100358-7

No. 816420

WASHINGTON COURT OF APPEALS
DIVISION 1

PELLCO CONSTRUCTION, INC.,

Appellant,

vs.

CORNERSTONE GENERAL CONTRACTORS, INC., et al.,

Respondents.

PETITION FOR REVIEW

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1. IDENTITY OF PETITIONER & APPELLATE COURT DECISION WARRANTING REVIEW

PELLCO Construction, Inc. asks for review of the Division 1 opinion filed on October 4, 2021, a copy of which is found in the Appendix.

2. ISSUE PRESENTED FOR REVIEW

Is there a public interest in rendering an authoritative decision on the lone statute, never before interpreted in its 24-year history, guiding Washington's public owners on the extents to which the GC/CMs (general contractor/construction manager) on their public works projects can compete for and receive the millions in tax dollars these owners spend each year on subcontract work performed on their GC/CM projects?

3. STATEMENT OF THE CASE

PELLCO Construction protested the Northshore School District's public works project alleging that Cornerstone General Contractors, the School District's GC/CM, was competing for the project's steel erection work despite this work not being "customarily performed . . . *by the [GC/CM]*," as required by RCW

39.10.390.[1] Cornerstone responded to PELLCO's protest arguing the statute also allowed GC/CMs to compete for work "customarily ~~performed~~ subcontracted . . . by the [GC/CM]"; or alternatively, work "customarily performed . . . by the [GC/CM] using a subcontractor."

The School District agreed with Cornerstone's interpretation and added its own, interpretating RCW 39.10.390(2)(a) as allowing GC/CMs to broadly compete for any work that is "customarily performed or subcontracted . . . by the [GC/CM]." Because a GC/CM typically either self-performs or subcontracts all the work that goes into any of its projects, Respondents' interpretations result in a statute that broadly prohibits GC/CMs from bidding on any subcontract work on their own projects,[2] then excepts from this broad prohibition nearly all work that goes into a project.

The School District denied PELLCO's protest.

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[1] RCW 39.10.390(2)(a).

[2] RCW 39.10.390(1) ("Except as provided in this section, bidding on subcontract work or for the supply of equipment or materials by the [GC/CM] or its subsidiaries is prohibited.").

PELLCO brought suit to enjoin Cornerstone and the School District from allowing Cornerstone to award itself a subcontract to perform work that Cornerstone itself had no capabilities of performing. PELLCO's efforts failed. The School District allowed Cornerstone to enter into a subcontract with itself to perform work Cornerstone had to hire another subcontractor to actually perform.

At that point, PELLCO abandoned any further attempts to preserve its private interest in being awarded the public contract. As PELLCO stated from the outset of its appeal in response to Respondents challenging PELLCO's right to appeal,[3] PELLCO has proceeded on the basis that its appeal raises an issue of substantial public interest in asking for a definitive interpretation of RCW 39.10.390. This statute is indispensable to public owners determining the extent to which GC/CMs can compete for and perform the many millions of dollars in public subcontract work performed each year on their projects. Despite the statute's critical role in regulating public owners' use of GC/CMs to perform

[3] PELLCO Resp. to Mot. to Dismiss at 7-9 (Sept. 24, 2020).

subcontract work, the statute has never been interpreted. And as this appeal illustrates, despite what appears to be an unambiguously stated intent that GC/CMs only compete for work they self-perform, RCW 39.10.390 remains subject to widely varying applications by Washington public owners without this Court's interpretation.

1) PELLCO's Position

PELLCO's position on appeal has been that the 1997 Legislative Session allowed GC/CMs to start competing for and performing the subcontract work on their own projects, but the legislature did so with an important limitation on the type of work GC/CMs could compete for. That limitation remains in place today in RCW 39.10.390(2)(a), largely in its original form, safeguarding the public from self-dealing and private market forces steadily pulling this alternative model for public works procurement out of the public forum.

PELLCO believes this legislative intent is apparent from the plain language and context of the statute. PELLCO further believes this intent is unanimously supported by a history of discreet

legislative sessions all referring to RCW 39.10.390's "customarily performed by the GC/CM" restriction as a restriction on the GC/CM only competing for work the GC/CM "self-performs," a term plainly referring to work the GC/CM possesses the experience and capacity to perform itself.[4]

2) Public Interest

Most important here, however, is the public interest in resolving the intent of this statute so public owners are accurately guided in the direction the legislature intended. PELLCO does not deny its belief that Respondents' use of RCW 39.10.390 is basely anti-competitive and guides money to specific market participants instead of spreading the public funds amongst the market based on fair competition. But with nothing to gain personally from this appeal, PELLCO's only remaining interest is shared with the public in providing public owners an authoritative decision on RCW 39.10.390(2)(a)'s intent so both public owners and their managers (and the private market) use GC/CMs to perform

[4] *See, e.g.,* PELLCO Reply pt. 1.G at 13-20 (May 17, 2021).

subcontract work only to the extent the legislature intended to allow.

PELLCO's petition presents the Court with the opportunity to finally interpret a statute that, in light of a vast expansion in our state's use of GC/CM delivery and the GC/CM's authority over the project's work, has become (and will increasingly be) critical to regulating GC/CMs to safeguard against self-dealing and the privatization of public works projects. This in turn has a significant impact on how public funds for subcontract work are spent, further raising the public interest in an authoritative decision resolving RCW 39.10.390(2)(a)'s intent.

Division 1 correctly observed early in its decision that PELLCO gains nothing in "winning" this appeal. There is, indeed, no direct private interest whatsoever. There is, however, a substantial public interest in public works funding being spent in accordance with the regulations and safeguards the legislature intended.

4. WHY REVIEW SHOULD BE ACCEPTED

In declining to accept review of the statutory interpretation presented by PELLCO's appeal, Division 1 applied factors that

Washington courts have not previously given weight to in deciding the existence of a public interest, finding PELLCO's appeal presented a mixed issue of public and private importance[5] (even though the appellate court had earlier recognized that PELLCO has no private interests at stake in this appeal[6]). And because there has been no government sponsorship of the issue[7] and PELLCO passed on any unrealistic attempts at obtain temporary injunctive from the appellate court at the outset of "shelter in place" last year,[8] Division 1 erroneously concluded that the intent of RCW 39.10.390(2)(a) was not a public interest. But this is one of only a very few statutory provisions that specifically seek to restrain GC/CMs' participation in subcontract work on their own projects. And because gccm projects are as popular as ever among public owners and will continue implicating rcw390(2)(a) as gccms seek to

[5] Op. at 5.

[6] *Id.* at 3.

[7] *Id.* at 5.

[8] *Id.* at 5-6.

perform subcontract work on those projects, the public interest in interpreting this statute is continuing and substantial.

In erroneously relying on arbitrary factors no other Washington court has agreed are indicative (or not) of a public interest, Division 1 misapprehended the importance of using PELLCO's appeal to finally interpret RCW 39.10.390. These factors wholly failed the court in identifying the substantial public interest in resolving the meaning of one of the only regulations on a GC/CM's power over a public works project.

Providing such an authority by accepting review of PELLCO's petition will relieve trial courts of protests similar to PELLCO's. Much more importantly, providing this long overdue interpretation will provide uniform guidance to all of Washington's public owners regarding the extent to which GC/CMs may obtain additional payment on their projects by separately awarding themselves subcontracts to perform their projects' work.

A. PELLCO's appeal presents an issue that falls squarely within Washington's "public interest" exception to mootness.

The Court's prior decision in *National Electrical Contractors Ass'n v. Seattle School District*[9] fully informs the Court's decision here. Like in this case, the project in *National Electrical Contractors* continued on before the appeal was heard. This Court nevertheless excepted the appeal from its mootness doctrine to interpret a statute critical to future public procurements of the same type. This is precisely the same reason why the Court should review the issue presented by PELLCO's appeal. RCW 39.10.390 is critical to any GC/CM project in which the GC/CM seeks to perform subcontract work, which is practically every GC/CM project in the state.

This Court fully recognized that enjoining the public owner from proceeding with the disputed procurement was "only of academic interest insofar as the present litigation" but was "a matter of interest and concern so far as future installations" were concerned.[10] The Court therefore concluded it was "justified in exercising [its] discretion and retaining" the appeal as it "seems

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[9] 66 Wn.2d 14 (1965).

[10] *Id.* at 17.

desirable that school districts through the state should have an authoritative construction" of the statute affecting that type of public procurement.[11]

The *National Electrical Contractors* decision only reversed the lower court to the extent the lower court misconstrued the statute.[12] That is the entirety of what PELLCO seeks by this petition.

B. Division 1's analysis of the public interest presented by PELLCO's appeal fails to follow this Court's teachings on the factors to consider in making this evaluation.

In arguing against a public interest exception, Respondents invented the requirement that a public officer must seek guidance from the Court.[13] Division 1 was unfortunately led astray by this argument, even though use of this factor finds no real support in Washington law.

The import of the public interest exception is to render an otherwise advisory opinion for purposes of providing future guidance to public officials on a dispute that is likely to repeat itself.

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[11] *Id.* at 20.

[12] *Id.* at 22.

[13] Cornerstone Response at 20.

PELLCO's offered interpretation of RCW 39.10.390 is far more reasonable than Respondents, given the statute's plain meaning. But without an authoritative decision from this Court on RCW 39.10.390's intent, there can be no doubt this issue will continue to be implicated on GC/CM projects across the state.

Division 1's analysis also falls into the same unfortunate trap that started PELLCO's appeal, namely, interpreting a statute to fit industry practice. Division 1 surmised that the issue has never arisen because the statute's "words and meaning are plain and consistent with industry standards."[14] This is precisely the problem. Statutes are not interpreted by molding them to fit "industry standards." Interpreting statutes in this way is rife with problems and not surprisingly finds no support in Washington common law. A good statute is typically found doing the opposite of what Division 1 expected, molding industry standards instead of being molded by them. In no case should statutes to be interpreted to fit

[14] Slip op. at 6 (Oct. 4, 2021).

"industry standards" being decided mostly by private interests that benefit from less public regulation and greater autonomy.

RCW 39.10.390 presents a major hurdle for private interests. And as such, the public interest is in ensuring public owners are closely following the protections the legislature required to keep private interests from taking over public projects.

1) Division 1 erroneously required a government sponsor to establish a public interest.

Division 1 incorrectly weighed the lack of a government entity expressing an interest in interpreting RCW 39.10.390 as indicative of this being a private matter. This is simply not a recognized factor for deciding whether a public interest is presented by an appeal that, from private interest standpoint, is entirely moot. While a government agency expressing an interest may help courts find a public interest, government sponsorship is neither a requirement for establishing a public interest nor indicative of an appeal presenting (or not) an issue of public interest.

2) Neither the availability of injunctive relief nor the petitioner availing itself of injunctive relief are material to whether the issue presented is one of public interest.

Division 1's decision is guided in part by PELLCO failing to avail itself of injunctive relief. But there is no legal precedent for requiring the petitioner to have attempted to obtain injunctive relief in addition to satisfying the elements Washington courts typically consider in deciding whether a public interest exists. Contrary to Division 1's analysis, PELLCO's failure to seek injunctive relief is far more in keeping with pursuing a public interest. PELLCO failing to avail itself of injunctive provides no help in deciding whether there is a public interest in determining RCW 39.10.390's legislative intent.

Seeking a restraining order would be more in line with PELLCO acting in its private interests. As Division 1 initially noted in its decision, PELLCO has no standing obtain a remedy for the harm arising from Respondents failing to abide by very plain statutory restrictions against general contractors competing with smaller subcontractors for work the general contractor does not perform itself. This appeal presents a significant public interest by virtue of

the sizeable amount of public tax dollars affected by the Court finally providing a uniform interpretation of a two-decades' old statute.

3) CPARB has no authority to interpret statutory intent.

Division 1's search for a public interest included the suggestion that the Capital Projects Advisory Review Board (CPARB), a board that serves at the pleasure of the executive branch, is available to resolve this issue.[15] CPARB does not interpret statutes and is no position render an authoritative opinion on RCW 39.10.390(2)(a). This itself operates on the bold assumption its members[16] could actually agree on a single interpretation, something as unlikely as Division 1 providing emergency injunctive relief for a bid protest at the height of 2020's chaos. Regardless, CPARB is not an authority in any way on the legislative intent expressed in statutes.

Denying this petition will continue to keep RCW 39.10.390's legislative intent hidden from the public owners that need an

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[15] *Id.* at 6.

[16] Division 1 incorrectly stated that PELLCO's president is CPARB member. Mr. Pellitteri is not.

authoritative decision more than anyone. Without a decision from the Court resolving RCW 39.10.390's intent, the GC/CM delivery model for public works will continue to succumb to the influence of private interests as GC/CMs continue accumulating more and more power over public works projects.

C. Without a decision from the Court, public owners are left to decide whether the legislature intended what PELLCO argues, what Respondents argue, or a myriad of permutations in between—any or none of which may follow the spending restrictions the legislature actually intended when GC/CMs perform subcontract on their own projects.

The School District and Cornerstone have applied RCW 39.10.390 in a manner consistent with their position before the trial court and Division 1, namely, that RCW 39.10.390's "customarily performed . . . *by the [GC/CM]*" restriction actually only restricts the GC/CM to competing for work "customarily ~~performed~~ subcontracted . . . by the [GC/CM]" or "customarily performed . . . by the [GC/CM] using a subcontractor." In other words, nearly all the work on a project. This change to the statutory language was allowed by the trial court, resulting in PELLCO appealing the trial court erroneously agreeing with Resondents'

argument that a statute should be interpreted by the industry's use of the statute.

Division 1's decision seemingly endorses this same erroneous approach to statutory interpretation, concluding that RCW 39.10.390's "words and meaning are plain and consistent with industry standards."[17] This approach to statutory interpretation, where the intent of the statute is judged by how the market responds to the statute, abdicates the role of the legislature to private interests. If "industry standards" dictate the meaning of statutes, why have statutes at all?

The stakes for the public are particularly high with regard to statutes like RCW 39.10.390 because it purposely seeks to regulate GC/CMs competing for the millions of public dollars spent on subcontract work on the state's many GC/CM projects each year. The School District's interpretation has resulted in the GC/CM awarding itself a contract for work the GC/CM will obtain through a private contract with another subcontractor, who will perform

[17] Op. at 6.

the work for a price and terms hidden from the public. This is a rare opportunity for the Court to set a guidepost for public owners in area that directly affects public spending, which the public's interest always includes transparency.

5. CONCLUSION

The Court's review and interpretation of a seemingly insignificant subsection of an alternative public works statutory scheme is in fact one of the single most effective steps *any* branch of our state's government can take to guard against the privatization of public works project.

The legislature placed an intentional safeguard in RCW 39.10.390(2)(a) to limit the extent to which GC/CMs can receive additional payment for performing work on their projects. PELLCO's appeal provides the Court the opportunity to finally interpret the legislative intent of this important statute and do so under facts perfect for providing public owners with a clear outline of what the statute does not allow. The prevailing interest is the public's interest in public construction funds being used subject to the safeguards intended by the legislature.

Whether the Court agrees with PELLCO's urged interpretation of RCW 39.10.390, one of the interpretations urged by Respondents, or provides its own interpretation, the significant public interest is in determining RCW 39.10.390(2)(a)'s intent to ensure our state's GC/CM projects are afforded the regulations and protections our legislature intended ever since first allowing GC/CMs to perform subcontract work on their own projects in 1997.

Protests like PELLCO's do not make headlines. But they are certain to exist in any given week in any given county in Washington. This is a rare opportunity to illuminate the laws that regulate the expenditure of a large portion of Washington's public funds, as most bid protesters stop after their personal interests are extinguished.

This issue of first impression for the Court is vastly overdue in shaping public owners' future expenditure of the significant public funds designated for subcontract work on public GC/CM projects across the state. PELLCO respectfully asks the Court to grant review to provide the long missing authoritative decision setting

the limits of gccms' involvement in public subcontract work on their own projects.

DATED this 4th day of November 2021.

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PELLCO CONSTRUCTION, INC., a Washington corporation, Appellant, v. CORNERSTONE GENERAL CONTRACTORS, INC., a Washington corporation, NORTHSHORE SCHOOL DISTRICT NO. 417, a Washington school district municipal corporation, Respondent.	No. 81642-0-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — PELLCO Construction, Inc. appeals from a denial of its motion for a preliminary injunction. PELLCO concedes that its appeal is moot, as a disappointed bidder's only remedy at law is to seek injunctive relief before a contract is executed. Because PELLCO has not demonstrated a substantial and continuing public interest justifying review, despite mootness, we dismiss the appeal.

FACTS

This dispute arises out of public bidding for Northshore School District's Inglemoor High School Concert Hall & Music Building project. Cornerstone General Contractors, Inc. (Cornerstone) serves as the general

contractor/construction manager (GC/CM) for the project. Prior to bidding, PELLCO reached out to the school district several times to express concerns with the fairness and effectiveness of the bid package structure. The school district considered PELLCO's feedback, issued responsive addenda, and slightly altered the bid packages, to address PELLCO's concerns. Most significantly, Cornerstone and Northshore School District split the structures bid package into two discrete packages: one for concrete, one for steel. Interested parties could submit bids for one package or "combination" bids for both packages.

PELLCO Construction, Inc. (PELLCO) bid on the concrete package and submitted the lowest responsive, responsible bid for the package. However, Cornerstone's combination bid was lower than the sum of PELLCO's concrete bid and the lowest separate bid for the steel package. PELLCO timely protested Cornerstone's bid, alleging that RCW 39.10.390 prohibits GC/CMs from bidding on subcontractor work unless the GC/CM performs the work with its own labor (as opposed to subcontracting the work). PELLCO filed a motion for preliminary injunction to enjoin Cornerstone from executing the contract. After oral argument, the King County Superior Court denied PELLCO's motion. PELLCO now appeals.

ANALYSIS

PELLCO's challenge presents a question of statutory interpretation as it argues that the plain meaning of RCW 39.10.390 precludes GC/CMs from bidding on subcontract work if the GC/CM subcontracts that work (as opposed to performing it with its own labor, equipment, and expertise). As such, PELLCO alleges that Cornerstone was legally precluded from bidding on both the concrete

and steel packages because it does not perform steel fabrication or erection work through its own forces and instead sub-contracts its steel work. Northshore School District and Cornerstone argue that the plain meaning of RCW 39.10.390 only requires that the GC/CM perform the subcontract work it bids on by taking contractual responsibility for the work, either by performing with its own forces or by further subcontracting the work.

We must first determine whether we will consider the merits of PELLCO's claim at all. PELLCO concedes that, as a disappointed bidder, it has lost standing to seek a legal remedy. Cornerstone has already executed the structures subcontract, and the project will be complete in December 2021. Cornerstone and Northshore School District ask us to dismiss PELLCO's petition as moot, while PELLCO asks us to grant discretionary review under the public interest exception.

I. Mootness

A disappointed bidder in a public contract dispute has limited remedies available—they may sue to enjoin the contract before it is executed. Dick Enters., Inc. v. Metro. King County, 83 Wn. App. 566, 569, 922 P.2d 184 (1996). Contract formation serves as a "bright-line cutoff" for bidder standing. Id. at 571. PELLCO concedes that its appeal is moot, as the disputed contract has been executed and work is scheduled to be completed by December 2021. However, PELLCO asks this court to grant discretionary review in the public interest.

As a general rule, this court declines to review cases "where only moot questions" remain to avoid giving advisory opinions. Sorenson v. City of Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972); Nat'l Elec. Contractors

Ass'n v. Seattle Sch. Dist. No. 1, 66 Wn.2d 14, 17–18, 400 P.2d 778 (1965). There is "[a] recognized exception to this general rule," and this court will grant review of an otherwise moot case if it involves "'matters of continuing and substantial public interest.'" Hart v. Dep't of Soc. and Health Servs., 111 Wn.2d 445, 447, 759 P.2d 1206 (1988) (quoting Sorenson, 80 Wn.2d at 558). This is an exception to the general rule, and we will only "deliver advisory opinions" on "'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 403, 416, 27 P.3d 1149, 1155 (2001) (emphasis added) (quoting In re Disciplinary Proceeding Against Deming, 108 Wn.2d 82, 122–23, 736 P.2d 639, 744 P.2d 340 (1987) (Utter, J., concurring)).

In determining whether there is sufficient public interest to justify issuing an advisory opinion, courts consider several criteria: 1) the public or private nature of the question presented; 2) desirability of an authoritative determination for the future guidance of public officers; 3) likelihood of future recurrence; 4) the level of genuine adverseness and quality of advocacy; 5) the likelihood the issue will escape review due to short-lived facts. Sorenson, 80 Wn.2d at 558; Westerman v. Cary, 125 Wn.2d 277, 286–87, 892 P.2d 1067 (1994).

A. Public or Private Nature of the Question Presented

First, PELLCO argues that the public has a significant interest in this dispute because millions of taxpayer dollars are spent on public contracting and thus the public has an interest "in ensuring this money is being properly spent." Cornerstone and Northshore School District argue that this is a private dispute between contracting companies, and the dispute is of a private, commercial nature.

PELLCO's suit arises out of its private, commercial interest in being awarded a contract. PELLCO's "disappointed bidder" standing for seeking an injunction comes from being rejected for a paid contract, as opposed to taxpayer standing. However, the statute at the heart of PELLCO's appeal exclusively governs public contracting.[1] Therefore, the question is broadly of a public and private nature.

B. Future Guidance for Public Owners

Next, PELLCO argues that without an authoritative determination from this court to guide them, public bodies[2] "may continue to fall under the hypnotism" of the statutory scheme. However, as the respondents point out, no public officer is seeking such guidance. Northshore School District, the public official in this case, opposes discretionary review and does not seek guidance, and PELLCO brings forward no evidence of other public owners in need of guidance. PELLCO's assertion that public owners are "hypnotized" by the statutory scheme is insufficient to justify reviewing a moot case, and this factor weighs against invoking the public interest exception.

C. Likelihood of Recurrence and Evasion of Review

Third, PELLCO argues that due to the nature of bidder standing, the issue before us is capable of repetition yet will evade review. However, respondents

[1] RCW 39.10.390

[2] RCW 39.10.210 defines "public body" as "any general or special purpose government in the state of Washington, including but not limited to state agencies, institutions of higher education, counties, cities, towns, ports, school districts, and special purpose districts."

note that an unsuccessful bidder who is denied a preliminary injunction may timely appeal that denial before their claim becomes moot.

While the standing of a disappointed bidder is fleeting, bidders are not without remedy. A disappointed bidder may seek an injunction to enjoin formation of the contract, and if they fail, they may "immediately appeal the trial court's decision." Dick Enters., Inc, 83 Wn. App. at 571. Here, PELLCO expressly requested the trial court delay issuing its order so it could seek emergency relief in this court. The court granted its request, but PELLCO failed to pursue an emergency stay from this Court, instead filing a notice of appeal after the matter became moot. PELLCO's failure to seek relief while its case was justiciable does not mean the issue will evade review in the future.

PELLCO suggests that RCW 39.10.390 may go another 24 years without interpretation if this court declines to review this case. However, as PELLCO concedes, it is also likely that no case before us has sought interpretation of the statute because its words and meaning are plain and consistent with industry standards.

It is worth noting that our Legislature has created the Capital Project Advisory Review Board to advise the legislature on policies related to public works delivery methods like RCW 39.10.390. Its membership includes many stakeholders in public contracting, including PELLCO's president. PELLCO, and other stakeholders impacted by the GC/CM delivery method, have a clear avenue to pursue questions about RCW 39.10.390 through their advisory role. Without a

stronger showing that this issue is likely to recur and evade proper review, these factors also weigh against issuing an advisory opinion.

D. Level of Genuine Adverseness and Quality of Advocacy

A final factor "may also play a role" in a court's consideration of reviewing an otherwise moot case—"'the level of genuine adverseness and the quality of advocacy of the issues.'" Westerman, 125 Wn.2d 286 (quoting Hart, 111 Wn.2d at 448). The respondents allege that PELLCO's performance in this appeal raises questions about the quality of advocacy. However, Westerman is clear that this final factor "serves to limit review to cases in which a hearing on the merits has occurred." Id. (citing Orwick v. Seattle, 103 Wn.2d 249, 253-54, 692 P.2d 793 (1984)). As such a hearing has occurred here, this factor weighs in favor of the public interest exception.

Taking all the factors together, PELLCO has failed to demonstrate a "continuing and substantial public interest" to justify taking a concededly moot case. Sorenson, 80 Wn.2d at 558. Consistent with our general rule for non-justiciable cases, we decline to reach the merits and dismiss the case.

II. Attorney Fees

Cornerstone requests attorney fees on appeal, alleging that it is entitled because PELLCO's appeal was frivolous. Reasonable attorney fees are recoverable on appeal pursuant to RAP 18.1 if allowed by statute, rule, or contract. In re Guardianship of Wells, 150 Wn. App. 491, 503, 208 P.3d 1126 (2009). A party may recover attorney fees pursuant to RAP 18.9 if the petitioner files a

frivolous appeal. "An appeal or motion is frivolous if there are 'no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility' of success." In re Recall Charges Against Feetham, 149 Wn.2d 860, 872, 72 P.3d 741 (2003) (internal citation omitted) (quoting Millers Cas. Ins. v. Briggs, 100 Wn.2d 9, 15, 665 P.2d 887 (1983)). While we dismiss PELLCO's claim as moot, its appeal was not frivolous. We decline to award attorney fees on appeal.

Dismissed.

WE CONCUR:

PNW CONSTRUCTION LAW

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Filing Petition for Review

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