No. 102713-3

SUPREME COURT
OF THE STATE OF WASHINGTON

ALEXANDRIA REAL ESTATE ENTITIES INC., JOHN JOSEPH COX, and DEAN A. TAKKO,

Petitioners,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

MEMORANDUM OF *AMICI CURIAE* WASHINGTON ASSOCIATION OF GENERAL CONTRACTORS, WASHINGTON CHAPTER

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I. INTRODUCTION

The Association of General Contractors, Washington Chapter ("AGC"), submits this *amicus curiae* memorandum in support of Petitioners' Alexandria Real Estate Entities, et al.'s ("ARE's") petition for review. Division II's decision in this case, authorizing a private/public funding model for public development outside the regulated public works process, undermines the anti-corruption protections of public bidding in Washington. This important public policy should be liberally applied to protect builders like AGC's members from anti-competitive favoritism, not to mention Washington's taxpayers. Instead, Division II liberally undermined public works laws, like public bidding, by authorizing to blatantly disregard public bidding laws with this lease-construction-leaseback contract on a public campus. Without review by this Court, this unregulated, judicially created exception to public works construction will spread like wildfire to public projects across the state. This is a quintessential Supreme Court case due to its potential to broadly

undermine Washington public policy if Division II's decision is left undisturbed. RAP 13.4(b)(4).

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

The identity and interest of *amicus* AGC are described in the motion for leave to file this memorandum.

III. STATEMENT OF THE CASE

AGC adopts the statement of the case from Petitioner's petition for review and briefing in Division II.

III. ARGUMENT IN SUPPORT OF REVIEW

(1) Division II's Decision Undermines Public Bidding, Contrary to Public Policy to the Detriment of Many Interests Including AGC's Membership

This Court should grant review because Division II's decision undermines public bidding in Washington, an issue of broad and important public policy suited for review by this Court. RAP 13.4(b)(4).

It is "well settled that there is a strong public policy in the State of Washington favoring competitive bidding laws." *Platt Elec. Supply v. Seattle*, 16 Wn. App. 265, 269, 555 P.2d 421

(1976). This Court has long identified that public bidding serves key public policies. Namely, it prevents "fraud, collusion, and favoritism" thereby benefiting "property holders and taxpayers" across Washington. *King County v. Taxpayers of King County*, 104 Wn.2d 1, 7, 700 P.2d 1143 (1985) (abrogated on other grounds by statute). Public bidding also benefits all Washingtonians by ensuring that publicly funded projects receive "the best work or supplies at the most reasonable prices practicable." *Edwards v. City of Renton*, 67 Wn.2d 598, 602, 409 P.2d 153 (1965).[1]

[1] Washington has other laws and policies that are strongly favored to achieve similar goals of preventing fraud, collusion, and favoritism, *i.e.*, corruption. Our state's Constitution and so-called "Sunshine Laws," help ensure open and transparent government. *See, e.g.*, RCW 42.56.030 (Public Records Act ensures government accountability); RCW 42.30.030 ("All meetings of the governing body of a public agency shall be open and public"); RCW 44.48.150 (Legislature finding that providing transparent information to the public "contributes to governmental accountability, public participation, agency efficiency, and open government"); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716, 719 (1982) (open courts) (citing Wash. Const. art. 1, § 10 ("Justice in all cases shall be administered openly")). These laws also show that

As ARE points out in its petition, public bidding laws are liberally interpreted to bring about these crucial public policies. Pet. at 11 (citing *Sw. Wash. Ch., Nat. Elec. Contractors Ass'n v. Pierce County*, 100 Wn.2d 109, 116, 667 P.2d 1092 (1983) (competitive bidding statutes are afforded a "more liberal construction."; 1984 AGO No. 17, at 10 ("any ambiguity relating to public works contracts is to be resolved in favor of utilization of a bidding procedure")).

There is mischief to be had, undermining these liberally applied public policies, if the distinguishing feature that removes a project from the realm of public works is simply timing of payment – whether upfront or as a commitment of public funds to rent over the next 80 years. By analogy, whether a consumer buys a product by paying with cash or by using a credit card and paying it off over time, that consumer is still expending their own funds to make a purchase. Here, too, UW is redeveloping its

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transparent and accountable government are keenly important to Washingtonians.

campus by agreeing to pay the cost of construction over time as it occupies the building, which it will eventually own free and clear from the developer. That is an expenditure of public funds; a "cost" paid by the University without which the developer would not undergo the construction project. Pay now or pay later, the public will still be paying for the cost of construction. It is a public work.

Like any other public works construction project, it should be subject to public bidding, to ensure to avoid corruption and ensure a high-quality result at the lowest price. AGC's membership will suffer if these projects are removed from competitive public bidding, allowing public entities to play favorites. Review is appropriate to decide this issue of public importance, which affects far more than just the two parties litigating this case. RAP 13.4(b)(4).

(2) <u>This Case Applies Far Beyond this Project or University Development; It Implicates Nearly Every Public Construction Project, Thus Calling for This Court's Review Under RAP 13.4(b)(4)</u>

AGC submits this memorandum in part to emphasize the wide reach of Division II's opinion. While this "test case" involves just UW's Seattle campus, public bidding applies to essentially every public entity in Washington, who now have a judicially blessed avenue to skirt public works laws like competitive bidding. This includes cities, counties, school districts, port districts, public utility districts, water-sewer districts, fire district, library districts, and more. *See*, *e.g., Buying and Biding: Ensuring your government follows Washington purchasing laws*, Center for Government Information, a service of the Office of the Washington State Auditor, (Aug. 2022), available at https://sao.wa.gov/sites/default/files/2023-05/Bid_Law_Guide.pdf (appendix) (listing 31 class of government entities to which public bidding applies).

There is nothing in Division II's decision that limits the practice used by UW for this project to be implemented on virtually any other public works project. If the Seattle School District wants to build a new school, it could simply hire its

favorite contractor to finance and construct the school with only a leasing agreement as its payment. This approach could be applied to any virtually any public construction project in the state.

It is hard to imagine a "test case" with more potential statewide impact than this one, which Division II failed to understand in its analysis. This is a matter that should be decided by this Court, not a single panel of three judges sitting in Tacoma. RAP 13.4(b)(4).

Importantly, whether novel lease-construction-leaseback contracts or other Public-Private Partnership" ("P3") models should be allowed and how they should be regulated by public works laws is a *legislative* matter. Division II was wrong to permit this novel arrangement through judicial fiat. This also warrants review by this Court. RAP 13.4(b)(4).

For example, chapter 47.29 RCW is an extensive statute designed to permit and regulate P3 projects in the transportation sector. This statute makes explicit that P3 transportation projects

developed under that chapter where the project is "owned, ***leased***, used, or operated by the state, as a public facility" is a "public works" project. RCW 47.29.020(5), .060(3) (emphasis added). The very existence of this statute and the fact that a similar one failed to pass in the Legislature recently to allow P3 development on other projects, H.B. 2726 (see pet. at 23-26), shows that Division II was wrong to authorize this novel workaround to public works construction laws by judicial decree.

This case demands review and reversal by this Court. Division II's decision, undermining public bidding laws without sufficient thought or action from the Legislature is an issue of substantial public importance. RAP 13.4(b)(4).

IV. CONCLUSION

For the reasons described above, AGC respectfully asks that this Court grant review and reverse Division II.

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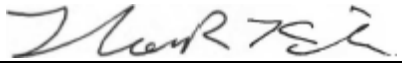
DATED this 4th day of March, 2024.

Respectfully submitted,



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