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SUPREME COURT  
OF THE STATE OF WASHINGTON

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PELLCO CONSTRUCTION, INC.,

*Plaintiff-Appellant,*

v.

CORNERSTONE GENERAL CONTRACTORS, INC., et al.,

*Defendants-Respondents.*

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**BRIEF OF AMICI CURIAE  
IN SUPPORT OF PETITION FOR REVIEW**

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## **I. INTRODUCTION**

This case impacts General Contractor / Construction Manager (GC/CM) public works procurement throughout Washington state and is of considerable future consequence to public agencies, their contractors, and subcontractors. The case permits the Court to foster the public interest and safeguard the judiciary's role in protecting the integrity of public bidding laws. The Court can do this by ensuring that procurement laws are followed as written and are not circumvented for short-term cost savings. The public interest in the Court accepting review of this matter is particularly keen because GC/CM "best value" procurement lacks effective mechanisms for self-policing.

## **II. SUMMARY OF ARGUMENT**

The plain language of RCW 39.10.390 prohibits GC/CMs from bidding on subcontract work unless the work is customarily self-performed by the GC/CM. Respondents' position that RCW 39.10.390 permits GC/CMs to bid on work they customarily subcontract, as well as work they customarily self-perform, conflates "customarily performed" with "customarily subcontracted." Since all of a general contractor's work on a project is necessarily either self-performed or subcontracted, Respondents' interpretation renders the statute meaningless and its protections illusory.

Although the case is technically moot, the issue it presents is live. As discussed below, the criteria for accepting review are satisfied.

### **III. IDENTITY AND INTEREST OF AMICI**

Under RAP 10.3(e), the identity and interest of Amici is in the accompanying motion for leave to submit this amici curiae brief.

### **IV. ISSUE PRESENTED FOR REVIEW**

The issue is whether the Court should grant review where (1) the issue is a public question of statutory interpretation; (2) a decision by the Court will provide critical future guidance for public agencies and their contractors; (3) the issue presented will recur in future GC/CM public works procurement throughout Washington state; and (4) the matter can be determined based on this record.

### **V. STATEMENT OF THE CASE**

Amici adopt the “Statement of the Case” set forth in Pellco’s Petition for Review.

### **VI. ARGUMENT**

#### **A. This Case Satisfies the Criteria for Supreme Court Review.**

“Even if a case becomes moot, the court has discretion to decide an appeal if the question is of continuing and substantial

public interest.” *Randy Reynolds & Associates, Inc. v. Harmon*, 193 Wn.2d 143, 152, 437 P.3d 677 (2019) (cleaned up). To determine whether an appeal presents such an interest, the Court considers a “nonexclusive list of criteria”: “(1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question.” *Id.* (cleaned up). And “as a fourth factor, courts may also consider the level of adversity between the parties and the quality of the advocacy of the issues.” *Id.* at 153 (cleaned up). As discussed below the criteria for Supreme Court review are satisfied.

1. Interpretation of RCW 39.10.390 is a public issue.

Issues that pertain to interpretation of statutes and regulations are public because they are likely to arise again. *See Hart v. Dep’t of Social and Health Services*, 111 Wn.2d 445, 449, 759 P.2d 1206 (1988) (en banc) (“The continuing and substantial public interest exception has been used in cases dealing with constitutional interpretation; the validity and interpretation of statutes and regulations; and matters deemed sufficiently important by the appellate court. Most of the public interest exception cases fall into the first two categories as they tend to present issues which are more public in nature and are more

likely to arise again. Further, decisions involving the constitution and statutes generally help to guide public officials.”) (cleaned up).

The question here concerns the interpretation of RCW 39.10.390, a public works competitive bidding statute restricting the conditions under which a GC/CM may bid against competing subcontract bidders. By nature, this is a public issue satisfying the first review factor. *See National Elec. Contractors Ass'n v. Seattle Sch. Dist. 1*, 66 Wn.2d 14, 400 P.2d 778 (1965) (en banc) (finding an analysis of what constitutes an improvement requiring competitive bidding under school district's competitive bidding statute of great public interest). *See also Gostovich v. West Richland*, 75 Wn.2d 583, 452 P.2d 737 (1969) (the primary purpose of competitive bidding laws is to protect the public).

2. An authoritative construction of RCW 39.10.390 that will provide guidance to public officials is desirable and necessary.

It is appropriate to accept review where the issue involves the interpretation of a statute and will provide future guidance to public officials. *State v. Beaver*, 184 Wn.2d 321, 331, 358 P.3d 385 (2015) (en banc); *Matter of Det. of M.W. v. Dep't of Social and Health Services*, 185 Wn.2d 633, 374 P.3d 1123 (2016) (en banc); *In re Marriage of Horner*, 151 Wn.2d 884, 93 P.3d 124

(2004) (en banc). In *State v. Beaver*, the Court analyzed whether under RCW 10.77.190 “due process requires a finding of current mental illness before the conditional release of an insanity acquittee may be revoked. . .” *Beaver*, 184 Wn.2d at 331. The Court recognized that “[c]ases involving interpretation of . . . statutes are public in nature and provide guidance to future public officials.” *Id.*

The Court emphasized this important tenet in *Matter of Det. of M.W. v. Dep’t of Social and Health Services*, 185 Wn.2d 633, 374 P.3d 1123 (2016) (en banc), when the Court found that interpreting RCW 71.05.320(3)(c)(ii), the Involuntary Treatment Act, would “provide guidance for future public officials implementing the ITA.” This Court found in *In re Marriage of Horner*, 151 Wn.2d at 892, that interpretation of Chapter 26.09 RCW (the Child Relocation Act) was “of a public nature because it concerns the interpretation of RCW 26.09.520 and because the Court of Appeals opinion was not limited to the Horner facts, but contained an interpretation of the statute.” *In re Marriage of Horner*, 151 Wn.2d at 892. The Respondents’ flaunting of the statute demonstrates the need for judicial interpretation.

The Court should accept review because the case involves a public issue, and a decision regarding RCW 39.10.390 will provide guidance to public officials on future GC/CM public works projects throughout Washington state.



3. The issue is highly likely to recur.

It is clear from the record that absent direction from this Court, GC/CM contractors and public agencies, such as Respondents, will persist in conflating “customarily performed” with “customarily subcontracted” unabated. *See* Cornerstone App. Br. at 36; Northshore App. Br. at 30. GC/CMs such as Cornerstone and public agencies such as Northshore have little incentive to follow the GC/CM subcontract bidding law if they think ignoring it will save them money.

4. The parties’ level of and quality of advocacy of the issue supports review.

As a fourth factor, courts may also consider the level of adversity between the parties and the quality of the advocacy of the issues. *Randy Reynolds & Associates, Inc. v. Harmon*, 193 Wn.2d 143, 152, 153; *Hart v. Dep’t of Sac. & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988). The level of adversity between the parties and the quality of the advocacy of the issues below favors the Court exercising its discretion to decide this appeal.

**B. Respondents’ Interpretation Eviscerates the Statute’s Protections.**

The goal of statutory interpretation is to carry out legislative intent. *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d

801, 807, 16 P.3d 583 (2001). “If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself.” *Id.* Courts look to the statute as a whole and give effect to all of its language. *Dot Foods, Inc. v. Wash. Dep't of Revenue*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009). If the language of the statute is plain, that ends the court’s role. *Cerillo v. Esparza*, 158 Wn.2d 194, 205-06, 142 P.3d 155 (2006).

RCW 39.10.390 explicitly prohibits GC/CMs from bidding on subcontract work, the supply of equipment, or the supply of materials unless the work within the subcontract bid package, the equipment, or materials is customarily performed or supplied by the GC/CM:

RCW 39.10.390 General  
contractor/construction manager procedure—  
Subcontract work.

(1) Except as provided in this section, bidding on subcontract work or for the supply of equipment or materials by the general contractor/construction manager or its subsidiaries is **prohibited**.

(2) The general contractor/construction manager, or its subsidiaries, may bid on subcontract work or for the supply of equipment or materials if:

(a) The work within the subcontract bid package or equipment or materials is **customarily performed or supplied** by the

general contractor/construction manager . . .  
(emphasis added).

Websters defines “customarily” to mean “by or according to custom or established practice.”<sup>1</sup> The word “performed” as used in the statute is a transitive verb.<sup>2</sup> Websters defines “performed” to mean “to carry, do” or “to do in a formal manner or according to prescribed ritual.”<sup>3</sup> The clear intent of the Legislature is that in order for a GC/CM to bid for subcontract work against competing subcontractors, the work must be done *by the GC/CM*, i.e., self-performed, with its own employees. Respondents seek to create ambiguity where none exists. Worse, they urge the Court to adopt an interpretation that renders the protections afforded by the statute unavailing.

Respondents’ interpretation conflating “customarily performed” with “customarily subcontracted” eviscerates RCW

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<sup>1</sup> MERRIAM-WEBSTER ONLINE, Customarily, <https://www.merriam-webster.com/dictionary/customarily> (last accessed May 12, 2021).

<sup>2</sup> A transitive verb requires a direct object, which is a non, pronoun, or noun phrase that follows the verb and completes the meaning of the sentence by indicating the person or thing that receives that action of the verb. MERRIAM-WEBSTER ONLINE, Transitive, <https://www.merriam-webster.com/dictionary/transitive> (last accessed May 12, 2021).

<sup>3</sup> MERRIAM-WEBSTER ONLINE, Performed, <https://www.merriam-webster.com/dictionary/performed> (last accessed May 12, 2021).

39.10.390. A GC/CM, as a general contractor, necessarily must either self-perform or subcontract the work. Respondents' interpretation of "customarily performed or supplied" to include or mean "customarily subcontracted" renders the statute meaningless because under their interpretation there is no work on a GC/CM project the GC/CM can't bid against competing subcontractors.

## VII. CONCLUSION

It is the province of this Court to "say what the law is," and it should take the opportunity to do so here. *Colvin v. Inslee*, 195 Wn.2d 879, 892, 467 P.3d 953 (2020). Amici urge the Court to grant review of Appellant's Petition to address the Respondents' erroneous interpretation of a public works bidding statute impacting projects throughout Washington state.

I certify that this document contains 1,705 words, in compliance with the word limits set forth in RAP 18.17.

DATED this 22nd day of December, 2021.

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