PACIFICA
LAW GROUP

PACIFICA LAW GROUP

2021 Annual Summary
Construction | Procurement

We are pleased to offer this comprehensive summary of the major construction and procurement developments in 2021 that have an impact on public and private owners, contractors, design professionals and developers. Topics include:

- *Spearin* Doctrine
- Termination
- Public Works GC/CM Subcontracting
- Prevailing Wage
- Licensing
- Liens
- 2021 Legislative Developments in Construction Law

If you would like to read our past year-end summaries, please click the following links:

2020 Annual Summary

2019 Annual Summary

2018 Annual Summary

PACIFICA
LAW GROUP

Contents

PACIFICA
LAW GROUP

A. SPEARIN DOCTRINE: SUPREME COURT DISAGREES WITH COURT OF APPEALS, ALLOWING AFFIRMATIVE DEFENSE TO OWNER'S DEFECT CLAIM

In *Lake Hills Investments LLC v. Rushforth Construction Co., Inc*., 198 Wn.2d 209, 494 P.3d 410 (2021), the Supreme Court reversed the Court of Appeals and upheld a trial verdict in favor of the contractor.

The key issue in the case was the contractor's assertion of a defective design defense under the *Spearin* doctrine, and the owner's argument that the jury instruction failed to properly state Washington law because it did not require the contractor to prove that the design defect was the "sole cause" of damage.

The case arose from a development project consisting of a public library, two mixed-use residential/retail buildings, three commercial buildings, and townhouses. Based on delays in completion of various phases, the owner alleged construction defects by the contractor. The contractor alleged that the owner caused the delays by underpayment of work and that the alleged defects were mainly due to the owner's failure to provide a sufficient design as required under the *Spearin* implied warranty. The contractor ultimately stopped work.

The jury, using a special verdict form, found the builder responsible for the majority of construction defects, but also found that the owner was responsible for the vast majority of delays and for underpaying. The trial court entered a net award in favor of the contractor of over $9.5 million, including nearly $6 million in attorney's fees and costs.

On appeal, the owner argued that the Court's jury instructions were erroneous because they did not require the contractor, for its affirmative defense to the defect claim, to prove that the alleged flaw in the design was the "sole cause" of the damage at issue. The owner argued that such a "sole cause" instruction was necessary because otherwise the contractor might entirely escape liability for construction defects by showing that a defect in the plans and specifications merely contributed to the defect or even if the contractor's deficient performance caused some of the damage.

The Court of Appeals agreed and vacated the judgment in favor of the contractor, remanding for a new trial:

> A defective plans affirmative defense can relieve a breaching general contractor of its liability by proving an alternate proximate cause. [Contractor's] affirmative defense theory was that a single

> cause, defective plans or specifications, injured [owner]. To be relieved of all liability for its breaches, [contractor] had to prove [owner's] defective designs "solely" caused the plaintiff's damages.

The Supreme Court granted review. The Supreme Court agreed that the jury instruction was flawed, but disagreed with the Court of Appeals' reasoning. It held that, rather than lacking a term like "solely," the affirmative defense instead failed to properly alert the jury that it could proportion liability with defective design in mind:

> The rationale for the defective design defense is fairness based on control. If the owner provides a defective design, then the contractor should not be responsible for the damage caused by following the design because he was not the source of the defects. An affirmative design defect defense is a complete defense if the damage is solely due to the design. However, if the defects were caused by a combination of deficient performance and deficient design, then it is not a complete defense. Jury instruction 9 was potentially misleading because it described the defense as a complete defense and did not explicitly inform the jury that it could calculate and attribute proportional liability, determining what percentage of the defect was caused by defective specifications.

Nonetheless, the court held that the owner failed to prove that the faulty jury instruction had prejudiced it. The court reversed and remanded to the Court of Appeals to consider the trial court's award of attorney's fees.

B. Termination: Supreme Court Affirms Court of Appeals, Holding City Liable for Wrongful Termination of Public Works Contract; City Not Entitled to Offset Credit for Costs to Repair Defective Work; Contract Provision Allows Award of Attorney's Fees

In *Conway Construction Co. v. City of Puyallup*, 197 Wn.2d 825, 490 P.3d 221 (2021), the Supreme Court affirmed a 2020 Court of Appeals decision concerning Puyallup's choice to terminate its contractor for default after becoming concerned about defective work and unsafe working conditions on a road construction project.

The City contracted with Conway to build an arterial roadway from permeable concrete—the first project of its kind. When the City raised concerns about nonconforming work, the

Contractor took some steps to remedy, but also requested a meeting with the City to discuss the issues. The City refused and terminated the contract for default.

The contractor sued the City asking the Court to declare the termination for default improper and deem the termination to have been for public convenience. After a bench trial, the trial court found that the City had breached the contract when it terminated the contractor. The court awarded damages and attorney's fees.

On appeal, the City first argued that it was not required to give the contractor 15 days' notice to cure before termination because Section 22 of the Public Works Contract took precedence over WSDOT Standard Specifications Section 1-08.10 (1), which required a 15-day cure period. The Court of Appeals saw no conflict between the two provisions, however, because Section 22 did not speak to termination process or procedures. It therefore held that Section 1-08.10(1)'s cure period language bound the City. The Supreme Court agreed with the Court of Appeals.

Furthermore, the Supreme Court held that the City's termination for default was unreasonable. Chief Justice González, writing for the court, observed that, though the contract allowed the City to terminate for default if the contractor's remedial efforts were not "satisfactory," the City must act reasonably when deciding if it is satisfied. The court concluded that by terminating the contract after repeatedly refusing Conway's request for a meeting—and in spite of the other steps that Conway took to remedy the defective work—"the City's withholding of 'satisfaction' with the proposed remedy was unreasonable."

As a final issue regarding the termination, the court considered the City's argument that "its burden was to show only that Conway initially defaulted." After reviewing federal case law, the court held that the City bore the burden of proving that it acted reasonably.

The Supreme Court agreed with the lower courts that the City was not entitled to offset its costs incurred to repair the contractor's faulty work that it discovered after termination. The City had not given the contractor notice and opportunity to cure the defective work. While the court acknowledged that the "result may seem unfair," the contract clearly required notice and opportunity to cure and the court's holding enforced the contract.

Finally, the Supreme Court reversed the Court of Appeals and reinstated the trial court's award of attorney's fees to Conway. The City argued that RCW 39.04.240 (which provides a fee shifting mechanism applicable to public works contracts) was an exclusive fee mechanism and that Conway was not entitled to fees because it had failed to make an offer as required by that statute. Conway argued that RCW 39.04.240 was not exclusive, and that it was entitled to fees under a prevailing party fee provision in the parties' contract.

The Supreme Court agreed with Conway. Relying on *King County v. Vinci Construction Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 398 P.3d 1093 (2017), the court held that "RCW 39.04.240 is not an exclusive fee provision" and that the contractual fee provision was enforceable.

C. Public Works GC/CM Subcontracting: Court of Appeals Declines to Address Question of Whether GC/CM May Bid and then Subcontract Project Scopes

In *PELLCO Construction, Inc. v. Cornerstone General Contractors, Inc.*, No. 816420, 2021 WL 1723731 (Wash. Ct. App. 2021), a subcontractor challenged a school district's award of its project's publicly bid combined concrete and steel scope to the General Contractor/Construction Manager (GC/CM).

The Court of Appeals (Division I) ultimately declined to review the appeal as moot under *Dick Enters., Inc. v. Metro. King County*, 83 Wn. App. 566, 922 P.2d 184 (1996), as the GC/CM (Cornerstone) had previously executed the project subcontract at issue. Nonetheless, the briefing in the case raises an interesting issue regarding the bidding of subcontractor work under RCW 39.10.390, which reads:

> (1) Except as provided in this section, bidding on subcontract work or for the supply of equipment or materials by the general contractor/construction manager or its subsidiaries is prohibited.
>
> (2) The general contractor/construction manager, or its subsidiaries, may bid on subcontract work or for the supply of equipment or materials if:
>
> > (a) The work within the subcontract bid package or equipment or materials is customarily performed or supplied by the general contractor/construction manager . . .

The District selected Cornerstone to be the GC/CM for its Inglemoor High School Concert Hall & Music Building Project. Cornerstone's subcontractor bid packages allowed subcontractors to submit bids for the concrete scope, bids for the steel scope, or combined bids for both scopes. PELLCO submitted the lowest responsive, responsible bid for the concrete scope, but Cornerstone itself submitted a combined bid that was lower than a combination of PELLCO's bid and the lowest separate steel scope bid. Cornerstone usually self-performs the concrete scope on its projects while hiring subcontractors to perform the steel scope.

PACIFICA
LAW GROUP

PELLCO protested the award of the combined package to Cornerstone and unsuccessfully moved for a preliminary injunction to prevent Cornerstone from executing the contract.

PELLCO appealed, along with subcontractor industry groups writing as *amici curiae*. PELLCO conceded that it lacked standing under *Dick Enterprises*, but argued that the Court should review the issue under the "public interest exception." PELLCO argued that RCW 39.10.390 barred Cornerstone from contracting for the combined steel/concrete package. PELLCO argued that the legislature had intended RCW 39.10.390 to limit GC/CM's ability to bid on projects and thereby disincentivize anti-competitive practices such as designing bid packages to benefit the GC/CM or punishing subcontractors who protest bids awarded to the GC/CM. The statute's plain language, they argued, reflects this intent by allowing GC/CMs to only bid work that they "customarily perform[] or suppl[y]." This language, PELLCO contended, precludes a GC/CM from bidding on a scope that it customarily subcontracts to another.

The District and Cornerstone responded that PELLCO's position was contrary to the core policy objective of procurement law in Washington: to secure work at the best value to the public. They noted that PELLCO's interpretation would force public agencies to contract with businesses who bid the work at a higher cost to the public than a GC/CM who would be subcontracting out a substantial portion of the scope. Cornerstone's bid on the combined scope, they argued, was also in keeping with common industry practice. Furthermore, they asserted that the subsequent legislative history of RCW 39.19.390 since 1994 shows movement towards a greater allowance for GC/CM bidding on subcontract scopes.

While the Court of Appeals declined to review the merits of the case, we expect that the underlying statutory question will need to be clarified by the legislature or interpreted by a court.

D. Prevailing Wage: Court of Appeals Strikes Down 2018 Amendment to RCW 39.12.015 as Unconstitutional

In *Associated General Contractors of Washington v. State*, __ Wn. App. 2d __, 494 P.3d 443 (2021), AGC and other industry groups challenged a 2018 amendment to Washington's prevailing wage statute.

The amendment, passed as SSB 5493 and codified in RCW 39.12.015, changed the way that L&I set prevailing wages within a geographic area. Previously, L&I's industrial statistician had set prevailing wages after collecting data on the wages paid within localities. SSB 5493 required, instead, that the industrial statistician adopt highest the wages, benefits, and overtime rates required by a collective bargaining agreement effective in the geographic area.

The Court of Appeals agreed with AGC and held that the amendment violated the non-delegation doctrine. The court observed that, by requiring the industrial statistician to rely on future collective bargaining agreements, the amendment lacked sufficient standards or guidelines to justify private parties effectively setting prevailing wages. Furthermore, the court determined that the amendment lacked sufficient procedural safeguards against the "misuse of CBAs or abuse by private parties." Consequently, the court overturned the superior court's earlier ruling and remanded for further proceedings.

E. Licensing: Court of Appeals Holds That Contractor's Registration Was Suspended Without L&I Action When Its Contractor's Bond Lapsed

In *Abacus Fine Carpentry, LLC v. Wilson*, 16 Wn. App. 2d 112, 480 P.3d 433 (2021), the Court of Appeals held that a contractor could not sue to collect on its contract with homeowners because it was not registered at the time of the project. In 2010, Abacus failed to pay its contractor's bond premium, and the bond lapsed. However, L&I failed to take action when it received notice of the bond's lapse. The Wilsons hired Abacus in 2016.

The court's analysis turned upon its interpretation of RCW 18.27.010, which "automatically" suspends a contractor's registration if its statutory bond should lapse. Abacus argued that "automatically" in this context meant only that L&I lacked discretion over to whether to suspend a contractor's registration in this situation but that it must still take some positive action to make the suspension effective. The court rejected this, favoring the Wilsons' argument that RCW 18.27.010 requires "no action or notice by [L&I] to officially suspend a contractor's registration." Abacus, therefore, was not registered during the project and could not sue to recover on the contract.

F. Liens: Court of Appeals Determines That Warranty Work Is Not Repairs for the Purposes of Extending a Contractor's 90-Day Window to File a Mechanics' Lien

In *Brashear Electric, Inc. v. Norcal Properties, LLC*, 16 Wn. App. 2d 741, 482 P.3d 955 (2021), the Court of Appeals considered whether performing warranty work after substantial completion extended a contractor's 90 days to record a claim of lien.

Norcal Properties, LLC, and Blue Bridge Properties, LLC, each hired general contractor Vandervert Construction to build retail buildings on their adjacent properties. Vandervert then hired Brashear Electric as a subcontractor on both jobs. Brashear completed its contract work on the Norcal and Blue Bridge projects in June 2017 and September 2017, respectively. On January 17, 2018, on Vandervert's direction, a Brashear electrician performed minor warranty work at both properties. Brashear recorded a claim of lien on the Norcal and Blue Bridge properties on January 30 and 31, respectively.

The court's decision rested upon its interpretation of RCW 60.04.091. That statute requires anyone claiming a mechanics' lien to record "a notice of claim of lien no later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment."

The court first noted that *Williams v. Athletic Field, Inc*., 172 Wn.2d 683, 261 P.3d 109 (2011), required it to strictly construe lien statutes when considering whether warranty work was "within the protection of the mechanics' lien statutes."

The court then considered whether warranty work was a type of "labor, professional services, materials, or equipment" within the meaning of RCW 60.04.091. Applying the statutory definitions in Chapter 60.04 RCW, the court determined that the question before it was whether Brashear was "repairing" the buildings when it corrected its own nonconforming work.

The court determined that "a strict construction of 'repairing' supports a conclusion that it does not encompass correcting one's own nonconforming work." Holding that "[w]arranty work does not extend the time to record a claim of lien," the court affirmed the trail court's grant of summary judgment for the property owners.

G. Other Significant Holdings By Washington Courts

- In *Tadych v. Nobel Ridge Construction, Inc.*, No. 81948-8-I, 2021 WL 3030166 (Wash. Ct. App. 2021), the Court of Appeals held that the one-year claim period in a contract for the construction of a custom home was not unconscionable and that the contract consequently barred the owners' lawsuit.

- Applying *Dick Enters. v. Metro. King County*, the Court of Appeals held in *AIDS Healthcare Foundation v. Department of Public Health*, No. 80532-1-I, 2021 WL 1535452 (Wash. Ct. App. 2021), that, by executing its contracts with the successful applicants for federal funding allocations, King County had rendered a disappointed applicant's claims moot.

- In a 2020 decision, *Shimmick Construction Co., Inc. v. Department of Labor and Industries*, 12 Wn. App. 2d 770, 460 P.3d 192 (2020), the Court of Appeals upheld an L&I citation for the violation of a number of safety regulations governing the use of cranes under power lines. The court held that a pair of tow trucks outfitted with booms, which the contractor used to install an electrical panel vault under a power line, were cranes for the purposes of the safety regulations. Furthermore, the court rejected what it characterized as a "no harm, no foul" theory of defense—that, because the trucks' booms never actually came dangerously close to the power line, Shimmick's employees were never exposed to a dangerous condition. The court held that the regulation disallowed operation of a crane under a live power line and that the operation was itself a violation of the regulations.

H. Alternative Public Works Contracting Procedures Statute Amended and Reauthorized (Chapter 39.10 RCW)

This year, the Legislature reauthorized the Alternative Public Works Contracting Procedures Statute for an additional ten years. The contracting procedures under Chapter 39.10 RCW now extend through the end of June 2031.

In addition to renewing the statute, the legislature made a number of amendments throughout Chapter 39.10 RCW. Many of these amendments were aimed at improving MWBE participation in alternative public works contracting. RCW 39.10.220 now requires that members of the Capital Projects Advisory Review Board must "be knowledgeable or have experience in public works procurement and contracting, including state and federal laws, rules, and best practices concerning public contracting for minority, women, and veteran-owned businesses and small businesses." Further, the Board must include a member from "the private sector representing the interests of the disadvantaged business enterprises community." The makeup of the board must "reflect the gender, racial, ethnic, and geographic diversity of the state, including the interests of persons with disabilities." The legislature also tasks the Board with providing opportunities for outside participation, particularly with respect to DBE matters.

The legislature's other amendments include:

- Language throughout Chapter 39.10 RCW encouraging contracting agencies and GC/CMs to post bid solicitations on websites and in other forums aimed at MWBEs.

- Addition of a member "representing transit, selected by the Washington state transit association" to the Board. (RCW 39.10.220)

- Inclusion of a member "representing the interests of disadvantaged business enterprises" to the Project Review Committee. Further, panels created by the Committee must include a member that represents the interests of DBEs. (RCW 39.10.240)

- Authorization for public bodies to use design-build procedures for parking garages and pre-engineered metal buildings without regard to costs. (RCW 39.10.300)

- Requirement that public bodies selecting GC/CMs or design-build proposals must consider proposers' record of using disadvantaged businesses and their plans to use such businesses as suppliers, subcontractors, and subconsultants on the project. (RCW 39.10.330, RCW 39.10.360)

- Requirement that bid packages for subcontractors on GC/CM projects have "trades separated in the matter consistent with industry practices" and in a way that will maximize competition and that is mindful of increasing DBE participation. (RCW 39.10.380)

- Requirement that committees reviewing job cost proposals now include a member familiar with "public contracting for minority, women, and veteran-owned businesses and small businesses. (RCW 39.10.430)

- A new section setting forth additional requirements for public bodies using the GC/CM method for heavy civil construction projects. (RCW 39.10.908)

- Requirement that the Board to work with OMWBE and other stakeholders to create best practices guidelines for increasing MWBE participation in alternative public works. The Board must report to the legislature regarding its findings and post the guidelines on its website by June 30, 2022.

I. Predesign Requirements Amended to Decrease the Number of Predesigns (RCW 43.82.035, RCW 43.88.110, RCW 43.88.0301)

The legislature amended several statutes related to predesign requirements applicable to certain state agency capital projects in Title 43 RCW. In making these amendments, the legislature's stated goal was to reduce the number of predesigns as it found that many predesigns unnecessarily consumed limited resources and extended project timelines.

The amendments raise the minimum valuation of certain state agency capital project requiring a predesign from five million dollars to ten million dollars—now the same as for projects at state educational institutions. They permit the Office of Financial Management to make case-by-case

exceptions to the predesign requirements for projects over this threshold. When deciding whether to make such an exception, OFM must consider:

> (1) If there is a siting determination left to be made;
>
> (2) If there is a determination to be made about whether the project will be new construction, be a renovation, or include both;
>
> (3) Whether the agency asking for funding has recently started or competed a similar project;
>
> (4) If there is "any anticipated change to the project's program or the services to be delivered at the facility;"
>
> (5) If the agency asking for funding indicates that the project is not complex enough to warrant some or all of the requirements of a predesign; and
>
> (6) If any other factors reduce the need for a full or partial predesign.

J. OMWBE Gains an Audit and Review Unit (Chapter 39.19 RCW)

Chapter 39.19 RCW establishes and empowers Washington's Office of Minority and Women's Business Enterprises (OMWBE). Formerly, the statute tasked the Attorney General with investigating MWBE violations. In 2021, the legislature amended this chapter, creating an audit and review unit within OMWBE "for the purpose of detecting and investigating fraud and violations of this chapter." In addition to being empowered to subpoena witness and to compel the production of evidence, the audit and review unit must also now conduct a site review of at least three percent of MWBE contractors every year. Furthermore, the unit must investigate external complaints that it receives.

The legislature's amendment also changes some of the penalties for noncompliance. Most notably, if a contractor commits one of the violations detailed in RCW 39.19.080, the state now must withhold payment, decertify the contractor, debar the contractor for one to three years, terminate the contractor, or impose civil penalties. Willful, repeated violation now must disqualify the contractor for three years.

Finally, OMWBE must now identify the state agencies and educational institutions in the lowest quintile of contracting with MWBEs and those "that are performing significantly below their established goals, as determined by [OMWBE]" each year. OMWBE "must meet with each

identified agency to review its plan and identify available tools and actions for increasing participation."

K. Subcontractor Listing Statute Clarified (RCW 39.30.060)

In 2020, the legislature amended RCW 39.30.060 (commonly referred to as the subcontractor listing statute) to include new listing requirements for both "structural steel installation and rebar installation" subcontractors.

The 2020 amendment confusingly listed the two separate subcontractor listing requirements in the alternative ("or"). Consequently, it was possible to read RCW 39.30.060 as requiring the listing of either HVAC, plumbing, and electrical subcontractors within one hour of bid submittal, OR structural steel and rebar installation subcontractors within 48 hours of bid submittal, a conclusion that made little sense given the purpose of the statute and the recent amendment.

In 2021, the legislature changed the "or" to an "and" and confirmed that the amendment imposed an additional (and not alternative) subcontractor listing requirement.

The legislature also clarified that RCW 39.30.060 does not apply "to design-build requests for proposals under RCW 39.10.330" or "to general contractor/construction manager requests for proposals under RCW 39.10.350."

L. Ports May Not Purchase Fully Automated Cargo Handling Equipment Until the End of 2031 (RCW 53.58.010)

A new section in Title 53 RCW bars port districts and port development authorities from purchasing fully automated marine container cargo handling equipment. RCW 53.58.010 defines such equipment to be "equipment that is remotely operated or remotely monitored, with or without the exercise of human intervention and control." Ports may purchase "zero and near zero emissions cargo handling equipment and infrastructure supporting that equipment." RCW 53.58.010 expires December 31, 2031.

PACIFICA
LAW GROUP

M. Deposit for Condominium Purchase May Be Used for Construction; Multiunit Building Inspector Requirement Clarified (RCW 64.90.645 and RCW 64.55.040)

A 2021 bill intended to ease the construction of condominiums amended two separate statutes. It amended RCW 64.90.645 to allow a condominium declarant to withdraw purchase deposits paid by prospective condominium owners for construction costs. The declarant may only do this if the purchase and sale agreement for the unit allows deposit funds to be used in this way, if the deposit does not exceed 5% of the purchase price, and if the declarant maintains a surety bond. The bond must be adequate to cover the amount withdrawn, and the declarant may not withdraw an amount greater than the face value of the bond.

The bill also amends RCW 64.55.040 to explicitly allow a qualified inspector for the construction of a multiunit dwelling or the conversion of a multiunit dwelling into a condominium to be the architect or engineer of record.

N. COVID-19 Issues

After nearly two years of pandemic, we are still waiting to see significant case law on COVID-19 in the construction arena. We expect to see decisions hinging on force majeure clauses. Nearly all construction contracts have such provisions. These allow parties additional time to complete contract work in the wake of a significant event, such as a pandemic. Contracts only rarely allow a contractor to recover costs after a force majeure event.

One interesting case was filed in the Sothern District of California in June 2020. In *Level 10 Construction, LP v. Sea World LLC*, a contractor sued Sea World after Sea World refused to process outstanding payments while the park was closed due to the pandemic. This looked to be a test case to see how a court would interpret a force majeure clause in a COVID-19 context. However, the parties settled in August 2020 without significant briefing on the case's merits.

Another legal theory that we expect to see in cases that come out of the pandemic is constructive acceleration. To make a constructive acceleration claim, a contractor needs to show that the owner required the contractor to adhere to the original contractual deadlines despite there being some condition—such as a pandemic—for which the contract allowed a delay. There is presently no case law discussing this theory in the COVID-19 context, but the theory could give a contractor an avenue to recovery for increased costs resulting from being held to original deadlines during the pandemic.

Nonetheless, it is important to continue to focus on best practices in contracting. Owners and contractors should review their contract documents for legacy clauses and make changes as necessary. In particular, public bodies and businesses should review their force majeure clauses, and apply lessons learned since early 2020. Public owners should also be aware of the potential consequences of forcing a contractor to work through any future severe COVID-19 waves or restrictions.

CONSTRUCTION & PROCUREMENT

This Annual Survey is brought to you as a service of the construction and procurement lawyers at Pacifica Law Group. To learn more about our practice and the services that we provide, please visit our website at: http://www.pacificalawgroup.com/practice-areas/construction.

For more information, please contact us:

john.parnass@pacificalawgroup.com (206) 245-1740

zak.tomlinson@pacificalawgroup.com (206) 245-1745