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2019 Annual Summary
Construction | Procurement

We are pleased to offer this comprehensive summary of the major construction and procurement developments in 2019 that have an impact on public and private owners, contractors, design professionals and developers. Topics include:

- Interlocal Cooperation Act: New Amendment Expands Piggybacking Authority
- Site Safety: Washington Supreme Court Addresses General Contractor's Safety Obligations
- Bid Protests: New Amendments Impose Additional Timing Requirements
- Statute of Repose: Manufacturing Equipment Not "Improvements" Subject to Statutory Bar
- Bidder Responsibility Requirements: New Mandatory L&I Training
- Materialmen's Lien Statute: Court of Appeals Upholds Finding of Clearly Excessive Lien
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A. Interlocal Cooperation Act: New Amendment Expands Piggybacking Authority

The Washington state legislature recently passed revisions to the Interlocal Cooperation Act (RCW 39.34) that expand the ability of municipal entities to "piggyback" off of other governmental contracts. RCW 39.34.030(5)(b) generally allows municipalities to make purchases through contracts awarded by other public agencies generally referred to as "piggybacking", subject to a number of significant requirements that are intended to generally ensure a transparent and competitive procurement process.

The prior version of the statute, as consistently interpreted by the State Auditor's Office (SAO), required that the "piggybacking" agency ensure that the awarding agency followed a competitive process consistent with the **piggybacking agency's** own substantive procurement requirements. This made the statute of somewhat limited usefulness, particularly for municipalities seeking to purchase off of contracts awarded by non-Washington state entities and/or purchasing cooperatives that may or may not be subject to the same procurement requirements.

The modifications to RCW 39.34.030(5)(b) (Senate Bill 5958) alter the piggybacking authorization in subtle but significant ways. The statute (as interpreted by the SAO) now allows piggybacking when the awarding agency (1) complies with the **awarding agency's** own bid requirements; (2) advertises in accordance with its own requirements; (3) posts the bid or solicitation on a website or provide a link to the notice; and (4) ensures that the bid request and contract allows for use by other agencies. The modification to the first prong greatly expands the ability of municipalities to piggyback, and allows for piggybacking even where the awarding agency's substantive procurement requirements may differ from those of the piggybacking agencies.

These modifications notwithstanding, piggybacking remains an area that is subject to significant oversight from the SAO, and all municipalities should carefully consider and evaluate (with counsel, as appropriate) proposed piggybacking arrangements.

For more details, see SAO Guidance Document, "Using Others' Awards ('Piggybacking')" (September 2019).

B. Site Safety: Washington Supreme Court Addresses General Contractor's Safety Obligations

General contractors may want to revisit and, if necessary, revise their approach to writing site specific safety plans (and training associated with implementation of site-specific plans) in light of *Vargas v. Inland Washington, LLC,* decided by the Washington Supreme Court on November 21, 2019. There, an employee of a subcontractor who was severely injured when a concrete supply hose whipped into his head, knocking him unconscious and causing traumatic brain injury, sued the general contractor on theories of direct and vicarious liability. The Supreme Court reiterated that "a general contractor owes a common law duty to all employees, including employees of subcontractors, to provide a safe place to work in all areas under its control and supervision." Focusing on the content of the general contractor's site specific safety plan, the Court reversed entry of summary judgment in favor of the general contractor and remanded for a jury trial, explaining "The jury is in the best position to evaluate [the general contractor's] conduct and determine whether it agrees with [plaintiff's expert] position" that the general contractor failed to address the specific risks of concrete pours in its site specific plan and thereby was potentially negligent in causing the injury to the plaintiff.

C. Bid Protests: New Amendments Impose Additional Timing Requirements

An amendment to the bid protest statute (RCW 39.04.150) which became effective July 2, 2019 provides bidders with an additional remedy when considering whether to challenge the potential award. Before this amendment, a potential protester was required to submit a bid protest within two days of the bid opening, sometimes without having sufficient information to understand the grounds to protest an award without seeing bids submitted by competitors. The amendment (through Substitute Senate Bill 5418) revises the statute to provide that a contractor can either submit a protest or request copies of competing bids within two days of bid opening. If the contractor requests competing bids, the contractor then has two additional days after the competing bids are provided to submit a bid protest. During that time extension, the municipality may not execute a contract for the project. Saturdays, Sundays and legal holidays are not counted.

D. Statute of Repose: Manufacturing Equipment Not "Improvements" Subject to Statutory Bar

In late 2018, the Court of Appeals held that the six-year construction statute of repose (RCW 4.16.300) did not apply and therefore did not protect the contractor from a suit filed by the estate of an employee killed while performing maintenance work on a boric acid pump. The statute of repose generally bars claims arising from construction of any "improvement" upon real property that has not accrued within six years after substantial completion. The issue presented in this case (*Puente v. Resources Conservation Co., Int'l*, 5 Wn. App. 2d 800 (2018)), was whether the pump in question was an "improvement" upon real property or not. If not, the repose statute would not apply and the suit could proceed. Relying on prior cases holding that items such as conveyor belts or refrigeration units that were engineered and designed to be part of a manufacturing process occurring within the overall improvement, the Court held that the boric acid pump itself was not part of the "improvement" as such but was instead an "accoutrement" to the manufacturing process. Based on that characterization, the Court held that the plaintiff's suit was not barred by the statute of repose even though it was filed more than six years after substantial completion of the overall structure.

E. Bidder Responsibility Requirements: New Mandatory L&I Training

The bidder responsibility statute (RCW 39.04.350) was modified effective July 1, 2019 per House Bill 1673 to require bidders to receive training from the Department of Labor and Industries on prevailing wage and public works requirements on public projects. The Department is required to keep records of businesses that have satisfied the training requirements. Bidders that have completed three or more public works projects and have had a valid Washington business license for three or more years are exempt.

F. Materialmen's Lien Statute: Court of Appeals Upholds Finding of Clearly Excessive Lien

In *Woodley v. Style Corp. d/b/a ServPro* (Feb. 11, 2019), the Court of Appeals took up the validity of a blanket lien filed by a water damage restoration contractor (ServPro) on multiple condominium units. The contractor was hired by the Homeowners Association, but the Association failed to pay because it was trying to obtain money from the original roofing contractor that caused the water damage. ServPro filed a blanket lien that named each owner of the 20 condominium units but did not allocate a specific portion of the total debt to each unit. Pursuant to RCW 60.04.081—the statute that provides for an accelerated procedure to challenge

liens thought to be clearly excessive—one unit owner filed a motion to release the lien on the basis that the blanket lien clouded title to the owner's unit "for an amount far above the usual or specified value of its services benefiting" the individual unit owner. The Court of Appeals held the lien was "clearly excessive" for purposes of RCW 60.040.081 and awarded attorney fees in favor of the unit owner against the lien claimant.

G. Materialmen's Lien Statute: Court of Appeals Confirms Award of Prevailing Party Attorneys' Fees

RCW 60.04.181(3) provides the court with discretion to award attorney fees to the "prevailing party" in an action to enforce a lien on a private project. In *Hernandez v. Edmonds Memory Care LLC*, 450 P.3d 622 (2019), laborers who performed framing for a subcontractor on a memory care facility project were not paid for the days they worked. Aided by counsel, the laborers filed a lien on the property owned by the memory care facility owner. Counsel for the laborers sent the owner copies of the lien, as well as a complaint to be filed to start a lawsuit. Thirteen days later, the owner sent the laborers' counsel a check for the lien amount, along with a thank you note for giving the owner notice of the claim and stating that the owner was not aware of the claim prior to the counsel's notification. The next day, counsel for the laborers asked the owner to pay legal expenses incurred in filing the lien and preparing the draft complaint, claiming they are the "prevailing" party in a lien action. The laborers moved the court for an order granting legal fees. The trial court awarded fees. On appeal, the fee award was affirmed, applying a "common sense" meaning to the word "prevailed." The Court of Appeals held that because the laborers recovered their unpaid wages, they were entitled to attorney fees incurred in the collection effort even though the owner did not contest the claim and no court entered a judgment on the claim.

H. Apprenticeship: New Utilization Requirements on Public Works Projects

Effective January 1, 2018, the statute governing apprenticeship training programs on public works projects (RCW 39.04.320) was revised to require significant new requirements concerning apprenticeship utilization. The new requirements provide that there must be a specific line item in the contract specifying that apprenticeship utilization goals should be met and must identify monetary incentives for meeting the goals and monetary penalties for not meeting goals. The awarding agency must report the apprenticeship utilization by contractor and subcontractor to the Department of Labor and Industries.

I. CONTRACT INTEGRATION: COURT RULES HANDWRITTEN EDITS TRUMP PRINTED CONTRACT PROVISIONS

Negotiating and executing complex subcontracts on large projects is a central task of any general contractor's project manager. While it is always preferable to have a fully integrated written subcontract, it is sometimes the case that time pressure results in handwritten modifications to the formal printed provisions. In a recent lease dispute, the parties penciled in the following handwritten language on the same page that contained the responsibility/standard of care provision: "Honesty, Good Faith, Reasonable Care, Material Facts." This handwritten language was inserted just below Section 8 (which addressed real estate agency law) and just before Section 10 (which addressed responsibility and set forth a standard of care for the real estate agent based on willful misconduct or gross negligence). The Court of Appeals held that the handwritten language (construed to impose a lighter duty of care on the agent) controlled and thereby displaced the stricter willful misconduct / gross negligence standard of care:

> Because the handwritten modification prevails over the conflicting printed willful misconduct or gross negligence provision in section 10, the handwritten reasonable care standard controls.

Juanita Country Club Condo. Owners Ass'n v. Phillips Real Estate Srvcs, LLC (March 4, 2019).

J. ARBITRATION: COURT OF APPEALS CONFIRMS LIMITED REVIEW OF ARBITRATION AWARD

In another reminder that agreeing to submit claims to arbitration substantially decreases any right of appellate relief even if the arbitrators commit legal error, the Court of Appeals in *Mainline Rock & Ballast Inc. v. Barnes, Inc.*, 8 Wn. App. 2d 594 (2019) declined to correct or modify an arbitration award that, even according to the court's decision, may well have misapplied applicable law. Explaining this outcome, the Court of Appeals memorably wrote:

> One might contend that this court acts like an ostrich by refusing to consider a contract provision that affords the prevailing party reasonable attorney fees and costs. But again, the Supreme Court teaches that our role is not to reach the merits, but to only consider the face of the award. This rule promotes efficiency in arbitration.

The dispute was between a blasting contractor and the owner of a rock quarry. The contract between the parties provided for an award of attorney fees to the prevailing party and for an assessment of interest. The winning party (i.e., the party to whom the arbitration award was

given) challenged the award, claiming that the award failed to grant interest and failed to award attorney fees as required by the contract. Given the summary way in which the award was written, however, it was not possible to determine from looking at the face of the award whether or not the arbitrators had granted interest or not or whether the arbitrators had granted legal fees or not. While acknowledging that legal error by an arbitrator is grounds for revising or vacating an arbitrable award, the Court of Appeals applied the "facial legal error" standard, which in practice meant that "the court may not review contract language not quoted in the arbitration award," and declined to modify the award. Going beyond the face of the award might "possibly entail an intricate review of the merits of the case, and conflicts with the goal of avoiding extensive and expensive litigation." In other words, the "ostrich" rule.

K. ADA: Federal Court Addresses Claims at T-Mobile Park

The U.S. District Court for the Western District of Washington evaluated claims that certain conditions at T-Mobile Park violated the Americans with Disabilities Act ("ADA"). The conditions alleged by plaintiffs to violate the ADA included excessive cracks, slopes and changes in level along walking surfaces at the stadium, seating that does not have minimum depth requirements, restricted access to bullpen and dugout areas, lack of comparable sight lines for fans in wheelchairs and congested concessions that failed to meet the ADA's width requirements preventing wheel chair users from navigating to sale counters. *Landis v. Washington State Major League Baseball Stadium Public Facilities District*, 2019 WL 3891566 (W.D. WA, Aug. 20, 2019). The decision contains an excellent discussion of ADA requirements. Finding that factual disputes existed, the Court largely denied the plaintiffs' motion for summary judgment. One of the primary claims involved plaintiffs' contention that numerous gaps, cracks and expansion joists located throughout the stadium were noncompliant with ADA. In response, the defendants maintained that while there may be noncompliant cracks and expansion joints, they have put in place an established maintenance plan to replace deficient joints and identify and repair any cracks, bumps or gaps: "To this Plaintiffs in essence reply that the Mariners are not doing a good enough job." Finding that the "effectiveness of Defendants' maintenance plan is a deeply factual question" related to number of cracks, the speed at which they are repaired, the amount of resources committed to the problem and the reasonableness of acts taken to date by the Mariners, the Court ruled that "determination is better resolved at a trial on the facts and, thus, summary judgment is not appropriate."

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L. INSURANCE: GENERAL CONTRACTOR'S FAILURE TO VERIFY AND OBTAIN SUBCONTRACTOR INSURANCE LEADS TO CARRIER WIN IN FEDERAL COURT

In our end-of-year summary in 2018, we addressed the rule, established in a 2007 case, that if a party to a construction agreement promises to obtain insurance and then fails to obtain that insurance as required by the contract, that party in effect 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. This year brings a similar case, *Cincinnati Specialty Underwriters Ins. Co. v. Milionis Constr. Inc.*, 352 F. Supp. 3d 1049 (E.D. WA 2018). In the 2007 case, *Frank Coluccio Constr. Co. Inc. v. King County*, 136 Wn. App. 751 (2007), the owner promised to obtain a Builders Risk Policy but then did not purchase the policy as promised by the contract. In the new case (*Cincinnati*), the general contractor, as a covenant in its policy with its insurer, promised to obtain an "Independent Contractor's Limitations of Coverage Endorsement" otherwise known as an ICL. The ICL required the general contractor to verify and obtain insurance from subcontractors and to verify that such insurance names the general contractor as an additional insured on the subcontractor's general liability policies. In *Cincinnati*, the general contractor did not comply with the ICL (i.e., did not verify and obtain the required subcontractor insurance). Based on that failure, the federal court held that the carrier was relieved of its duty to indemnify the general contractor under the policy.

M. PROGRESSIVE DESIGN-BUILD LEGISLATION TAKES EFFECT JULY 2019

In a move likely to further accelerate the growing use of various types of design-build contracting across Washington's public sector, Governor Inslee has signed legislation that for the first time officially authorizes public bodies to award public works contracts on a "progressive design-build" basis. The legislation builds on a set of statutory amendments enacted in 2013 that began the process of making design-build contracting more accessible to a wider range of public bodies.

Prior to this legislation, certain public bodies across Washington had already begun to use progressive design-build. The impetus provided by the new legislation's official recognition of progressive design-build should spur further interest.

The legislation (SHB 1295) modifies the alternative public works contracting procedures contained in RCW 39.10 and took effect July 28, 2019. Key features of the legislation are as follows:

- Public bodies are now expressly authorized to award contracts through a "progressive" design-build process. Noncertified bodies must still obtain CPARB/PRC approval upon application concerning specific projects.

- Design-build procurement allows for performance-based project criteria. The statute continues to state that when determining if a project is suitable for use of the process, owners are to consider whether construction activities will be highly specialized, whether the project will provide greater opportunity for innovation or efficiencies between the designer and builder than on traditionally procured projects, and whether significant savings in project delivery time would be achieved. These criteria have been in place since 2013 and are not modified by the 2019 amendments.

- The 2019 legislation does not define what is meant by the term "progressive" design-build contracting. That process is generally understood to mean a phased design-build procurement in which the owner retains a design-builder early in the life of a project (often before any design development) through a primarily qualifications-based RFP process. Progressive-design build projects are typically established as a two-phase process, with the first phase including budget-level design development, preconstruction services, and negotiation of a contract price (either lump sum or guaranteed maximum price; and the second phase including final design, construction and commissioning.[1] The process allows for selection of the design-builder prior to development of schematic design, and the contract documents can include opportunity for abandonment of the process following completion of design if negotiations on construction pricing fail.

- The Design-Build Best Practices Guidelines issued by CPARB in 2018 outline some key differences between progressive, traditional and bridging design-build procurement.[2] According to these CPARB Guidelines: "The key difference between them is the point in the process that the contract scope and price are established. The owner must provide a target budget in the RFP. The selection process for all three methods requires competing teams to submit, at minimum: qualifications, a technical approach design concept and cost or price-related factors." Under the "progressive" variation of design-build, the contract scope and price are developed after team selection through a series of steps taken jointly by the owner and the design-builder once the design is sufficiently advanced.

- Evaluation factors for selection of the design-builder now include submission of a management plan to "meet time and budget requirements and one or more price-related factors." The phrase "price-related factors" is a new statutory term that means any factor

[1] *See generally* Design Build Institute of America, Progressive Design-Build Procured with a Progressive Design & Price, https://dbia.org/wp-content/uploads/2018/05/Primer-Progressive-Design-Build.pdf.
[2] *See* https://des.wa.gov/sites/default/files/public/documents/About/CPARB/AdminDocs/DBBP-Guidelines_Revised_5-2018.pdf?=04b85.

that impacts cost, including overhead or profit. The new legislation decreases the minimum project value for design-build projects from $10 million to $2 million.

- Previous limitations on use of design-build (such as the statewide cap of 15 design-build projects for noncertified bodies) were eliminated.
- Any public body utilizing design-build must now provide contract documents that "require the design-builder to submit plans for inclusion of underutilized firms as subcontractors and suppliers including, but not limited to, the office of minority and women's business enterprises certified business, veteran certified businesses, and small businesses as allowed by law."
- The RFQ for design-build services must include the estimated design-build contract value and the intended use of the project.
- RFQ evaluation factors are modified. Among other things, the public body must assess proposers' past performance in utilization of the office of minority and women's business enterprises certified businesses and its ability to provide payment and performance bonds.
- Final proposals must include each finalist's accident prevention program.
- Contract documents must require the firm awarded the contract to track and report actual utilization of office of minority and women's certified business enterprises and veteran certified businesses.

The new legislation also made significant changes to Job Order Contracting in Washington State:

- All public bodies are now authorized to award Job Order Contracts, in contrast to the previous version of the statute which limited its availability to only certain authorized public bodies.
- Evaluation factors must include past performance on approved subcontractor inclusion plans.
- Unused capacity may be carried forward to the next year.
- Subcontractor bonding requirements must be reduced to the greatest extent possible.
- The maximum work order sum is raised to $500,000 from $350,000, exclusive of WSST.
- The square footage of any stand-alone permanent structure is increased from 2,000 SF to 3,000 SF.
- A state-registered apprenticeship program must be used for any work order over $350,000 that includes over 600 single trade hours (this requirement can be waived in certain circumstances, e.g.., demonstrated lack of availability of apprentices in the area).

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