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* ASSOCIATED BUILDERS AND CONTRACTORS OF WESTERN WASHINGTON

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A. INTRODUCTION

Division II wrongfully held that the novel lease-construction-leaseback contract that pledged millions of dollars of public funds to redevelop public land on the University of Washington's ("UW's") Seattle campus is not a public work. Petitioners Alexandria Real Estate Entities, et al. ("ARE"), correctly describe the public bidding ramifications of that decision, which merits review by this Court. But *amicus* Associated Builders and Contractors of Western Washington ("ABC"), submits this memorandum to stress that Division II's opinion undermines other important public works provisions, like performance bond, retainage, and lien rights, that help protect subcontractors and workers like ABC's members from nonpayment for work on construction projects. If Division II's decision is not overturned, public entities that use the lease-construction-leaseback method for construction will deprive subcontractors, laborers and material suppliers working on that

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project any meaningful payment security in performing their work. This case, which UW admits is a "test case" for future construction funding across Washington on numerous projects, has substantial public impact that this Court should decide. Review is necessary and vital to ABC's membership. RAP 13.4(b)(4).

B. IDENTITY AND INTEREST OF *AMICI CURIAE*

The contemporaneously filed motion for leave to file this *amicus* memorandum details the identity and interest of *amicus* ABC.

C. STATEMENT OF THE CASE

ABC has nothing to add to the statement of the case already presented by the petitioners in this case and in the Court of Appeals, and thus adopts it for purposes of this memorandum.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

(1) Removing Major Public Projects Like This One from Public Works Laws Harms ABC Members Who Rely on Bond, Retainage, and Lien Rights to Ensure Payment Security

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While Division II's decision mainly addressed public bidding under RCW 28B.10.350,[1] the clear implication of this decision is that a construction project performed pursuant to a lease-construction-leaseback contract with a public entity on public land does not qualify as a "public work" under RCW 39.04.010(4). Op. at 14 ("if the construction is not being done at the cost of the university, then the construction is not for a public work"). That decision *significantly* impacts ABC's members because it undermines important lien, payment bond, and retainage rights on public construction projects that carry these protections under Washington law. Division II's opinion affects high education projects specifically but would also have

[1] "When the cost to The Evergreen State College or any regional or state university of any building, construction, renovation, remodeling, or demolition, other than maintenance or repairs, will equal or exceed the sum of $110,000 … complete plans and specifications for the work shall be prepared, the work shall be put out for public bid, and the contract shall be awarded to the responsible bidder who submits the lowest responsive bid."

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implications for projects involving other public owners across Washington. Division II failed to grasp the broad implications of its decision, which has statewide impact thereby meriting this Court's review. RAP 13.4(b)(4).

Division II's decision is plainly wrong that a project like the multi-million-dollar (and ultimately multi-billion-dollar) redevelopment of UW's Seattle campus is not a public work. "'Public work' means all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality." RCW 39.04.010(4). Even though the lease-construction-leaseback contract here obligates UW to pay millions in lease payments in consideration for construction of the project, the court held that those lease payments are not considered a cost to the public entity for construction of the building. That makes no sense; the construction would not occur but for a multi-million-dollar commitment of public funds, and the public entity will own the

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improvements in fee simple after the leasehold period expires. Division II's opinion is wrong for all the reasons ARE explains in its briefing.

Key for this brief, Division II's decision is also terrible public policy that has statewide implications for public works projects that this Court should correct. RAP 13.4(b)(4). Public work contracts come with important protections, beyond just the public bidding assurance already briefed to this Court. Crucial for ABC members, they include significant lien, payment bond, and retainage rights that ensure subcontractors, laborers, materialmen, and suppliers receive payment for services provided on such projects.

Payment bonds protect vulnerable subcontractors, materialmen, and suppliers, from nonpayment. "Washington law requires general contractors on public works projects to obtain a performance bond from a surety company to ensure that the general contractor 'faithfully perform[s] all the provisions of

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such contract and pay[s] all laborers, mechanics, and subcontractors and material suppliers.'" *Campbell Crane & Rigging Servs., Inc. v. Dynamic Int'l AK, Inc.*, 145 Wn. App. 718, 723, 186 P.3d 1193 (2008) (quoting RCW 39.08.010. "If the contractor fails to pay a subcontractor, this statute provides 'laborers, mechanics, and subcontractors and material suppliers' with a substitute lien action for the work they have performed on public works projects."). *Id.*

Retainage protections are also key. "The public works retainage statute…requires that the contracting public entities retain up to five percent of the payment due to the contractor 'as a trust fund for the protection and payment' of any claims under the contract." *Campbell*, 145 Wn. App. at 723 (quoting RCW 60.28.011(1)). "This statute also allows those 'performing labor or furnishing supplies toward the completion of a public improvement contract' to recover payment by filing a lien action against the retainage." *Id.*

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Finally, while the court's decision means these projects are not "public works" (and thus not subject to payment bond or retainage lien rights), unlike other non-public works construction projects, these projects also deprive subcontractors of their traditional mechanics lien rights. Construction projects performed pursuant to a lease-construction-leaseback contract involving a public entity like UW, are almost always going to construct an improvement upon *public property*. "Washington courts have repeatedly held since 1931 public property cannot be subject to a mechanic's lien." *Est. of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 500, 210 P.3d 308 (2009). "Washington has *never recognized an exception to the rule* that public property is not subject to a mechanic's lien." *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 883-84, 155 P.3d 952 (2007), *aff'd*, 166 Wn.2d 489 (2009) (emphasis added); This Court has recognized that statutory protections are necessary to provide security for workers on public construction

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projects "because…mechanics' and materialmens' liens are not available." *Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 176 Wn.2d 502, 523-24, 296 P.3d 821 (2013) (review granted twice by this Court to review project to construct Seattle Mariners baseball stadium on public land). Accordingly, if the decision is not overturned, subcontractors will not have the right to assert liens against the public property (except perhaps a less sure lien against the leasehold interest) as security for payment, where the project is constructed pursuant to a lease-construction-leaseback contract with a public entity.

Without performance bond and retainage rights that apply to public works construction projects, *or even the ability to lien the public property at issue*, subcontractors, materialmen, and suppliers are vulnerable to nonpayment for work performed on these novel, hybrid, private/public construction projects. This poses an enormous threat to ABC's members if this lease-

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construction-leaseback contract funding arrangement given judicial blessing. UW admits that this is a "test case" no doubt being monitored by public entities of all kinds across the state who will make this a standard practice for funding major construction projects that should come with the protections of other "public works" projects. Review is appropriate under RAP 13.4(b)(4).

(2) Division II's Decision Sets Bad Public Policy by Judicial Decision Alone, Presenting a Substantial Public Question that Warrants Review Under RAP 13.4(b)(4)

Division II's creates a vacuum of protection for ABC members across Washington, contrary to public policy favoring payment security on public construction projects, by judicial action alone, without sufficient legislative thought or support. As ARE wisely points out in its brief, in 2018, the Legislature considered and declined to pass H.B. 2726, an act designed to address "public private partnerships for alternative public works contracts." CP 407-69. The bill would have permitted public

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entities, including educational institutions like UW, to engage in this lease-construction-leaseback contract with private entities. But this bill failed to pass. Clearly, more deliberation is needed to protect all parties with an interest in public construction, including ABCs members who wish to ensure they are protected from nonpayment through well devised bond, retainage, and/or lien protections.

Simply put, Division II's opinion is poor public policy. It waves aside a century's worth of carefully crafted public works laws, beyond just the public bidding aspect already briefed to this Court. This is a case with broad public impact, which fits perfectly within the RAP 13.4(b) criteria for this Court's review and intervention.

E. CONCLUSION

For the reasons stated above, this Court should grant review and reverse.

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This document contains 1,461 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 4th day of March, 2024.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Associated Builders and Contractors of Western Washington Memorandum of Amicus Curiae*** in Supreme Court Cause No. 102713-3 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 4, 2024 at Seattle, Washington.

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