No. 100358-7

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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PELLCO CONSTRUCTION, INC.,

Petitioner,

v.

CORNERSTONE GENERAL CONTRACTORS, INC., ET AL.,

Respondents.

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# RESPONDENT NORTHSHORE SCHOOL DISTRICT'S ANSWER TO APPELLANT PELLCO CONSTRUCTION, INC.'S MOTION FOR EXTENSION OF TIME AND PETITION FOR REVIEW

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## TABLE OF CONTENTS

**PAGE**

## TABLE OF AUTHORITIES

**PAGE**

## I. INTRODUCTION

Appellant PELLCO Construction, Inc. ("PELLCO") seeks to pursue an untimely appeal of an unpublished Court of Appeals decision ("Opinion") that PELLCO itself acknowledges is moot. The Rules of Appellate Procedure ("RAP") do not support the relief PELLCO seeks and, even if the appeal had been timely, it fails on the merits. This dispute originates from a bid protest for a project that is now essentially complete and is based on a statute (Chapter 39.10 RCW) that was amended and reauthorized while the case has been on appeal. Respondents Northshore School District ("School District") and Cornerstone General Contractors, Inc. ("Cornerstone") are entitled to the finality of the Court of Appeals' decision and PELLCO's untimely attempt to seek further review before this Court, contrary to the RAP, should be rejected.

There is no dispute that PELLCO's Petition for Review ("Petition") was filed late under the deadline established by RAP 13.4(a). To prevail on its retroactive Motion for Extension of Time ("Motion") modifying this deadline, PELLCO must meet an exacting standard and show that "extraordinary circumstances" and a need "to prevent a gross miscarriage of justice" justify excusing its tardiness. RAP 18.8(b). PELLCO concedes that its own administrative

errors "fail to present an extraordinary circumstance justifying the Court's departure from its preference for finality[.]" Motion at 1-2. But even if this concession were not fatal to its Motion (it is), PELLCO does not articulate how a gross miscarriage of justice would occur if its Motion were denied. Instead, PELLCO reiterates the same arguments it raised at the Trial Court and before the Court of Appeals. These arguments do not satisfy RAP 18.8(b)'s standards, nor do they override the presumption that untimely appeals will not be accepted for review. PELLCO's Motion should be denied on this basis.

If the Court grants the Motion and considers PELLCO's Petition, however, the Petition should be denied on the merits. For the reasons explained below and in the response filed by Cornerstone, there is no "issue of substantial public interest" presented in PELLCO's Petition that justifies this Court's review. RAP 13.4(b). PELLCO's Petition is grounded on its own idiosyncratic interpretation of a statute (reauthorized in 2021 by the Legislature) that applies to a narrow subset of public construction. The evidence at the Trial Court showed that PELLCO's interpretation conflicted with others in the industry, including PELLCO's own witnesses and the regulatory body charged with overseeing "General Contractor / Construction Manager" (GC/CM) construction in Washington, and that PELLCO's position was in direct contravention with

the primary purpose of public bidding statutes: benefitting taxpayers. Following PELLCO's appeal, the Court of Appeals concluded, based on a correct application of the relevant factors, that PELLCO had not articulated a compelling basis for the court to depart from its general rule against hearing non-justiciable cases. The same is true now, and the Petition raises nothing new or different justifying this Court reaching a different conclusion. The Court should deny the Petition accordingly.

## II. STATEMENT OF THE CASE

In the interest of efficiency, the School District joins in the Restatement of Case submitted by Cornerstone.

## III. ARGUMENT

### A. The Court Should Deny PELLCO's Belated Motion for an Extension of Time

RAP 18.8(b) establishes the rigorous criteria that a party pursuing an appeal must meet to obtain relief from the deadline for filing a petition for review. Under this rule, "[t]he appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a . . . petition for review[.]" RAP 18.8(b). Applying these criteria, "[t]he appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this

section." The reasons for this rule are straightforward: RAP 18.8 "clearly favors the policy of finality of judicial decisions over the competing policy of reaching the merits in every case." *Reichelt v. Raymark Indus., Inc*., 52 Wn. App. 763, 765 (1988).

The "rigorous test" established under RAP 18.8 has been rarely satisfied. "In each of [the] cases [cited in *Reichelt*], the moving party actually filed the notice of appeal within the 30-day period but some aspect of the filing was challenged." *Id*.

Here, PELLCO filed its Petition for Review on November 5—two days past the deadline established under RAP 13.4(a). In keeping with its pattern at both the Trial Court and the Court of Appeals,[1] PELLCO did not move for relief from the RAP 13.4(a) deadline prior to filing its Petition. Instead, PELLCO responded only after receiving a letter from the Court's Clerk prompting it to do so. PELLCO's retroactive request for schedule relief does not meet the standards of RAP 18.8(b) and should be denied.

[1] PELLCO has consistently missed relevant deadlines. For example, under RAP 9.5, PELLCO was required to file a report of proceedings with the Court of Appeals by October 9, 2020. PELLCO filed the report more than three months later, on January 15, 2021. Under RAP 10.2(a), PELLCO's opening brief in the Court of Appeals was due on March 1, 2021. PELLCO filed its opening brief 15 days later, on March 16, 2021. On multiple occasions prior to its current Motion, PELLCO has moved for belated relief from relevant deadlines.

The Motion concedes that PELLCO's administrative errors do not constitute "extraordinary circumstances" justifying the Court departing from its rules. Motion at 1-2 ("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."); *id*. at 5 ("PELLCO Construction's counsel's errors were indisputably administrative issues that do not rise to 'extraordinary circumstances.'"). This is dispositive under RAP 18.8(b). But PELLCO's admission that no "extraordinary circumstances" exist is also the law, as PELLCO's failure to follow the RAP was due to its own errors and lack of diligence. *See Reichelt*, 52 Wn. App. at 765–66 ("extraordinary circumstances" constitute "circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control.").

PELLCO also does not establish that the Court's denial of its belated Motion would result in a gross miscarriage of justice. RAP 18.8(b). Indeed, the Motion does not even argue or apply this standard. Instead, the Motion conflates the

standard under RAP 18.8 (*i.e.*, an untimely petition for review can be pursued only when failing to do so would result in a "gross miscarriage of justice") with the standards that permit an appellate court to hear a moot appeal (*i.e.*, in exercising its discretion to hear a moot appeal, an appellate court may consider the public interest implicated).

When the correct standard is applied, the Motion does not establish that any "gross miscarriage of justice" would occur were this litigation to conclude. To the contrary, PELLCO concedes that "the parties' rights [including PELLCO's] are not implicated by the outcome of the appeal." Motion at 7. And the perceived "privilege to the public" that PELLCO argues will result from an advisory opinion has already been reviewed and rejected. *See* Court of Appeals Opinion at 7 ("Taking all the factors together, PELLCO has failed to demonstrate a 'continuing and substantial public interest' to justify taking a concededly moot case."). Indeed, PELLCO has not demonstrated that any agency has expressed confusion regarding administration of GC/CM contracts, or that PELLCO's interpretation would advance the public interest in any way.

For these reasons, PELLCO's belated Motion for Extension of Time should be denied and the Court should dismiss the Petition as untimely.

### B. If PELLCO's Motion is Granted, the Court Should Deny PELLCO's Petition for Review

In the interest of efficiency, the School District joins in Cornerstone's response to the issues raised in PELLCO's Petition, filed concurrently with this response. The School District addresses below only specific issues relevant to its position as a public agency administering GC/CM contracts.

First, PELLCO is incorrect that the Washington Capital Projects Advisory Review Board (CPARB) has no role in advising and commenting on public contracts administered under Washington's Alternative Public Works Statute, Chapter 39.10 RCW. To the contrary, the Legislature established CPARB for this precise purpose. RCW 39.10.230(1) (CPARB shall ". . . make recommendations regarding best practices, expansion, continuation, elimination, or modification of the alternative public works contracting methods . . ."); RCW 39.10.230(2) (CPARB shall "[e]valuate the use of existing contracting procedures . . ."). The School District regularly looks to CPARB for guidance in this regard. And the evidence presented at the Trial Court was that neither CPARB nor other oversight bodies, including the Washington State Auditor, have raised concerns regarding the GC/CM bidding procedures that the School District used in connection with the Project that is the subject of this appeal. CP 181-194. This is persuasive evidence that there is no fundamental defect

in how GC/CM construction is currently being executed in Washington, contrary to PELLCO's arguments.

Second, it is important to note that the primary purpose behind Washington's public bidding statutes, which is to benefit taxpayers by ensuring that public work is executed at the lowest cost, was served here. *Equitable Shipyards, Inc. v. State, Dep't of Transp*., 93 Wn.2d 465, 473 (1980) ("The primary purpose of public bidding is to benefit the taxpayers by procuring the best work or material at the lowest price practicable."); *Quinn Constr. Co. v. King Cnty. Fire Prot. Dist. No. 26*, 111 Wn. App. 19, 27 (2002) ("[T]he primary purpose of requiring competitive bidding on government contracts is to ensure prudent expenditure of public funds . . ."). As explained in detail to the Trial Court, the statutory interpretation PELLCO advances would *reduce* competition by drastically limiting the amount of work GC/CMs are permitted to compete for and, in the case of the School District's Inglemoor Project, would have required the School District to pay a $70,000 premium for the work PELLCO sought to perform. CP 181-194, 197-202. Under these circumstances, there is no public interest that justifies PELLCO's desired advisory opinion.

## IV. CONCLUSION

The School District respectfully requests that the Court deny PELLCO's Motion for Extension of Time. PELLCO has

had a full opportunity to present and argue its position. Consistent with the rules and standards that govern this appeal, and in the interest of finality, PELLCO's appeal should be rejected. *Reichelt*, 52 Wn. App. at 766, n. 2 (noting that "the prejudice of granting [motions for schedule relief] would be to the appellate system and to litigants generally, who are entitled to an end to their day in court.").

If the Court grants PELLCO's Motion, the School District respectfully requests that the Court deny PELLCO's Petition for Review.

This document contains 1,715 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 20th day of December, 2021.

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## CERTIFICATE OF SERVICE

I certify that on December 20, 2021, I caused a true and correct copy of the foregoing document to be served on the following counsel via messenger:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Seattle, Washington this 20th day of December, 2021.

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## PERKINS COIE LLP

## December 20, 2021 - 11:16 AM

## Transmittal Information

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