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No. 100358-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

PELLCO CONSTRUCTION, INC.,

Petitioner,

v.

CORNERSTONE GENERAL CONTRACTORS, INC., ET AL.,

Respondents.

**RESPONDENT NORTSHORE SCHOOL DISTRICT'S
ANSWER TO MEMORANDUM OF AMICI CURIAE IN
SUPPORT OF PETITION FOR REVIEW**

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I. INTRODUCTION

Amici Curiae's Memorandum filed in support of Appellant PELLCO Construction Inc.'s ("PELLCO") Petition for Review ("Petition") argues that this untimely and moot appeal of an unpublished Court of Appeals' decision is the ideal opportunity for the Court to issue an advisory opinion construing RCW 39.10.390 for the benefit of the public. It is not. Regardless of Amici's desire for an opinion endorsing their interpretation of the statute, this appeal is not the appropriate vehicle to modify how public GC/CM construction is executed in Washington.

Amici do not and cannot show that PELLCO's Petition involves "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The interest that Amici advance is a purely private, commercial interest shared only by some specialty subcontractors, and the advisory opinion that Amici seek would disrupt well-settled contracting practices and result in public entities paying *more* for public construction. This result is not mandated by the statute in question and would be in direct contravention with the public interest imbued in Washington's bidding statutes: to benefit taxpayers by ensuring that public construction work is executed at the lowest possible cost to the public.

Even if PELLCO’s Petition were considered on the merits, moreover, Amici do not raise any new or different statutory argument demonstrating that the lower courts in fact erred. This is because the bid process in question was conducted in full compliance with the relevant statute.

For these reasons and the reasons explained in its Answer to PELLCO’s Motion for Extension of Time and Petition for Review (“Answer”), Respondent Northshore School District (“School District”) respectfully requests that the Court deny PELLCO’s Motion and decline to consider its Petition on the merits. If the Court grants PELLCO’s Motion, the School District respectfully requests that the Court deny PELLCO’s Petition.

II. ARGUMENT

A. **Amici’s Private Commercial Interest Does Not Equate to an Issue of “Substantial Public Interest”**

Pursuant to RAP 13.4(b), the Court will accept a timely petition for review only under defined circumstances. Tellingly, PELLCO and Amici appear to seek review only under RAP 13.4(b)(4), which provides that the Court may hear an appeal “[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4). Amici *do not* argue that the Court of Appeals’ decision was in conflict with governing laws

(RAP 13.4(b)(1), (b)(2)), or that the case involves a significant question of law under the Constitution of the State of Washington or of the United States (RAP 13.4(b)(3)).

Amici's Memorandum does not raise any issue that merits discretionary review under RAP 13.4(b)(4). First and foremost, while the relevant question is whether a substantial public interest is at stake, Amici's involvement in this litigation, like PELLCO's, is driven by their private commercial interest in obtaining a greater share of work on public GC/CM construction projects. As outlined in Amici's accompanying Motion for Leave to File Amicus Brief, Amici are associations of specialty subcontractors that, by definition, represent the interests of their members, each of which profits from performing GC/CM construction work for public entities in Washington and stands to benefit if RCW 39.10.390 is interpreted narrowly, in a manner that reduces competition and increases the costs of public construction, as PELLCO advocates. This insular private interest does not equate to a public interest, much less a "substantial public interest" that justifies this Court intervening in the public contracting process in question. RAP 13.4(b)(4).

Moreover, the public interest at stake in this litigation weighs squarely against this Court granting discretionary review. It is blackletter law in Washington that the primary

purpose behind Washington’s public bidding statutes is to benefit taxpayers by ensuring that public work is executed at the lowest cost. *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 outlined in the School District’s Answer to PELLCO’s Petition, the evidence at the Trial Court established that this purpose was fulfilled by how the bid process in question occurred and, further, that PELLCO’s idiosyncratic interpretation of RCW 39.10.390 would disrupt existing industry practices and result in public entities paying more for the same work. By their nature, therefore, PELLCO’s Petition and Amici’s Memorandum advocate *against* the public interest.

Finally, Amici do not show that the questions presented in this appeal should be determined by this Court. RAP 13.4(b)(4). Washington’s Alternative Public Works statute (RCW 39.10) is, by its terms, subject to both periodic review, amendment, and reauthorization by the Legislature (this occurred in 2021), as well as ongoing monitoring by regulatory

bodies. RCW 39.10.230; RCW 39.10.250. It is through *these* avenues, not an untimely, moot appeal, that Amici and PELLCO should, if appropriate, seek changes in how GC/CM construction is done.

B. The School District’s Statutory Argument Does Not “Eviscerate” RCW 39.10

Amici’s argument that the School District’s and Cornerstone’s interpretation of RCW 39.10.390 “renders the statute meaningless,” Amici Memo. at 6-9, is based on a flawed understanding of the evidence in this case and misconstrues the position the School District articulated at the Trial Court and before the Court of Appeals. Thus, even assuming this case did present a substantial issue of public importance justifying the Court granting discretionary review (it does not), Amici’s statutory arguments fail on the merits.

All parties acknowledge that, under RCW 39.10.390, a GC/CM is *expressly permitted* to bid on a defined percentage of subcontract work (up to 30%) provided the following criteria are met: (a) the work within the bid package is customarily performed or supplied by the GC/CM; (b) the bid opening is managed by the public body and complies with RCW 39.10.380; and (c) notification of the GC/CM’s intention to bid is included in the public solicitation of bids. RCW 39.10.390(2)(a)-(c). In keeping with the overarching

purposes of public bid statutes, the GC/CM is awarded the bid package only if it proposes to perform the work for the lowest price. RCW 39.10.380.

The School District and Cornerstone correctly interpreted RCW 39.10.390 as not requiring a GC/CM to use only its own employees for scopes of work the GC/CM intends to bid. The School District has never argued that RCW 39.10.390 allows GC/CMs to bid on any and all work that could theoretically be subcontracted (some of which requires specialty licenses), but rather that the statute allows GC/CMs to bid only on work that they do in fact customarily perform (whether through direct employees or some mix of employees, subcontractors, and suppliers).

The School District's and Cornerstone's interpretation of the statute was consistent with the plain meaning of the statute, as well as with how construction is actually performed on virtually every construction project in the State. *See* School District's Answer to PELLCO's Petition. Indeed, the School District presented evidence at the Trial Court that general contractors *almost always* subcontract at least a portion of the work they "customarily perform." Clerk's Papers ("CP") at 190. This is the case because, when general contractors (including GC/CMs) perform virtually any large segment of work, they need to hire others (whether suppliers or

subcontractors) to support aspects of the work. *Id.* And even PELLCO’s Trial Court expert (the Executive Director of one member of Amici) testified that only “*a majority*” of work within a bid package be “self-performed” by the GC/CM’s own employees, suggesting that, in his view, at least some subcontracting is permissible. CP at 164 (Declaration of Ed Kommers ¶ 8) (“RCW 39.10.390 restricting a GC/CM to bidding only on those subcontract bid packages where the ‘work within’ the bid package is ‘customarily performed’ by the GC/CM has always been understood as requiring the GC/CM to have historically self-performed *a majority* of the work found within that bid package.”) (emphasis added).

Amici’s argument that the School District’s interpretation “renders the statute meaningless” because “there is no work on a GC/CM project the GC/CM can’t bid” is thus incorrect. Amici Memo at 8-9. There are certainly circumstances where a GC/CM may not “customarily perform” the type of work at issue. It is under these circumstances where RCW 39.10.390 would operate to bar the GC/CM from bidding on the work.

Because the evidence at the Trial Court established that Cornerstone did, in fact, “customarily” perform the type of “structures packages” work at issue in this dispute, and had performed this exact type of work on multiple prior projects (including other projects for the School District), CP 253-270,

282-289, PELLCO's and Amici's legal arguments fail on the merits.

III. CONCLUSION

Amici Curiae's Memorandum does not raise any issue justifying this Court granting discretionary review of PELLCO's untimely Petition. For the reasons explained in the School District's Answer, the School District respectfully requests that the Court deny PELLCO's Motion and decline to consider its untimely Petition for Review on the merits. If the Court grants PELLCO's Motion, the School District respectfully requests that the Court deny PELLCO's Petition.

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CERTIFICATE OF SERVICE

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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 18th day of January, 2022.

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