No. 100358-7

THE SUPREME COURT
OF THE STATE OF WASHINGTON

PELLCO CONSTRUCTION, INC.,

Appellant

v.

CORNERSTONE GENERAL CONTRACTORS, INC., et al.

Respondents.

CORNERSTONE GENERAL CONSTRACTORS, INC.'S ANSWER TO AMICI CURIAE MEMORANDUM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Statutes

I. INTRODUCTION

Several Amici Curiae have filed a memorandum in support of Pellco Construction, Inc.'s ("Pellco") Petition for Review ("Pellco's Petition"). These amici are several industry groups representing specialty construction subcontractors (collectively, the "Subcontractor Groups") who echo Pellco's argument that Pellco's Petition, despite being moot, should be considered because it presents an issue of "substantial public interest." However, the Subcontractor Groups have not presented any new or novel arguments beyond what Pellco presented in its initial Petition. As discussed herein and in Cornerstone's Answer to Pellco's Petition for Review and Motion for Extension of Time to File Petition for Review ("Cornerstone's Answer"), Pellco cannot meet the criteria for the substantial public interest exception. Moreover, the Subcontractor Groups have overlooked the fact that Pellco's Petition was not timely filed and that it cannot meet this Court's standards for an extension of time under RAP 18.8(b). Pellco's appeal is moot, and nothing the Subcontractor Groups have presented has changed that. Accordingly, this Court should reject the Subcontractor Groups' repackaged arguments contained in their memorandum.

II. ARGUMENT

A. Pellco's Appeal is Moot and Does Not Meet the Public Interest Exception

RAP 13.4(b) provides guidance for when a petition for review will be accepted by this Court. Both Pellco and Subcontractor Groups allege that Pellco's Petition involves an issue of "substantial public interest that should be determined by the Supreme Court." RAP 13.4(b). Neither Pellco or the Subcontractor Groups allege that Pellco's Petition meets any of the other three criteria warranting review.

However, it is undisputed that Pellco's Petition presents a moot appeal such that any ruling issued by this Court would constitute an advisory opinion. Generally, "Washington courts are prohibited from rendering advisory opinions." *To-Ro Trade Shows v. Collins*, 100 Wn. App. 483, 490, 997 P.2d 960, 963 (2000), *aff'd,* 144 Wn.2d 403, 27 P.3d 1149 (2001). "[W]here only moot questions or abstract propositions are involved, . . . the appeal . . . should be dismissed." *Hart v. Dep't of Soc. & Health Servs*., 111 Wn.2d 445, 447, 759 P.2d 1206, 1207 (1988) (quoting *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). This Court will issue such opinions "only on those rare occasions where the interest of the public in the resolution of an issue is overwhelming" *To-Ro Trade Shows v. Collins*, 144

Wn.2d at 416. These exceptions are rare and limited to cases involving issues of "broad overriding public import." *Id*.

1. Pellco's Appeal Does Not Present an Issue of Substantial Public Interest

Although Subcontractor Groups acknowledge that Pellco's appeal is moot, they join Pellco in arguing that this Court should still hear this appeal because it presents a question of "continuing and substantial interest." *See* Amici Curiae Memorandum In Support of Petition for Review[1] ("Amici Memorandum") at 2. The Subcontractor Groups argue that this Court should accept this moot appeal because it concerns interpretation of a public works competitive bidding statute.

It is clear that this case does not present such an issue of "broad overriding public import." Although Chapter 39.10 generally governs alternative public procurements in Washington, this case presents an issue of specific commercial interest to subcontractors seeking bid package work on public GC/CM construction projects. The Subcontractor Groups represent various subcontractors and trade contractors who compete for bid package work on public GC/CM projects. *See* Motion for Leave to File Brief of Amici Curiae In Support of

[1] Subcontractor Groups' Memorandum was in fact titled "Brief of Amicus Curiae In Support of Petition for Review." However, pursuant to RAP 13.4(h), this filing was improperly titled, which was noted by the Court in correspondence dated January 3, 2022.

Petition for Review (December 22, 2021) at 1-4. The Subcontractor Groups, like Pellco, have a significant interest in restricting competition from GC/CMs for this bid package work because a GC/CM is often able address inefficiencies and perform the work for a lower price. *See* Clerk's Papers ("CP") at 249. But this is a commercial interest, not a public one, much less one of "broad overriding public import." In general, private commercial interests are insufficient to justify application of the public interest exception. *See To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 416, 27 P.3d 1149 (2001).

Like Pellco, the Subcontractor Groups attempt to argue that the there is a substantial public interest by focusing on the fact that RCW 39.10.390 is a statute. *See* Amici Memorandum at 3. But an issue does not qualify as one of public interest merely because it is addressed by a statute. As this Court has noted,

> the existence of a statute implicating the public interest is not sufficient to support the examination of an issue which is not otherwise justiciable. Rather, in deciding whether to review such an issue, courts examine not only the public interest which is represented by the subject matter of the challenged statute, but the *extent to which public interest would be enhanced by reviewing the case.*

Snohomish Cty. v. Anderson, 124 Wn.2d 834, 841, 881 P.2d 240 (1994) (emphasis in original). The possibility that a decision

from this Court may provide guidance with respect to a public procurement statute does not mean the case is one of substantial public interest, and certainly does not render a moot case justiciable.

It is well established that the public interest in any public procurement is that public contracts be performed by the lowest bidder. *See e.g*. *Dick Enterprises*, 83 Wn. App. 566, 572, 922 P.2d 184 (1996); *Equitable Shipyards, Inc. v. State, Dep't of Transp.*, 93 Wn.2d 465, 473, 611 P.2d 396 (1980). Cornerstone's combined bid for the structures package work *saved the School District money*. CP at 287-88, 557. If Cornerstone were restricted from bidding on the combined work, it would have forced the School District to pay more for the same work. In the present instance, Pellco and the Subcontractor Groups' interpretation of RCW 39.10.390 directly conflicts with the public interest of work being performed by the lowest bidder. Pellco and Subcontractor Groups argue for an interpretation which is not in line with the public interest in competition and cost-effective procurements.

2. No Public Officials Seek Guidance Relating to RCW 39.10.390

The Subcontractor Groups argue that this Court must accept review because interpretation of this statute will provide future guidance to public officials. Amici Memorandum at 3.

Both Pellco and Subcontractor Groups argue that a decision regarding RCW 39.10.390 will provide guidance to public officials regarding GC/CM public works projects.

However, what both the Subcontractor Groups and Pellco fail to acknowledge is that there is no indication that any public officials have actually sought any guidance regarding this statute. There has been no evidence presented to indicate that the issue Pellco presents is one that plagues public officials or even that any public officials seek interpretation or guidance regarding RCW 39.10.390. In fact, the public owner directly involved in this dispute, the School District, has not indicated that it seeks, or has ever sought, guidance regarding RCW 39.10.390.

Moreover, the Subcontractor Groups rely on inapposite case law to support their argument that interpretation of RCW 39.10.390 warrants a substantial public interest. For example, the Subcontractor Groups cite to *State v. Beaver* and *Matter of Det. of M.W. v. Dep't of Soc. & Health Servs*, to encourage the Court to consider the present matter one of continuing and substantial public interest. However, both of these cases involved interpretation of statutes relating to U.S. and Washington Constitutional requirements and due process issues. *See State v. Beaver*, 184 Wn. 2d 321, 358 P.3d 385 (2004); *Matter of Det. of M.W. v. Dep't of Soc. & Health Servs*., 185 Wn.2d 633, 648, 374

P.3d 1123 (2016). [1] As the Court noted in *Beaver*, "[t]he continuing and substantial public interest exception has been used in cases dealing with constitutional interpretation, the validity of statutes or regulations, and matters that are sufficiently important to the appellate court. *State v. Beaver*, 184 Wn.2d at. 331. Although the cases relied on by the Subcontractor Groups met the public interest exception, the facts and statutes in these cases are far removed from the type of public interest improperly alleged to be at stake in interpreting RCW 39.10.390. The factual limitations of the present matter—an attempt to restrict subcontractor competition on bid package work of public GC/CM projects—distinguish this dispute from the type of public interest necessarily served by the Court's application of the mootness exception in *Beaver* and *Matter of Det. of M.W. v. Dep't of Soc. & Health Servs.*

[1] In particular, both of these cases deal with civil commitment and mental competence. This Court has recognized that the statutory scheme governing civil commitment is a matter of continuing and substantial public interest. *In Re Det. of LaBelle,* 107 Wn.2d 196, 200, 728 P.2d 139 (1986). As RCW 39.10.390 clearly does not deal with civil commitment, the Subcontractor Groups cannot rely on cases relating to civil commitment statutes to support their argument that there is a substantial public interest in the present case.

Finally, and as discussed in Cornerstone's Answer, the legislature has provided alternative avenues to address Capital Projects Advisory Review Board ("CPARB"). The CPARB was created to "provide an evaluation of public capital projects construction processes, including the impact of contracting methods on project outcomes, and advise the legislature on polices related to public works methods." RCW 39.10.220. CPARB is the proper forum for Pellco or the Subcontractor Groups to direct their concerns regarding interpretation of RCW 39.10.390. *See generally* Cornerstone's Answer at 22-27. Moreover, despite the existence of a forum designed to offer insight and evaluation of public works contracting from industry stake holders, CPARB declined to address any of the issues raised by Pellco and the Subcontractor Groups and reauthorized the language of RCW 39.10.390, without any changes, in the Spring of 2021. This further demonstrates that Pellco's appeal is based on its own personal interest rather than that of the general public or public officers generally.

B. Pellco and Subcontractor Group's Interpretation of RCW 39.10.390 Does Not Align With the Plain Reading

The Subcontractor Groups argue that the meaning of RCW 39.10.390 as applied by Cornerstone and the District renders the statute meaningless. Amici Memorandum at 9. The

Subcontractor Groups join Pellco in arguing that a GC/CM cannot "perform" bid package work unless it does so with its own forces.

However, the Subcontractor Groups' interpretation lacks the context of contract law, and the construction industry in particular. Construction contracts always call for the contractor to "perform" work, and such work is routinely subcontracted to others—frequently to the Subcontractor Groups' own members. CP at 289; *see also, e.g.*, CP at 202, 249-51, 279; *Bd. of Regents of Univ. of Washington v. Frederick & Nelson*, 90 Wn.2d 82, 85, 579 P.2d 346 (1978); WASH. PRAC., Wash. Construction Law Manual § 10:1 (2020-2021 ed.). In matters of contracting, especially in construction, performance of contract work is not synonymous with self-performance of all labor required by that work. Rather, performance of contract work is the fulfillment of the work or delivery of completed work by one contracting party to the other. The Subcontractor Groups—and Pellco—argue that RCW 39.10.390 *plainly and unambiguously* prohibits a GC/CM from competing for bid package work unless it customarily self-performs that work. Yet industry practices have developed over more than two decades based on the understanding that "performance" includes subcontracting for the fulfillment of contract work. If these common industry practices were truly at odds with a plain and unambiguous statute, it is unclear why it

has taken some 23 years for the issue to reach this Court. *See* Cornerstone's Answer at 25-27. The Subcontractor Groups' argument that the plain language of RCW 39.10.390 clearly requires a different result ignores the importance of industry usage and understanding, as well as the effects such an interpretive change would have on contracting practices.

C. Subcontractor Groups' Memorandum Does Not Address Pellco's Untimely Petition

The Subcontractor Groups' Memoranda does not address the fact that Pellco's Petition was not timely filed, and therefore should not be considered by this Court. Pellco's Petition was filed two days after the timeline set forth in RAP 13.4(a) However, Pellco cannot meet this Court's stringent rules for granting an extension of time.

RAP 18.8(b) provides that the Court will only grant an extension of time in extraordinary circumstances or to prevent a gross miscarriage of justice. *See* Cornerstone's Answer at 12-16. The only instances where an appellate court has allowed an extension of time, have been limited to cases where a moving party actually filed within the thirty-day period, but some aspect of the filing was defective. *See, e.g., Bostwick v. Ballard Marine, Inc.,* 127 Wn. App. 762, 112 P.3d 571 (2005); *Reichelt v. Raymark Industries, Inc.,* 52 Wn. App. 763, 765, 764 P.2d 653 (1988).

The Subcontractor Groups' Memorandum does not provide any new or additional argument that would assist Pellco in meeting this Court's standard for an extension of time under RAP 18.8(b). The Court cannot consider the merits of this Pellco's appeal because Pellco does not meet the stringent standard of RAP 18.8(b). Pellco's lateness was not caused by an "extraordinary circumstance," Pellco simply missed the deadline. There is no new information or argument presented by Subcontractor Groups that would change the fact that Pellco's petition was submitted late and that Pellco has provided no information that would warrant an extension of time.

III. CONCLUSION

The Subcontractor Groups' amicus memorandum does little more than inform the Court that they, like Pellco, would like the Court to consider this moot appeal and issue an advisory opinion restricting competition for bid package work on public GC/CM projects to the benefit of their member companies. The Subcontractor Groups' show no overwhelming public interest that would justify hearing a moot appeal. Moreover, the Subcontractor Groups do not address Pellco's untimely filing and provide no reasoning or argument as to why this Court should even consider the merits of Pellco's Petition. But even if this Court were to consider this moot case on its merits, the Subcontractor Groups offer nothing to assist the Court in that

exercise. The Court should give no weight to the Subcontractor Groups' briefing and should decline to hear Pellco's Petition.

I certify that this document contains 2396 words, in compliance with the word limits set forth in RAP 18.17.

DATED this 18th day of January, 2021, at Seattle, Washington.

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