have been covered by the All Risk policy had King County purchased it, and therefore held King County to be liable for all costs that would have been covered by a typical All Risk policy.

While *Coluccio* involved a total failure to obtain the required All Risk policy, the risk associated with the rule set out in *Coluccio* can manifest itself in more subtle ways. Instead of a wholesale failure to purchase a policy, it is sometimes alleged that a policy obtained by the promising party does not meet all of the specific requirements of the insurance clauses in the contract. In other words, even if a party does obtain a "policy" in a general sense, that policy is sometimes alleged to fall short of the specific mandates in the insurance section of the construction or design agreement. For that reason, it is important to scrutinize the specific insurance requirements to satisfy yourself that the coverages you promised to procure are in fact available in the market and that your broker faithfully carries out the contractual requirements. One example is that sometimes a construction contract requires a contractor to carry CGL coverage for an extended "completed operations" phase for up to six years after substantial completion, with endorsements naming the owner and other project participants as additional insureds. Even if a CGL policy with extended coverage is obtained, not obtaining and renewing these endorsements can expose the promising party to the *Coluccio* rule (i.e., that the breaching promisor steps into the shoes of the missing insurer and becomes liable for all sums that would have been covered by the missing policy).

G. Attorney-Client Privilege Does Not Extend to Communications with Former Employees

The attorney-client privilege is a bedrock of the attorney-client relationship, allowing lawyers to give (and clients to receive) candid legal advice without fear that such

communications will later be disclosed. But the scope of that privilege is often misunderstood, particularly when the client is an ***entity*** rather than an individual.

In a case of first impression, the Washington Supreme Court recently addressed whether the privilege extends to post-employment communications between corporate counsel and ***former*** employees of the client. In *Newman v. Highland School District No. 203*, 186 Wn.2d 769, 381 P.3d 1188 (2016), the Court held that the privilege ***does not*** attach to such communications.

The Court noted that the privilege does extend to corporate clients (in this case a School District), and that the privilege—depending on a variety of factors—may apply to some communications with ***current*** "lower level employees." But the Court drew a bright line with respect to communications with former non-managerial employees, holding that such communications are not privileged, and that the scope of the privilege is limited to the "duration of the employer-employee relationship."

H. Expert Discovery: Draft Reports Not Discoverable Under Civil Rules

Construction lawyers work closely with experts in a variety of disciplines to assist in resolution of construction disputes, and regularly consult with specialists to assist with case analysis, craft strategy, and ultimately testify at trial or other dispute resolution proceeding.

One threshold and critical question facing a lawyer working with an expert is whether and to what extent communications with and documents generated by an expert are protected from disclosure in litigation with opposing parties. Lawyers routinely assert "work product" protection or other privilege over a variety of expert-related documents, including (among other things) communications and draft reports. Our experience (at least in state court) is that there is a good deal of confusion and disagreement over the validity of this practice, leading to rampant gamesmanship and overall inefficiency.

Division III, in *Estate of Dempsey v. Spokane Washington Hospital Company*, 1 Wn. App. 2d. 628, 406 P.3d 1162 (2017), provides helpful guidance on this issue. The *Dempsey* court addressed whether the work product protection provided by Washington Civil Rule 26(b) extended to two classes of documents: (1) documents prepared by a lawyer and sent to an expert and (2) draft opinions of a testifying expert. The court answered both questions in the affirmative, albeit with some qualification.

As to the first (documents prepared by a lawyer and sent to an expert), the court noted that CR 26(b)(4) would provide protection for attorney work product, which would

include the documents prepared by a party's lawyer and sent to an expert. The Court held, however, that such protection is waived as to ***factual*** information provided by the lawyer and on which the expert ultimately relies for his or her opinion.

As to the second (draft expert opinions), the court unequivocally held that draft opinions *were* protected by CR 26(b)(5). As the court noted, CR 26(b)5 limits the scope of expert discovery to four enumerated categories, including the "substance of the facts and opinion to which the expert is expected to testify and a summary of the grounds for each opinion." While the court held that written opinions provided to counsel and about which the expert "expected to testify" were discoverable, ***draft*** opinions were not "because [the expert] will not testify about draft opinions."

I. EXPERT DISCOVERY: OSO LANDSLIDE EXPERT EMAIL DELETION DEBACLE

The litigation arising from the Oso landslide provides another window into the perils of expert discovery, and offers a cautionary tale to all lawyers (construction or otherwise) working with experts in the evaluation of cases and development of expert opinions.

In *Pszonka, et al. v. Snohomish County, et al*., King County Superior Court Cause No. 14-2-18401-8, plaintiffs sought sanctions against the State of Washington (one of the multiple defendants) for destruction of evidence (spoliation) and other discovery violations.

The State's expert witnesses had exchanged a variety of email communications with one another in the course of work on the case. It was largely undisputed that the State's experts collectively hatched a plan to delete most if not all of these "inter-expert" emails, and in fact did so throughout the course of work on the litigation. The court (Judge Rogoff) found that the state's attorney "actively encouraged" this arrangement, apparently on the theory that the emails constituted "draft opinions" that would not have been discoverable under the civil rules applicable to the case.

The court found all of this highly troubling. The court readily dismissed the argument that the emails were non-discoverable, finding that the emails (clearly) should have been preserved and did not (as the State conceded) constitute "draft opinions." The court found it most alarming that once the deletion of the emails came to light, the lawyers failed to candidly address the issue, and instead "delayed and obfuscated."

In a preliminary order dated October 4, 2016, the court ruled that sanctions were appropriate, and (in addition to a monetary sanction) ordered that plaintiffs were entitled to an "adverse inference" instruction permitting the jury to "infer that the experts deleted

the emails because the information contained therein would have negatively impacted the State's case."

The case, not surprisingly, settled shortly thereafter. The court (in the context of that settlement) ultimately imposed a monetary penalty against the State in the amount of $788,664.04, or double the base compensation the State agreed to pay for the "costs and attorney fees necessary for Plaintiffs to investigate and pursue the question of deleted emails."

J. 100 Years Later, *Spearin* Doctrine Continues to Evolve

2018 marks the 100th anniversary of a landmark construction case known as *United States v. Spearin*, 248 U.S. 132 (1918). *Spearin* is generally understood to establish the following rule: if an Owner issues "design" specifications (i.e., specifications that dictate a prescriptive roadmap on how to carry out the work) and if the Contractor actually complies with the prescribed roadmap, then the Contractor will not be liable for any extra costs incurred due to its compliance with the design specifications. The Owner's liability is said to arise from an "implied warranty" attached to the design specifications (that the design specifications will be adequate for the purpose intended).

On this 100th milestone, we take a moment to identify the core elements of *Spearin*. While *Spearin* is the subject of hundreds of decided cases across the country, its key elements can be digested as follows:

- The implied warranty rule in *Spearin* only applies to "design" specifications, not "performance" specifications. A performance specification is one that identifies the objective to be achieved by the Contractor but does not in great detail instruct the Contractor how to achieve that objective. A design specification, on the other hand, is understood to be one that provides a detailed roadmap of the means and methods required to be undertaken by the Contractor.

- If, as is often the case, the specification contains both design and performance elements, many courts restrict the application of the implied warranty in *Spearin* to only that part of the specification that is properly classified as a design requirement.

- The benefit of the *Spearin* implied warranty only extends to Contractors who actually perform the work according to the design specification; protection is not extended to Contractors who materially depart from the design requirements and/or Contractors who propose and perform alternates to the required design. *Valley Const. Co. v. Lake Hills Sewer Dist.*, 67 Wn.2d 910, 916, 410 P.2d 796 (1965).

- A Contractor who knew or should have known of the "defect" in the design specification at the time of bidding may not bring a *Spearin* implied warranty claim, because the doctrine only protects bidders who reasonably rely on the specifications; a bidder who understands or should have understood the defect or unconstructability of the design at the time of bidding and who fails to bring that alleged defect to the attention of the owner at the time of bidding does not rely reasonably.

- Claims for differing site conditions (i.e., encountering physical conditions materially differing from those indicated in the contract) generally cannot be pled as *Spearin* claims; rather, the Contractor bears the burden of proving the separate and independent elements of a viable differing site condition claim. *Dravo Corp. v. Municipality of Metro. Seattle*, 79 Wn.2d 214, 220, 484 P.2d 399 (1971); *Comtrol, Inc. v. United States*, 294 F.3d 1357 (Fed. Cir. 2002).

Washington courts have adopted the *Spearin* doctrine. *Weston v. New Bethel Baptist Church*, 23 Wn. App. 747, 753, 698 P.2d 411 (1978); *Tyee Const. Co. v. Pacific Northwest Bell Telephone Co*., 3 Wn. App. 37, 40-41, 472 P.2d 411 (1970). An evolving issue in courts across the county is whether and how the *Spearin* doctrine applies to various forms of alternate project delivery (design-build, GC/CM).

K. Erroneous Bid Documents Lead to Negligent Misrepresentation Claim

A performance bond is typically required on a public works project. RCW 39.08.010. In soliciting bids for a paving project, a public owner mistakenly stated that no bond was required, a mistake the Owner attributed to a clerical error. *Specialty Asphalt & Constr. Co., LLC v. Lincoln Cty*, 191 Wn.2d 182 (2018). The Owner issued an award letter to the low bidder on August 6, 2013. A few days later, the Owner sent the low bidder a contract, together *with* a contract bond. The low bidder replied by signing the contract but pointed out that no bond was required per the bid invitation. The public owner responded by calling the low bidder to tell it that the Owner required a bond for the project. The public owner withdrew the bid award and issued a new call for bids (this time with a bond requirement), but after receiving a complaint from the low bidder, the owner withdrew the rebid and offered to retain the original low bidder and reimburse it for the cost of the bond premium. Approximately one year later, the Owner again contacted the low bidder to see if the project could be done with a bond at the owner's expense.

The low bidder filed suit, claiming (as pertinent here) that the Owner was liable for negligently misrepresenting the bond requirement in the bid invitation. The Court of Appeals rejected the misrepresentation claim, based on its view that the low bidder had

not sustained any recoverable damages. The Supreme Court reversed and remanded the case for a trial on the negligent misrepresentation claim. The Supreme Court's view was that the low bidder had sustained damages, even if the public owner were to pay for the bond, because the bond premium is not the only form of damage. Instead, arranging for a bond requires administrative time to prepare for the bond, as well as a bond cap that could preclude the low bidder from bidding on more lucrative projects.

The Supreme Court also rejected the Owner's argument that summary judgment was proper because the low bidder could not have justifiably relied on the misinformation in the bid (i.e., any prudent bidder would know that a bond is required by RCW 39.08.010). The Supreme Court rejected this argument, holding that whether or not a party justifiably relies on a misrepresentation is an issue of fact that cannot be determined at the summary judgment phase.

L. Venue Issue Decided in Tunneling Dispute

In 2015, the Legislature amended the county venue statute to provide as follows: "Any provision in a public works contract with any county that requires actions arising from the contract to be commenced in the superior court of the county is against public policy and the provision is void and unenforceable." In *Frank Coluccio Constr. Co. v. King County*, 3 Wn. App. 2d 504 (2018), this amendment was at issue in a dispute over proper venue in a tunneling case between a Contractor and King County.

The dispute arose from a sewer improvement project located in Snohomish County. The Contractor, FCCC, had its principal office in King County. The owner (King County) issued FCCC a notice of default, stating that King County would terminate the contract unless FCCC provided a corrective action plan. FCCC alleged that King County was responsible for the lack of progress on the project due to the fact that King County had specified a tunneling method that was not feasible.

King County sued FCCC in King County, based on that part of the county venue statute providing that actions by the county shall be commenced in the superior court of the county "in which the defendant resides. . ." Because FCCC resided in King County, King County took the position that venue was proper in King County. FCCC in turn sued King County in Snohomish County, relying on that part of the county venue statute (RCW 36.01.050(1)) that gives the plaintiff a right to file suit against King County in the two nearest judicial districts. In effect, FCCC argued that its right to sue King County in a neighboring judicial district trumped the other part of the county venue statute that requires all actions by a county to be commenced in the county in which the defendant (FCCC) resides. The Court of Appeals held in favor of King County, ruling that the plain

and unambiguous language of RCW 36.01.050(1) gives the county the right to file suit against a public works Contractor in the county where the Contractor resides.

The Court also addressed which of the two lawsuits – King County's first-filed suit in King County, or FCCC's second-in-time suit in Snohomish County – took priority. Under the priority of action rule, the Court held that because the two actions were identical as to subject matter parties and relief, the first filed action in King County took priority and that dismissal of the Snohomish County lawsuit (in deference to the first-filed King County lawsuit) was proper under the priority of action rule.

M. Excavation Contractor Held Liable Under Utility Locate Statute

During work on a street improvement project, a Contractor drilled into an energized underground Puget Sound Energy (PSE) power line. The bid documents made the Contractor responsible for a utility relocation, including locating underground utilities as provided for in RCW 19.122, the Underground Utilities Damage Prevention Act (UUDPA). PSE sought damages from the Contractor, and the Contractor in turn sued the Owner claiming indemnity for PSE's damages. *Titan Earthwork, LLC v. City of Federal Way,* 200 Wn. App 746 (2017). The facts showed that the Contractor hired a utility locate company to mark the location of the underground power lines. Photographic evidence showed that the location of the PSE lines was in fact marked on the surface. The Contractor's excavation subcontractor, however, struck the power lines.

The Court held that hitting the power lines constituted a violation of RCW 19.122.040(2)(a), which provides that an excavator must "determine the precise location of the underground facilities which have been marked." Based on language in the UUDPA providing that "an excavator shall use reasonable care" to avoid damage to underground facilities, the Contractor argued that the issue of whether or not reasonable care was exercised was a question of fact, precluding summary judgment in favor of the City. The Court disagreed. The Court held that the "reasonable care" clause in RCW 19.122.040(2) was "modified by the subsequent clause that an excavator "must" do certain things, including determining the "precise location" of the underground facility. The Court held that failure to determine a "precise location" of an underground facility is, by definition, a failure to use "reasonable care."

Finally, the UUDPA provides for an award of attorneys' fees to the prevailing party in any action brought under RCW 19.122.040(4). In this case, the Contract between the parties said otherwise (that in any suit concerning alleged default in performance under the Contract, each party shall pay its own legal fees). The Court held that the Owner's affirmative defense that the Contractor failed to comply with RCW 19.122.040 was an

action on the Contract because the Contract required the Contractor to perform the work in accordance with applicable laws. As a result, the Court denied the Owner's request for legal fees because the Contract disallowed recovery of legal fees.

N. Incorporation of Arbitral Rules Divests Court of Jurisdiction to Decide Arbitrability

In a case of first impression for Washington courts, the Court of Appeals addressed a significant issue of arbitration law in *Raven Offshore Yacht, Shipping, LLP v. F.T. Holdings, LLC,* 199 Wn. App. 534 (2017). It is settled law that parties are allowed to submit disputes to private arbitration if they do so by way of a clearly written contract arbitration clause. It is equally settled that the court continues to play an important gateway role in deciding which issues, claims or disputes the parties have in fact agreed to submit to arbitration. This is referred to as a question of "arbitrability" (i.e., determination of which claims the arbitrator has the authority to decide). Sometimes the parties have a good faith disagreement on what claims are subject to arbitration, and it is on that issue the courts have exercised traditional jurisdiction to construe the contract and decide whether or not a particular dispute is subject to arbitration.

Many arbitration provisions, however, incorporate the procedural rules of the American Arbitration Association (AAA) or other arbitration bodies such as the Maritime Arbitration Association. Beginning approximately 10 years ago, the AAA included a statement in its procedural rules stating that the existence, scope or validity of the arbitration agreement is a matter to be decided by the arbitrator itself, *not* the court. Such a clause was at issue in *Raven*, where the Maritime Arbitration Association rules empowered the arbitrator to decide questions of arbitrability. Relying on various federal cases, the Court of Appeals held that the Maritime Arbitration Association's rule (empowering the arbitrator to decide whether a specific dispute is arbitrable) displaced the normal rule that arbitrability is a question for the court. Consequently, the Court compelled all parties to submit to arbitration on all issues, including whether the dispute itself was subject to arbitration.

As a practice note, parties wishing to preserve judicial control over questions of arbitrability should include specific language in their arbitration clause, such as "Notwithstanding any procedural rule of the AAA or other applicable arbitral body to the contrary, a court of competent jurisdiction rather than the arbitrator shall have the exclusive authority to determine issues of arbitrability, including but not limited to the existence, scope or validity of the arbitration clause."

O. Bond Principal Not Necessary Party in Action to Foreclose Against Release of Lien Bond

RCW 60.04.160 provides a mechanism for releasing private property from a lien filed by a lien claimant. The mechanism is the recording of a bond (release of lien bond), which can be purchased by the property owner or any contractor in the chain of procurement who disputes the correctness or validity of a claim of lien. Once the release of lien bond is recorded, the effect is to release the real property from the lien and thereby shift any potential liability to the bond surety.

In *Inland Empire Drywall Supply Co. v. Western Surety Co.,* 189 Wn.2d 840 (2018), a drywall supplier filed a lien against a private project. The general contractor arranged for a release of lien bond to be recorded, thereby freeing the property from the lien and shifting liability to the bond. Thereafter, the supplier filed a lawsuit naming the surety as a defendant but not naming the bond principal (general contractor) who arranged for the recording of the bond. The issue presented was who must be named as a party in a foreclosure action against a release of lien bond. The Supreme Court answered the question by holding that the bond principal is not a necessary party and that a claim against a release of lien bond can be pursued solely against the surety.

P. Retainage Statute: New Amendment Allows Subcontractors (Maybe) to Compel Release of Retainage

RCW 60.28 generally requires a public owner to retain a certain percent of funds on a public works contract for the protection and payment of (a) claims of any person arising under the contract; and (b) the state's claims for certain taxes, increases and penalties.

RCW 60.28.11 has for some time provided a mechanism for a general contractor to submit a "retainage bond" and therefore receive the retained funds prior to project acceptance. That bond takes the place of the retained funds, and is subject to claims and liens in the same manner as the retainage. Upon posting of that bond by the general contractor, project subcontractors had the option of posing an analogous bond (to the general contractor) for release of the portion of the retainage due and owing to the subcontractor. Under the old statute, however, the subcontractor's ability to do so was wholly dependent on the general contractor first initiating the release of project retainage by posting its own bond.

RCW 60.28.011 was amended in 2017 to theoretically address that limitation. The statute as amended now allows a subcontractor to compel the general contractor to submit

a bond to the owner for the portion of the project retainage pertaining to the subcontractor. Upon submission of the general contractor's bond to the owner (and release of the funds by the general contractor), the subcontractor can submit its ***own*** bond to the general contractor, allowing for release of the funds to the subcontractor.

We note that while the amendment is generally perceived to be a victory for subcontractors, it remains unclear whether it will make any practical difference. There are significant obstacles to such a demand by a subcontractor, including (1) the requirement that the subcontractor pay the bond premiums for ***both*** the general contractor's ***and*** its own bonds; and (2) the surety's often onerous underwriting requirements for both bonds.

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