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No. 100358-7

No. 816420

THE SUPREME COURT
STATE OF WASHINGTON

PELLCO CONSTRUCTION, INC.,

Petitioner,

vs.

CORNERSTONE GENERAL CONTRACTORS, INC., et al.,

Respondents.

**PELLCO CONSTRUCTION'S MOTION FOR EXTENSION OF
TIME TO FILE PETITION**

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1. REQUESTED RELIEF

PELLCO Construction respectfully requests that the Court extend time by two days for PELLCO to have timely filed its petition and accept PELLCO's petition November 3, 2021. PELLCO Construction's petition already asks the Court to waive its mootness doctrine to review an issue of substantial public importance.

None of the parties are directly affected by the outcome of this appeal, which is why PELLCO's appeal is technically moot. As such, none of the parties to this appeal require finality except for finality's sake. On the other hand, it is unlikely that another subcontractor will do what PELLCO has done and proceed with an appeal after losing at the trial court level. In this sense, rejecting PELLCO's petition because of its counsel's error would result in a gross miscarriage of justice in that RCW 39.10.390 will remain entombed in Washington's GC/CM statutes and the private market will continue to creep into public works projects.

PELLCO Construction submitted its petition to the Court on November 5 instead of November 3 because of a perfect storm of administrative issues—all of which fall into the category of

unfortunate incidents that fail to present an extraordinary circumstance justifying the Court's departure from its preference for finality, and granting an extension only to avoid a manifest injustice. But PELLCO's petition is different in that PELLCO's failure to timely petition for review did not result in PELLCO failing to timely preserve its rights.

PELLCO Construction has been before the Court on borrowed time for more than a year after losing any personal interest in King County Superior Court more than a year ago. PELLCO Construction has continued its appeal on the premise that a substantial public interest exists in finally providing Washington's public owners a definitive authority on the legislature's intended limits on GC/CMS competing for public subcontract work on their own projects.

2. BACKGROUND

PELLCO Construction's appeal posed an important question of public interest on RCW 39.10.390, a statute that is vitally important to ensuring taxpayer money is being competed for and spent in the manner our legislature intended. PELLCO's own rights were extinguished over a year ago when Cornerstone awarded

itself a subcontract to perform steel erection work, notwithstanding Cornerstone having to then enter into a private subcontract with the steel erector that would actually perform the public work.

Division 1 issued an opinion on October 4 using evaluation criteria suggested by Respondents by not supported by Washington law to determine that there was no public interest in interpreting RCW 390.10.390(2)(a) for the first time ever—even though the statute directly effects GC/CMs competing for public subcontract work, and by extension, how millions of dollars in public subcontract work is spent each year on GC/CM projects around the state.

Petition for Review. PELLCO Construction filed its petition for review of Division 1's order and called attention to the factors the appellate court considered without a legal basis for doing so. The factors Division 1 followed unfortunately led the appellate court right past a very apparent public interest in the form of a statute, never-before interpreted, controlling how millions of dollars in public subcontract work is competing for, and setting for the

restrictions to which GC/CMs can compete for that additional work. More unfortunate, though, was PELLCO Construction's counsel filing PELLCO Construction's petition on November 5, not by the November 3 deadline.

PELLCO's petition sought the interpretation of a statute that guides competition for public construction funds. As the Court has recognized, issues of statutory interpretation "tend to be more public, more likely to rise again, and helpful to the public officials."¹ As would be expected from an appeal seeking the interpretation of a statute setting the restrictions on allowing GC/CMs to perform public subcontract work on their own projects, PELLCO's appeal is the type that tends to "present issues which are more public in nature," as well as "issues more likely to arise again,"² but the Court providing an interpretation will "generally help to guide public

¹ *Randy Reynolds & Assoc. v. Harmon*, 193 Wn.2d 143, 153 (2019).

² *Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 449 (1988) (observing that most public interest cases fall into the category of constitutional and statutory and regulatory interpretation "as they tend to present issues which are more public in nature and are more likely to arise again").

officials.”³ PELLCO’s position is that this public interest is particularly strong where the statute forms a critical bulwark against private interests overreaching into public works.

PELLCO Construction’s counsel’s errors were indisputably administrative issues that do not rise to “extraordinary circumstances.”⁴ PELLCO Construction’s attorney means no disrespect to the Court and submits this motion in the hopes of drawing the Court’s attention to the greater good of interpreting this age-old statute, particularly at a time when GC/CM construction projects abound across the state.

3. DISCUSSION

The unknown intent of RCW 390.10.390(2)(a) persists regardless of the timeliness of PELLCO Construction’s petition. The Court has the same reasons for granting review of PELLCO’s petition

³ *Id.* (“Further, decisions involving the constitution and statutes generally help to guide public officials.”).

⁴ See, e.g., *Reichelt v. Raymark Indus.*, 52 Wn. App. 764, 765-66 (1988); *Beckman v. Dep’t of Soc. & Health Servs.*, 102 Wn. App. 687, 695 (2000). See also *Schaefco, Inc. v. Columbia River Gorge Comm’n*, 121 Wn.2d 366, 368 (1993) (holding that despite the potentially compelling issues presented by petitioner, petitioner still required sufficient excuse for the late filing).

as it does for accepting PELLCO's petition as timely: to meet the continuing and substantial public interest in providing Washington's public owners with restrictions the legislature intended with regard to GC/CMs competing for additional public dollars spent on their projects' subcontract work.

Further, none of the parties are directly affected by the Court's determination of RCW 39.10.390(2)(a)'s intent. Cornerstone awarded itself a subcontract shortly after the trial court denied PELLCO's request to enjoin the procurement. This extinguished any personal interest PELLCO might have had in the outcome of the dispute. Respondents' application of RCW 39.10.390 resulted in Cornerstone awarding itself a public contract to perform steel erection subcontract work, then entered into a private subcontract with the steel erector that would actually perform the work. There is a substantial public interest in determining whether this is what the legislature intended in restricting GC/CMs to only competing for work customarily performed by the GC/CM.

The reasons for RAP 18.8(b) desiring the finality of decisions over the privilege of a litigant to obtain an extension of time are

not particularly significant in this otherwise moot case. Certainly there is no disputing the recognized value in finalizing a dispute.⁵ But typically the greater value is finally resolving disputed rights. Because PELLCO's appeal is moot, the parties' rights are not implicated by the outcome of the appeal. Finality certainly has value in and of itself, the proverbial "closure" it provides. But finality does not mean anything more than that for the parties under the circumstances of this appeal.

Similarly, there is no real privilege that PELLCO personally obtains from being granted an extension of time. PELLCO gains nothing personally. On the other hand, granting PELLCO's petition a two-day extension will ultimately be a privilege to the public as it would allow the Court to provide public owners with decisive authority on the safeguards the legislature intended for GC/CMs bidding on the same public subcontract work that public owners are already paying them to manage.

⁵ See, e.g., *Reichelt*, 52 Wn. App. at 766 n.2.

PELLCO's counsel is incredibly humbled by his mistake and regretful his error now risks the chances of the Court reaching an issue of continuing and substantial public importance. Counsel's shortcomings should not deprive the public of an important answer on what the legislature intended as safeguards against the potential for GC/CM overreaching on public subcontract work and the privatization of public works projects. The public's interest in resolving the issue presented through PELLCO's petition is timeless. Its existence continues notwithstanding the mootness of the underlying dispute or whether PELLCO's petition was timely.

The import of PELLCO's petition and appeal is the vehicle it provides for guiding Washington's public owners on the intended exceptions to GC/CMs being prohibited from competing for public subcontract work on their projects. This guidance currently does not exist and will continue to be missing absent the Court accepting PELLCO's petition to prevent the manifest injustice to the public in not addressing this important statutory interpretation issue because of an error is that falls short of "extraordinary circumstances."

PELLCO's counsel is not so brazen as to suggest the Court should overlook counsel's tardiness for the sake of the public's interest in the issue presented. PELLCO's counsel deeply regrets that his own error and the error of his office is a significant stumbling block to the public interest being served by a much-needed interpretation of this statute. PELLCO's counsel's failures are not insignificant and are not taken lightly. But if the Court sees the public interest in finally interpreting this statutory restriction on GC/CMs competing for public subcontract work on their projects, there would be no ends met in the Court refusing to consider the public's interest because of PELLCO's counsel's failings.

The Court has recognized the public interest exception to mootness in part for the very reason the Court is empowered to review an untimely petition: to prevent a manifest injustice.⁶ The issue raised here affects nearly every public GC/CM project in the state and involves millions of dollars in public funds. Where

⁶ *Deaconess Hosp. v. Wash. State Highway Comm'n*, 66 Wn.2d 378, 401 (1965) (observing that the tradition of "prospective overruling" was intended "to prevent a manifest injustice").

PELLCO's counsel's error does not impact the parties because the parties themselves are unaffected by the appeal, the same reason for accepting review of PELLCO's otherwise moot appeal prevails on accepting PELLCO's late petition: to avoid the manifest injustice that would result from not obtaining the protections the legislature intended under RCW 390.10.390(2)(a) because of attorney error.

CONCLUSION

The loss here would be to the public in that, because of counsel's pedantic administrative challenges, the Court fails to reach an untouched statute routinely implicated by virtually every GC/CM public works project and one of only two statutory provisions restraining GC/CMs from awarding themselves all the subcontract work on their projects.⁷ Because Washington law generally prohibits GC/CMs from competing for public subcontract work on their own projects, there is a continuing and substantial

⁷ RCW 39.10.390(1) generally prohibits GC/CMs from bidding on subcontract work. RCW 390.10.390(2)(a) allows GC/CMs to bid on work "customarily performed by the GC/CM." RCW 390.10.390(3) restricts the value of subcontract work the GC/CM may perform to no more than 30% of the guaranteed maximum cost of construction.

interest in public owners knowing the extents to which the legislature intended for GC/CMs to compete for additional public construction funds. PELLCO's petition provides the Court the opportunity to settle this question for Washington owners, a question that has not been resolved in 24 years, and as the underlying bid protest and ensuing appeal illustrate, is subject to widely varying interpretations.

The requested two-day extension is understandably an extraordinary request that cuts against finality. PELLCO Construction's counsel submits this motion to both humbly account for and apologize for his error and make an effort to address this important public interest.

DATED this 15th day of November 2021.

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This motion contains less than 1,950 words and complies with RAP 18.17(c).

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