NO. 98318-6

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE CONSTRUCTION, INC.,

Petitioner,

vs.

CITY OF SAMMAMISH, a governmental entity, PORTER BROTHERS CONSTRUCTION, INC., a Washington corporation, HARTFORD FIRE INSURANCE COMPANY, a corporation, and Bond No.52BCSDL1582,

Respondents.

RESPONDENT HARTFORD FIRE INSURANCE COMPANY'S ANSWER TO PETITION FOR REVIEW

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I. Introduction and Relief Requested

Respondent Hartford Fire Insurance Company ("Hartford") files this Answer to Petitioner State Construction, Inc.'s ("State Construction") Petition for Review ("Petition") of the Division I, Court of Appeals' January 13, 2020 unpublished decision ("Opinion"), affirming the trial court's orders granting Hartford's Motion for Summary Judgment and Hartford's Motion for Attorney Fees and Costs. *See* App. No. 1. The Opinion was subsequently published on February 19, 2020. *Id.*

State Construction's Petition is yet another attempt to belatedly cure its failure to timely file its statutory retainage claim within the time period established by RCW 60.28.011(2).[1] Notably, State Construction fails to cite, let alone address, the RAP 13.4(b) criteria governing acceptance of review. Instead, State Construction argues that this Court should grant review because this case presents issues of first impression, requires statutory construction of ambiguous and conflicting laws, and adversely affects due process rights of all construction entities in Washington State. Even if State Construction's assertions were correct, they fail to satisfy any of the conditions warranting acceptance of review under RAP 13.4(b).

[1] State Construction does not seek review of the decision dismissing its payment bond claim under RCW 39.08.030(1)(a). Therefore, Hartford does not address the Court of Appeals' Opinion or the facts regarding that claim. Instead, the Petition focuses solely on State Construction's untimely claim against the retainage and Hartford's award of attorneys' fees.

First, this is not a case of first impression, nor does the Opinion conflict with a decision of the Supreme Court or a published decision of the Court of Appeals. In fact, Washington case law interpreting RCW 60.28.011(2) has long held that "[a] claimant must comply with the requirements of CH 60.28 RCW in order to recover from the retained percentage." *Thompson v. Peninsula Sch. Dist. No. 401*, 77 Wash. App. 500, 505, 892 P.2d 760 (1995); *Shope Enterprises, Inc. v. Kent Sch. Dist.*, 41 Wash. App. 128, 133, 702 P.2d 499 (1985) ("Failure to [follow claim filing procedures] bars recovery against the fund.").

Second, the statute governing State Construction's retainage claim is not ambiguous. RCW 60.28.011(2) clearly requires that a notice of claim against the retainage "must be given within forty-five days of completion of the contract work." State Construction attempts to create ambiguity in RCW 60.28.011(2) where none exists by inserting language from other subsections which the legislature clearly did not intend to be read into RCW 60.28.011(2).

Moreover, for over a century, this Court has repeatedly rejected similar attempts to retroactively challenge the public owner's certification of the date of completion. *Denny-Renton Clay & Coal Co. v. Nat'l Sur. Co.*, 93 Wash. 103, 110, 160 P. 1 (1916) ("a legal acceptance, binding as between the city and the principal contractor, is binding also upon the

materialman."); *Pearson v. Puget Sound Mach. Depot,* 99 Wash. 596, 169 P. 961 (1918); *Seattle Plumbing Supply Co. v. Maryland Cas. Co.,* 151 Wash. 519, 523 – 24, 276 P. 552 (1929) ("The completion of the contract and acceptance of the work… being binding between the board and the contractor was likewise binding upon the [materialman].")

Finally, contrary to State Construction's assertions, the Opinion will not preclude subcontractors and materialmen from being fully compensated on public projects. Contractors have been able to navigate public works lien statutes for nearly a century in Washington without issue. Moreover, nothing in RCW 60.28.011(2) precludes a contractor from filing a notice of lien at any point during the duration of a public works project. Indeed, as the Court of Appeals noted, this is exactly what State Construction could have done, but failed to, in this case. *See* App. No. 1, at pp. 20-21.

In its Petition, State Construction impermissibly seeks to re-write the requirements of RCW 60.28.011(2) in order to remedy its failure to timely file a lien against the statutory retainage. State Construction fails to address any of the conditions for review in RAP 13.4(b), much less explain why such conditions have been satisfied. For that reason, Hartford respectfully requests that the Court deny State Construction's Petition and award Hartford its attorney fees under RAP 18.1(j).

II. Restatement of the Case

A. The Sammamish Community and Aquatic Center Project.

This case arises out of the Sammamish Community and Aquatic Center Project ("Project") located in the City of Sammamish ("City"). Porter Brothers Construction, Inc. ("Porter Brothers"), contracted with the City to serve as the general contractor on the Project and subcontracted with State Construction to perform grading, exaction, and other project site work. (CP 111-117; CP 144; CP 52). Porter Brothers invoiced the City monthly, and when the City paid the invoice, it retained five percent of the funds owed to Porter Brothers, as required by RCW 60.28.011, in a statutory retainage fund. Porter Brothers' subcontract with State Construction similarly allowed it to retain five percent of every progress payment as retainage.

On April 28, 2017, State Construction filed a complaint naming Porter Brothers, the City, and Hartford as defendants. (CP 1). The Complaint asserted three causes of action: (1) breach of contract against Porter Brothers; (2) payment bond claim against Hartford, pursuant to RCW 39.08.030; and (3) retainage fund claim against the City, pursuant to RCW 60.28.030. *Id.*

B. The City Maintained a Retainage Trust Fund Pursuant to RCW 60.28 et seq.

As owner of the Project, the City retained "five percent of the moneys earned by the contractor as a trust fund for the protection and payment of . . . claims of any person arising under the contract." RCW 60.28.011(1). RCW 60.28.030 provides an independent statutory cause of action against the retainage fund for any person, firm, or corporation furnishing materials, supplies, or equipment to the construction project. However, RCW 60.28.011(2) imposes strict notice requirements as an absolute precondition to asserting a cause of action against the retainage fund: the claimant must file a notice of claim "within ***forty-five days of completion*** of the contract work." (emphasis added).

C. The City Certified the Project as Completed on April 1, 2016, and Accepted on February 21, 2017.

The City's only obligation as a statutory party to State Construction's lawsuit was to comply with the requirements of RCW 60.28.030 by certifying the following information to the trial court:

> [T]he name of the contractor; the work contracted to be done; the date of the contract; **the date of completion and final acceptance of the work**; the amount retained; the amount of taxes certified due or to become due to the state; and **all claims filed with it showing respectively the dates of filing**, the names of claimants, and amounts claimed.

(emphasis added). The City fulfilled its statutory obligations by certifying the required information on May 22, 2017 (Certification), August 14, 2017 (Amended Certification), and September 14, 2017 (Second Amended Certification), and January 29, 2018 (Third Amended Certification) (collectively "RCW 60.28.030 Certifications"). (CP 308-332).

As required by RCW 60.28.030, the City certified that: (1) "[t]he date of completion is April 1, 2016"; and (2) "[t]he date of final acceptance is February 21, 2017." (CP 309; CP 322). In addition to the City's statutory certifications, the City's answer to discovery requests confirm that the date of completion was April 1, 2016. For instance, the City's answer to State Construction's Second Set of Interrogatories provides as follows:

> **INTERROGATORY NO. 9:** What was the date of completion of the Contract Work?
>
> **ANSWER:** April 1, 2016.

(CP 345).

D. State Construction's Claim against the Retainage was not Filed within 45 days of Completion.

Pursuant to RCW 60.28.011(2), a notice of claim against the retainage fund "must be [filed] within ***forty-five days of completion*** of the contract work." The City's RCW 60.28.030 Certifications verify that the Project was completed on April 1, 2016." (CP 309; CP 322; CP 335). In addition, the City's answers to State Construction's interrogatories confirm

that the date of completion was April 1, 2016. (CP 345; CP 361). State Construction filed its Notice of Claim on March 27, 2017 – nearly one year after the deadline for filing a notice of claim against the retainage. (CP 314; CP 326; CP 333). Accordingly, State Construction's retainage claim was untimely as matter of law.

E. Procedural History

State Construction completed filing and service of its complaint against Hartford on May 3, 2017. (Sub No. 108, Hartford Supp. CP 539). On August 29, 2017, not less than 30 days and not more than 120 days after completion of filing and service of the Complaint, Hartford served on State Construction an "offer of settlement pursuant to RCW 39.04.240 and RCW 4.84. et seq." (Sub No. 108, Hartford Supp. CP 539). Hartford's settlement offer requested that State Construction dismiss its payment bond and retainage claims no later than September 11, 2017, because they were time-barred. (Sub No. 108, Hartford Supp. CP 539). State Construction ignored and rejected Hartford's offer of settlement, among other requests for it to dismiss its untimely claims.

On January 11, 2018, State Construction filed a motion for summary judgment in which it sought a determination, as a matter of law, that its bond and retainage claims were timely. On January 12, 2018, Hartford filed a

cross motion for summary judgment to dismiss State Construction's bond and retainage claims. (CP 10-50).

On July 19, 2018, the trial court issued an "Order Re: Cross-Motions for Summary Judgment" in which it granted Hartford's motion for summary judgment and held that State Construction's bond and retainage claims were "not timely filed" and "invalid and not enforceable." (CP 508-512). As a result, State Construction recovered nothing on its claims against Hartford's bond or the retainage fund.

The trial court's July 19, 2018 Order declined to award attorney fees and costs to any party "consistent with the American rule, and on this record." (CP 512). However, the trial court did not address (and did not foreclose) either party's entitlement to attorney fees and costs pursuant to Washington's public works fee-shifting statute, RCW 39.04.240, which is an exception to the American Rule and was not before the trial court or part of the record on summary judgment.

On July 19, 2018, in a final effort to minimize the expenditure of fees and costs, Hartford offered to waive its claim for prevailing party attorney fees and costs if State Construction agreed not to pursue any further appeals or litigation. (Sub No. 108, Hartford Supp. CP 540 – 41). On July 25, 2018, State Construction rejected Hartford's offer of settlement and, surprisingly, demanded payment of $100,000.00 within 10 business days.

(Sub No. 108, Hartford Supp. CP 541). In light of State Construction's unreasonable demand, Hartford had no choice but to file a Motion for Attorney Fees and Costs. On November 2, 2018, the trial court granted Hartford's Motion for Attorney's Fees and Costs pursuant to RCW 39.04.240. (CP 532-535).

III. Grounds for Denying Review

State Construction identifies no RAP 13.4(b) grounds warranting review of the Opinion. On this basis, alone, the Court should deny review.

A. The Opinion Correctly Held that State Construction's Retainage Claim was Untimely.

State Construction asserts that the Court of Appeals committed three errors in affirming the dismissal of State Construction's retainage claim. First, State Construction argues that the Court of Appeals "conflated completion of the contract work" with "substantial completion." Petition, at p. 14. Second, State Construction argues that the Court of Appeals improperly looked at the definition of "contract" contained in RCW 39.04.010(2). *Id.*, at p. 15. Third, State Construction argues that the Court of Appeals improperly conflated the payment bond statute and the retainage statute in its analysis. *Id.*

State Construction's analysis of the Opinion is incorrect. The Court of Appeals correctly affirmed the dismissal of State Construction's

retainage claim because it was not filed within 45 days of the date the City certified as the date of "completion of the contract work." *See* App. No. 1, at p. 16. On that point, the Opinion stated the following:

> Hartford contends State Construction's lien was not timely because it was sent almost a year after the date of substantial completion, April 1, 2016, the date the City certified as the date of 'completion of the contract work.' It again argues that the City's certification is legally conclusive and cannot be challenged factually by State Construction. ***We agree. State Construction is bound by the City's determination that the contract work was complete as of April 1, 2016.***

Id. The Opinion affirming the dismissal of State Construction's retainage claim was based upon State Construction's failure to file notice of its lien within the statutorily required period commenced by the City's certifications – certifications which the Court of Appeals and this Court have repeatedly determined are legally conclusive and binding as a matter of law.

Indeed, the Court of Appeals' decision that the City's RCW 60.28.030 certifications are legally conclusive is based upon precedent set by this Court more than 100 years ago. In *Denny-Renton Clay & Coal Co. v. Nat'l Sur. Co.*, 93 Wash. 103, this Court held that engineer's certification was binding upon the contractor and the materialmen. *Id*., at 110. This Court further held that the date certified by the public owner could not be undermined except by evidence of fraud or collusion. *Id*. The plaintiff did

not have evidence of fraud or collusion, and, therefore, the Court concluded that it could not rebut the certified contract completion date. *Id*; *see also* App. No. 1, at pp. 8 – 9.

Similarly, in *Pearson v. Puget Sound Machinery Depot*, 99 Wash. 596, this Court upheld the lower court's determination that a lien claim filed 31 days after the engineer certified completion and the project was accepted was untimely. *Id*., at 597 – 98. The Court reiterated the precedent set by *Denny-Renton*, and held that the engineer's certification and the owner's acceptance were legally binding on the contractor. *Id*., at 599 – 600; *see also* App. No. 1, at p. 9.

State Construction complains that the Court of Appeals improperly referred to "substantial completion" and to the AIA contract between the City and Porter Brothers in its analysis regarding the triggering date from which State Construction had 45 days to file its retainage lien. *See* Petition, at pp. 14 – 15. The Court of Appeals' analysis on that issue, however, was in response to State Construction's reliance on an internet summary of the law and its argument that the triggering date for its retainage claim—the date certified as the "completion of the contract work"—should be the same as the triggering date for its bond claim—the date of final acceptance. *See* App. No. 1, at pp. 16 – 18.

In response to State Construction's argument, the Court of Appeals determined that the public owner could deem the date of completion of the contract work to be the date of final acceptance, but that nothing in the language of the statute mandated that outcome. *See* App. No. 1, at p. 17. That analysis, however, pertains to the owner's discretion in designating the date of completion of the contract work. It does not alter the conclusion that once the owner chooses the date of "completion of the contract work," that date is legally binding upon all potential retainage claimants.

Indeed, the Court of Appeals' final statement regarding State Construction's untimely retainage lien demonstrates that the City's certification, alone, was sufficient grounds to affirm dismissal of State Construction's retainage claim, but even if it were not, State Construction's arguments do not raise a genuine issue of material fact that there should be a different date of completion:

> Even if the City's certification were not legally conclusive, State Construction has not established a genuine issue of material fact that the substantial completion date provided by the City was not the date of 'completion of the contract work' for the purposes of RCW 60.28.011(2). Therefore, the contract work was completed on the Project as of April 1, 2016, and State Construction's notice of lien claim, filed on March 27, 2017, was untimely as it was not filed within the 45 days required by statute.

See App. No. 1, at p. 19.

This Court should deny review of State Construction's untimely retainage claim because it fails to meet any of the criteria set forth in RAP 13.4(b). First, the decision is not in conflict with a decision of this Court or a published decision of the Court of Appeals. Rather, it is based upon a century of precedent set by this Court. Second, the decision does not raise significant constitutional questions, and, importantly, State Construction identifies none. Third, while public construction projects generally involve the public interest, State Construction's individualized harm arising out of its failure to comply with the requirements for filing a retainage claim does not. Contractors and other entities involved in public projects have been able to navigate the statutory requirements for obtaining liens against retainage for over a century. In fact, at least nine other entities properly filed a Notice of Claim against the retainage on this Project prior to the statutory deadline. CP 310 – 15. For all of the reasons set forth above, this Court should deny review.

B. The Opinion Correctly Held that State Construction's Procedural Due Process Rights were Not Violated.

Similar to its arguments regarding the Court of Appeals' analysis of its untimely retainage claim, State Construction fails to address how its procedural due process claim meets any of the criteria for review under RAP

13.4(b). Because the Opinion on this issue was correct, and because none of the RAP 13.4(b) criteria are present, this Court should deny review.

As recognized by the Court of Appeals, State Construction's argument regarding lack of notice ignores the fact that State Construction had multiple ways to protect its interest in the retainage:

> Subcontractors have multiple ways to protect their interest in the retainage fund, including negotiating with the contractor for advance notice of the lien filing deadline, tracking the contractor's progress on the project and requesting records from the public owner as to the status of the contractor's progress, or filing lien claims regularly throughout the project.

App. No. 1, at pp. 20 – 21. Washington law clearly allows a claimant to file a lien prior to the completion of the project. *Airfco, Inc. v. Yelm Cmty. Schs. No. 2*, 52 Wn. App. 230, 232 – 34, 758 P. 2d 996 (1998); *see also Pearson*, 99 Wash. at 598 – 600; *Title Guar. & Sur. Co., v. Coffman, Dobson & Co.*, 97 Wash. 211, 213 – 15, 166 P. 620 (1917). In fact, at least nine other claimants on this Project were able to accomplish just that by filing their lien prior to the completion of the contract work. CP 310 – 315. Lack of notice is not what caused State Construction's untimely notice, it was State Construction's lack of diligence.

Moreover, as it pertains to this Project, there is no statutory or other legal requirement that the public owner notify subcontractors or

materialmen of the claim filing deadlines. In fact, this Court has expressly rejected this exact argument:

> The certificate of the engineer in charge of the work and the resolution accepting the work were public records, open to the appellant and all other materialmen. **It was their duty to know those records and to file their claims for material and labor within the time limit of 30 days.** Not having done so, it is inconceivable how they can now be heard to say that there was fraud or arbitrary action when the records were open to them.

Pearson, 99 Wash. at 600.

Further, State Construction's reliance on RCW 60.28.011(11) is misplaced and would require the Court to ignore the first sentence of the subsection—a sentence that State Construction conveniently omitted from its Petition:

> [RCW 60.28.011(11)] applies only to a public body that has contracted for the construction of a facility using the general contractor/construction manager procedure, as defined under RCW 39.10.210.

RCW 60.28.011(11). There is no evidence that this Project was contracted using the general contractor/construction manager procedure. That specific procedure separates the project into two phases—design and construction—and for that reason specifically requires notice of completed work during the first half of the project. As clearly stated in that subsection, it is not applicable to public works projects in general.

Thus, under the well-established body of Washington law governing public works projects, it was State Construction's duty to know of the claim filing deadlines and to avail itself of its right to file its notice of claim at any point during the Project to ensure that its retainage claim was timely filed. State Construction's thinly veiled arguments regarding due process rely on its misstatements of the notice requirements of RCW 60.28.011(11), and ignore the fact that State Construction had numerous procedural mechanisms available to provide timely notice of its lien. Because State Construction has nobody but itself to blame for its failure to timely file its lien, this Court should deny review.

C. The Opinion Correctly Affirmed the Trial Court's Award of Attorneys' Fees to Hartford.

State Construction misleadingly asserts that the Court of Appeals "erroneously ruled that RCW 39.04.240 'supersedes' RCW 60.28.030 and 39.08.030(1)…." Petition, at p. 19. This statement is patently false. In actuality, State Construction (not the Court of Appeals) argued that RCW 60.28.030 and RCW 39.08.030(1) supersede RCW 39.04.240. *See* App. No. 1, at pp. 27 – 28.

In addressing State Construction's argument, the Court of Appeals noted that "RCW 39.04.240 provides that the provisions of RCW 4.84.250 through .280 "shall apply to an action arising out of a public works contact

in which the state or a municipality… is a party." *See* App. No. 1, at p. 27. The Court of Appeals then stated as follows:

> The mandatory language of RCW 39.04.240 undermines State Construction's suggestion that the legislature intended RCW 60.28.030 and RCW 39.08.030(1)(b) to supersede it. We therefore conclude that RCW 60.28.030 and RCW 39.08.030(1) do not supersede RCW 39.04.240.

Id., at pp. 27 – 28.

Beyond mischaracterizing the Opinion regarding RCW 39.04.240, State Construction makes the conclusory statement that the Court of Appeals' decision upholding Hartford's attorney fee award is in conflict with *Better Fin. Solutions, Inc. v. Caicos Corp.*, 117 Wn. App. 899 73 P.3d 424 (2003). *See* Petition, at pp. 19 – 20. State Construction is again incorrect, and its one-sentence *analysis* of this point is telling.

In fact, *Better Fin. Sols.* did not address the applicability of RCW 39.04.240 within the context of bond and retainage claims; rather, it merely held that the prevailing party attorney fee clauses in RCW 39.08.030 and RCW 60.28.030 are limited by their express terms to "the claimant" and do not provide for an award of fees to the defendant. *Better Fin. Sols.*, 117 Wash. App., at 913. Hartford agrees that neither RCW 39.08.030 nor RCW 60.28.030 provide a statutory basis for an award of attorney fees to a prevailing party defendant. That is precisely why Hartford, the trial court,

and the Court of Appeals correctly relied upon RCW 39.04.240 as the statutory basis for the attorney fee award.

Contrary to State Construction's misleading citation of *Better Fin. Sols*, numerous Washington federal courts have held that RCW 39.040.240 entitles a prevailing surety to recover its attorney fees and costs when it successfully defeats a bond or retainage claim. For instance, both *Puget Sound Elec. Workers Health & Welfare Tr. v. Lighthouse Elec. Grp.,* No. C12-276 RAJ, 2014 WL 2619921 (W.D. Wash. June 12, 2014) and *Carpenters Health & Sec. Tr. of W. Washington v. Paramount Scaffold, No*. 12-1252-RSM, 2013 WL 12237750 (W.D. Wash. Sept. 25, 2013)[2], awarded attorney fees and costs to the prevailing surety, pursuant to RCW 39.04.240, following dismissal of the claimants' bond and retainage claims.

The above-referenced cases illustrate that RCW 39.04.240 is a viable and appropriate basis upon which to award attorney fees and costs to a successful defendant on bond and retainage claims. Furthermore, these cases illustrate that RCW 39.08.030 and RCW 60.28.030 are not the

[2] WA GR 14(b) provides that a party may cite unpublished opinions from other jurisdictions "only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court." The local rules for the Western District of Washington do not expressly prohibit the citation of unpublished opinions. In the federal context, Fed. R. App. P. 32.1 dictates that a court "may not prohibit or restrict the citation of federal judicial opinions." Applying this analogous rule, citation of the foregoing unpublished federal decisions is permitted. In any event, Hartford does not allege that they constitute binding precedent, but cite them for their factual and legal similarities and persuasive value. Copies of the foregoing unpublished federal decisions are attached as an appendix hereto.

exclusive means for recovery of fees and costs, as both *Puget Sound Elec. Workers Health & Welfare Tr. v. Lighthouse Elec. Grp.* and *Carpenters Health & Sec. Tr. of W. Washington v. Paramount Scaffold* involved claims under RCW 39.08.030 and RCW 60.28.030, yet awarded fees under RCW 39.04.240. Indeed, this Court has previously held that alternative fee remedies, including RCW 39.04.240, may exist in the context of public works projects. *King Cty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV,* 188 Wash. 2d 618, 629, 398 P.3d 1093 (2017). The Court of Appeals' decision to enforce the mandatory language of RCW 39.04.240 by awarding fees and costs to Hartford is not grounds for review. *See* App. No. 1, p. 27.

IV. Hartford is entitled to RAP 18.1(j) fees.

The Court of Appeals affirmed the trial court's award of Hartford's attorney fees pursuant to RCW 39.04.240. Furthermore, because Hartford was the prevailing party on appeal, the Court of Appeals awarded Hartford its attorney fees and costs pursuant to RAP 14.2 and RAP 18.1. For the foregoing reasons, this Court should award Hartford attorney fees pursuant to RAP 18.1(j).

V. Conclusion

State Construction once again seeks to retroactively remedy its failure to timely file its retainage claims and its decision to reject Hartford's

offer of settlement under RCW 39.04.240. However, in doing so, State Construction completely ignores the criteria which govern this Court's decision to accept review. Indeed, this case satisfies none of the criteria in RAP 13.4(b).

Rather, in affirming the trial court's dismissal of State Construction's retainage claim, the Court of Appeals simply applied the precedent set by this Court over 100 years ago. That precedent remains good law, and Hartford requests that the Court deny State Construction's attempts to circumvent the legislature and re-write RCW 60.28.011(2) to remedy State Construction's failure to follow the lien procedures.

The Court of Appeals' decision affirming Hartford's attorney fee award under RCW 39.04.240 also does not meet the criteria for review under RAP 13.4(b). There is no Washington law holding that RCW 39.08.030 and RCW 60.28.030 supersede the mandatory alternative fee remedies under RCW 39.04.240, and State Construction makes no persuasive argument Court to set such precedent. The position in which State Construction finds itself is completely of its own making. This Court should not entertain State Construction's attempt to re-write the law to fix its individualized mistakes. For those reasons, Hartford respectfully requests that this Court deny State Construction's Petition for Review.

DATED this 17th day of April, 2020.

WILLIAMS KASTNER & GIBBS, PLLC

By /s/ Paul K. Friedrich_____
Alexander Friedrich, WSBA # 6144
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Attorneys for Respondent
Hartford Fire Insurance Company

DECLARATION OF SERVICE

Vanessa L. Stoneburner declares:

On April 17th, 2020, I emailed a copy of the foregoing document to:

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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.

EXECUTED THIS 17th day of April, 2020, at Seattle, Washington.

/s/ Vanessa Stoneburner
Vanessa Stoneburner

INDEX TO APPENDIX
INCLUDING UNPUBLISHED DECISIONS
PURSUANT TO WA GENERAL RULE 14(B)

No.

HARTFORD APPENDIX NO. 1

FILED
1/13/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE CONSTRUCTION, INC., a Washington Corporation, Appellant, v. CITY OF SAMMAMISH, a governmental entity, PORTER BROTHERS CONSTRUCTION, INC., a Washington Corporation, Defendants, HARTFORD FIRE INSURANCE COMPANY, a corporation, Bond No. 52BCSDL1582, Respondent.	No. 78753-5-I DIVISION ONE PUBLISHED OPINION FILED: January 13, 2020

ANDRUS, J. — State Construction, Inc., a subcontractor on a public works project, challenges the dismissal of its lien and bond claims. Because its claims were untimely, we affirm.

FACTS

In May 2014, Porter Brothers Construction, Inc. contracted with the City of Sammamish (City) to construct the Sammamish Community & Aquatic Center (the

Project).[1] The City and Porter Brothers entered into an American Institute of Architects Standard Form Agreement between Owner and Contractor (AIA Agreement). Under this agreement, Porter Brothers invoiced the City monthly, and when the City paid the invoice, it retained five percent of the funds owed to Porter Brothers, as required by RCW 60.28.011.[2] A retainage fund totaling $1,351,472 is now on deposit in an escrow account at Heritage Bank pursuant to a retainage agreement between Porter Brothers and the City.

Porter Brothers subcontracted with State Construction on June 10, 2014, to perform certain excavation and utilities work. State Construction began this work shortly thereafter.

Porter Brothers also obtained a payment and performance bond[3] for the value of the Project, $28 million, from Hartford Fire Insurance Company. On October 12, 2015, Hartford filed a Uniform Commercial Code (UCC) financing statement against Porter Brothers, attaching, as collateral for debts owed to Hartford, Porter Brothers' interest in any payments due to the contractor, including monies to which it might be entitled from retainage funds.

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[1] The Project involved the construction of a 69,000 square foot building with a 6-lane, 25-yard lap pool and other spaces, a parking structure and surface parking lot, and an access loop road.

[2] RCW 60.28.011(1)(a) required the City to hold back a contract retainage not to exceed five percent of the moneys earned by the contractor and to deposit the retained funds into a trust fund for the protection and payment of claims and state taxes and penalties. This is commonly referred to as a retainage fund.

[3] RCW 39.08.010(1)(a) provides that on public improvement projects, contractors must post a performance and payment bond to ensure that they have the financial ability to perform all provisions of the contract; to pay all laborers, mechanics, subcontractors, and material suppliers; and to pay all state taxes, increases, and penalties. Contractor bonds guarantee that the contractor will perform the contract and will pay bills for labor and materials for which it contracts. 11 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE 3D, § 163:10 (2005). If the contractor defaults, the surety agrees to pay an owner's damages up to the limit of the bond and to pay claims of unpaid subcontractors and suppliers. Id.

Porter Brothers subsequently executed multiple "Irrevocable Assignment" documents, in which it assigned to Hartford any right to payment it had on several outstanding projects, including this Project. The assignment at issue here, executed November 3, 2015, included the right to receive any portion of the retainage funds held by the City:

> FOR VALUE RECEIVED, the undersigned, Porter Brothers Construction, Inc., . . . hereby irrevocably assigns, transfers and sets over to Hartford Fire Insurance Company . . . all Contract Funds of any nature, including, but not limited to, progress payments, earned or unearned funds, change orders, extras, claims of any nature, retainages, with all the interest accruing thereon, and whether said Contract Funds are due now or in the future under the . . . contract [for the Project].

The City determined that the Project was "substantially complete" on April 1, 2016.[4] The building was operational at that point and, according to the City, punch list items[5] were completed thereafter. State Construction completed punch list items in June 2016.

At some point around this time, Porter Brothers experienced financial difficulty and notified the City it was abandoning the contract because it was unable to complete the work. After Porter Brothers' voluntary default, Hartford stepped in

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[4] Although the record does not contain a complete copy of the City's AIA Agreement with Porter Brothers, they executed the AIA Standard Form of Agreement Between Owner and Contractor, Document A101-2007, which, in section 9.1.2, incorporated by reference AIA Document A201-2007, General Conditions of the Contract for Construction (General Conditions). Under paragraph 9.8.1 of the General Conditions, "substantial completion" is defined as "the stage in the progress of the Work when the Work . . . is sufficiently complete . . . so that the Owner can occupy or utilize the Work for its intended use." WERNER SABO, LEGAL GUIDE TO AIA DOCUMENTS § 4.56 SUBSTANTIAL COMPLETION: ¶ 9.8, at ¶ 9.8.1 (6th ed. 2019); see also 1 JONATHAN J. SWEET, SWEET ON CONSTRUCTION INDUSTRY CONTRACTS: MAJOR AIA DOCUMENTS § 15.14, at 627-28 (5th ed. 2009).

[5] Under paragraph 9.8.2 of the General Conditions, when the contractor considers the work substantially complete, the contractor submits a list of items needing to be corrected before final payment. LEGAL GUIDE TO AIA DOCUMENTS § 4.56 SUBSTANTIAL COMPLETION: ¶ 9.8, at ¶ 9.8.2. This list is known as the punch list. SWEET ON CONSTRUCTION INDUSTRY CONTRACTS: MAJOR AIA DOCUMENTS § 15.14, at 628.

and paid certain debts, including monies owed to union trust funds for employee fringe benefits and dues, and materials and supplies furnished by various companies.

The City stated in discovery that landscaping work was completed on August 31, 2016. The landscaping subcontractor testified that it completed its punch list work in November 2016. The City received as-built drawings on January 13, 2017. Porter Brothers indicated that the last subcontractor to perform services on the Project was Milne Electric, which completed its work on January 19, 2017. In discovery, the City stated that "Porter Brothers, by and through its subcontractors, was performing work under the contract through February 2017, of which the City has no[] specific knowledge. After February 21, 2017, warranty work was completed."[6]

On February 21, 2017, the City's council passed a resolution recognizing the "[P]roject was substantially completed by the contractor on April 1, 2016," accepting the Project as officially complete, and authorizing the contract closure process. The City filed a notice of completion with the state agencies, pursuant to RWC 60.28.051, on April 13, 2017, listing the "Date Work Completed" as "4/1/2016," and the "Date Work Accepted" as "2/21/2017."

On March 27, 2017, State Construction filed with the City a notice of a lien claim against the retainage fund and notified Hartford of its claim against the bond

[6] The General Conditions contains an express warranty that the work will be free from defects and conform to the design documents. LEGAL GUIDE TO AIA DOCUMENTS § 4.17 WARRANTY: ¶ 3.5. The warranty period runs for one year after substantial completion of the contract. Id. at § 4.70 CORRECTION OF WORK: ¶ 12.2, at ¶ 12.2.2.1; see also Patrick J. O'Connor, Jr., *Warranties, Guarantees, and Correction Remedies under the AIA Document A201 (1997)*, Constr. Law. 19, 24 (1998). Any work a contractor must perform to correct deficiencies is known in the construction industry as "warranty work."

for $250,462.27. State Construction later amended its claim against the retainage fund to $199,205.66 and claimed to be owed another $7,295.16 on unpaid invoices.

On April 28, 2017, State Construction filed suit against the City, Porter Brothers, and Hartford. State Construction sought to foreclose on its lien against the retainage fund, to collect the amounts it was owed from Hartford's bond or from the City, and to obtain a judgment against Porter Brothers for the amount owed under its subcontract.

In March 2018, Porter Brothers stipulated to the entry of judgment against it in favor of State Construction, in the amount of $199,205.66.[7]

In May 2018, State Construction and Hartford filed cross-motions for summary judgment. State Construction sought judgment against Hartford and the City for $199,205.66, or an order requiring Hartford to pay State Construction's lien from the retainage fund. Hartford contended the claims were time barred under RCW 39.08.030 and RCW 60.28.011(2).

The trial court dismissed State Construction's claims against the City. It further granted summary judgment for Hartford, concluding that while the retainage fund "is a statutorily authorized trust and may not be assigned to the general contractor's creditors," State Construction's lien claim was not timely filed and, as a result, was not enforceable against the retainage fund. The order did not separately address State Construction's claim against Hartford's bond but dismissed all claims against Hartford.

[7] State Construction waived its claim to $7,295.16 in unpaid bills.

The trial court awarded $20,012.21 in attorney fees to Hartford under RCW 39.04.240. State Construction appeals.

ANALYSIS

State Construction contends the trial court erred in concluding that its lien claims against Hartford's bond and the retainage fund were time barred. State Construction also maintains that if the notices were untimely, it resulted from the City's failure to notify it of the date of substantial completion, in violation of due process.

State Construction alternatively argues that even if its lien claims are untimely, it is still entitled to be paid out of the retainage fund because Porter Brothers unlawfully assigned the retainage funds to Hartford, and its stipulated judgment against Porter Brothers is a valid lien against any funds to which Porter Brothers is otherwise entitled. Finally, State Construction contends the trial court erred by awarding Hartford attorney fees.

A. Standard of Review

We review summary judgment orders de novo, performing the same inquiry as the trial court. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004). A court may grant summary judgment if the evidence, viewed in a light most favorable to the nonmoving party, establishes there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); Hisle, 151 Wn.2d at 861.

B. State Construction's Bond and Retainage Claims

1. RCW 39.08.030—Performance Bond

State Construction first contends the trial court erred in dismissing its claim against Hartford's performance bond. It argues that its notice was timely under RCW 39.08.030(1)(a). We disagree.

Subcontractors may bring a claim against a performance bond for any completed work, but

> such persons do not have any right of action on such bond for any sum whatever, unless within [30] days from and after the completion of the contract with an acceptance of the work by the affirmative action of the . . . city . . . , the . . . subcontractor . . . must present to and file with such . . . city . . . a notice in writing [in a form set out in the statute].

RCW 39.08.030(1)(a).

The City passed a resolution on February 21, 2017, accepting the Project as complete as of that date. State Construction concedes that the City "accept[ed] the Project as complete," as required by the statute, on February 21, 2017. It further concedes that it filed its lien claim notice with the City 34 days after the date of acceptance. It argues, however, that its notice should be considered timely because the statute requires both "completion of the contract" and "acceptance of the work" to occur before the 30-day deadline is triggered. It contends there are questions of fact as to whether contract completion occurred before or after February 21, 2017.

Hartford contends that the City's certification of the date of completion and acceptance is legally conclusive and that State Construction cannot factually

challenge the certification.[8] When a subcontractor initiates a lien foreclosure action, rather than file an answer, a public owner certifies

> the name of the contractor; the work contracted to be done; the date of the contract; the date of completion and final acceptance of the work; the amount retained; the amount of taxes certified due or to become due to the state; and all claims filed with it showing respectively the dates of filing, the names of claimants, and amounts claimed.

RCW 60.28.030 (emphasis added).

The City initially certified the date of completion to be the same date as the date of final acceptance—February 21, 2017. But the City amended its certification to distinguish between the "date of completion" and the "date of final acceptance." In its amended filings, the City certified the date of completion as April 1, 2016—the date it identified as the date of substantial completion under the contract.

RCW 60.28.030 does not explicitly provide that a certification is conclusive proof of the date of contract completion under either the bond or retainage statute. The Washington Supreme Court, however, considered a similar argument in Denny-Renton Clay & Coal Co. v. National Surety Co., 93 Wash. 103, 160 P. 1 (1916),[9] and Pearson v. Puget Sound Machinery Depot, 99 Wash. 596, 169 P. 961 (1918). In Denny-Renton, the plaintiff supplied bricks for a street improvement project in Wenatchee. 93 Wash. at 104. The engineer certified the work as complete on November 25, 1913, even though there remained "cleanup work" to

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[8] A "conclusive presumption," or "irrebuttable presumption," is "[a] presumption that cannot be overcome by any additional evidence or argument because it is accepted as irrefutable proof that establishes a fact beyond dispute." BLACK'S LAW DICTIONARY 1435 (11th ed. 2019).

[9] Superseded by statute, LAWS OF 1915, ch. 28, § 2 (requiring affirmative action of a public body to effectuate acceptance), as recognized in Nat'l Blower & Sheet Metal Co. v. Am. Sur. Co. of N.Y., 41 Wn.2d 260, 264, 248 P.2d 547 (1952).

be completed, including the removal of unused bricks and tarpaulins and sand from the pavement. Id. at 107-08.

The Court held that the engineer's certification constituted the city's legal acceptance and that this acceptance was binding on the contractor and the brick supplier. Id. at 110. It held that "[t]he fact that the 'cleanup work' was done after the engineer certified that the work was [100 percent] completed [wa]s immaterial." Id. The date certified by the public owner could not be undermined except by evidence of fraud or collusion on the part of the owner or its agent. Id. Because the plaintiff had no evidence of fraud or collusion, the Court concluded it could not rebut the certified contract completion date. Id.

Similarly, in Pearson, a subcontractor filed a claim against a surety bond on a Port of Seattle construction project 31 days after the Port engineer certified the building complete and the Port, by resolution, accepted it. 99 Wash. at 598. The Court deemed the bond claim untimely because the subcontractor had no evidence that the engineer concealed the certificate of completion and both the certificate and the Port's resolution accepting the work were public records. Id. at 599. Quoting Denny-Renton, the Court reiterated that the engineer's certificate and the Port's resolution of acceptance were legally binding on the subcontractor. Id. at 599-600.

Under Denny-Renton and Pearson, a public owner's resolution—deeming the project complete and accepting the project—is legally conclusive absent evidence of fraud or collusion by the public owner in the certification or acceptance process. We have seen no evidence of any fraud or collusion here. State Construction's evidence regarding work activities undertaken after April 1, 2016 is

thus immaterial and insufficient to preclude entry of summary judgment. See Jacobsen v. City of Seattle, 98 Wn.2d 668, 671, 658 P.2d 653 (1983) (disputes over immaterial facts are not a bar to summary judgment). We conclude that the City's formal resolution accepting the Project as complete is legally conclusive and triggered the bond claim filing deadline of RCW 39.08.030.[10]

Nevertheless, State Construction contends that the City's resolution, on its face, demonstrates that the contract was not complete because it authorized the deputy city manager to take steps "to complete the contract closure process." One of the key steps to closing out a public works contract, it maintains, is the filing of a "Notice of Completion of Public Works Contract" with the State, as required by RCW 60.28.051.[11] State Construction argues the City filed this notice on April 13, 2017, and that the "completion of the contract" for purposes of the bond lien statute did not occur until then.

The meaning of a statute is a question of law reviewed de novo. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Our primary

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[10] For this reason, we reject State Construction's argument that work still in progress in 2016 and 2017 creates a genuine issue of material fact. Moreover, State Construction's punch list argument appears contrary to the language in the City's AIA Agreement with Porter Brothers. Paragraph 5.2.1.1 provided that the City would issue final payment to Porter Brothers after Porter Brothers fully performed the contract, "except for the Contractor's responsibility to correct Work." This provision demonstrates that the parties had agreed that "full performance of the contract" did not include punch list work. The bond statute does not preclude a public owner from accepting a contract as complete before all punch list work has been finished. See Seattle Plumbing Supply Co. v. Md. Cas. Co., 151 Wash. 519, 521-22, 276 P. 552 (1929) (school board's acceptance of project as complete, "subject to terms as to repair of any defective work discovered within a year . . . and subject to all necessary clean-up work," is complete for purposes of bond claim); Nat'l Blower & Sheet Metal Co., 41 Wn.2d at 267 (clarifying that Seattle Plumbing "hold[s] squarely that an acceptance subject to necessary clean-up work does not make the acceptance conditional").

[11] Under RCW 60.28.051, the public owner must notify various state agencies when a contract is completed and cannot release any of the retained funds until the state agencies certify that all taxes or any other money owed to the state by the contractor have been paid or can be paid without recourse to the state's lien on the retained percentage.

duty in interpreting a statute is to discern and implement the legislature's intent. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Statutory interpretation begins with the statute's plain meaning. Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

Well-established rules of statutory construction lead us to conclude that the phrase "completion of the contract" refers to completion of the contract by the contractor, not by the public owner. Had the legislature used the language "completion of the contract and acceptance of the work by the public owner," we might conclude that the prepositional phrase "by the public owner" modifies both preceding phrases. But the legislature did not use this language. Instead, it used the phrase "completion of the contract with an acceptance of the work by the affirmative action of the [public owner]." RCW 39.08.030 (emphasis added). Under the last antecedent rule of statutory construction, courts construe the final qualifying words and phrases in a sentence to refer to the last antecedent unless a contrary intent appears in a statute. Eyman v. Wyman, 191 Wn.2d 581, 599, 424 P.3d 1183 (2018). Thus, under this rule, the prepositional phrase "by the affirmative action of [the public owner]" modifies only "acceptance of the work," and not the phrase "completion of the contract."

State Construction also relies on the fact that RCW 39.08.030 refers to "completion of the contract" while the language used in the retainage lien statute, RCW 60.28.011(2), refers to "completion of the contract work." It argues that because the legislature used different language in the two statutes, it must have intended different meanings. It maintains that the omission of the word "work" after "contract" in RCW 39.08.030 means that the City's post-acceptance activities can

delay the trigger date for bond claims.

But we find no material difference between "completion of the contract" and "completion of the contract work" as those phrases are used in the bond and retainage lien claim statutes. Although chapter 39.08 RCW does not contain definitions, a related public works statute—chapter 39.04 RCW—does. The definitions in this related statute provide context for evaluating State Construction's arguments here. See Lake, 169 Wn.2d at 526 (courts discern plain meaning from the ordinary meaning of the language at issue, the statute's context, related provisions, and the statutory scheme as a whole).

RCW 39.04.010(2) defines "contract" to mean "a contract in writing for the execution of public work for a fixed or determinable amount duly awarded after advertisement and competitive bid." The term "public work" is defined as "all work, construction, alteration, repair, or improvement . . . executed at the cost of the state or of any municipality." RCW 39.04.010(4). The focus of these definitions is clearly on the physical execution of construction activities performed by a contractor, not administrative activities performed by the public owner.

Furthermore, State Construction has not identified any authority for the proposition that "completion of the contract" as used in RCW 39.08.030(1)(a) occurs only after a public owner completes its internal administrative closure process or files a notice of completion required by RCW 60.28.051. Where a party fails to cite to relevant authority, we generally presume that the party found none. Edmonds Shopping Cen. Assocs. v. City of Edmonds, 117 Wn. App. 344, 353, 71 P.3d 233 (2003).

State Construction's argument is also unsupported by the City's AIA

Agreement with Porter Brothers. Article 3 refers to the dates of commencement, substantial completion, and final completion of "the Work." And article 5 ties final payment to when "the Contractor has fully performed the Contract." The parties appear to have treated completion of the contract to equate to completion of the contract work by Porter Brothers.

We agree with State Construction that the use of the preposition "with" to link the two events (contract completion and acceptance of work) means that the bond claim filing deadline does not trigger until both events occur. But the City's AIA Agreement with Porter Brothers did not permit it to accept the contractor's work before Porter Brothers completed it. Paragraph 5.2 of the AIA Agreement provided that the City would not make final payment of "the entire unpaid balance of the Contract Sum" to the contractor until "the Contractor has fully performed the Contract" and "Final Acceptance has occurred." The contract itself indicates the City would not accept the work until Porter Brothers had fully performed the contract.[12]

Our construction of the bond lien statute is consistent with the historical understanding of its requirements. As Hartford persuasively contends, the construction industry and our courts have long understood the deadline for a claim against a bond to coincide with the public owner's acceptance of the work. See Seattle Plumbing Supply Co. v. Md. Cas. Co., 151 Wash. 519, 522, 276 P. 552

[12] Acceptance has significant ramifications for a project owner. The owner is acknowledging that the work conforms to the applicable contract quality and quantity requirements and that title and risk of loss pass from the contractor to the owner. 4A BRUNER & O'CONNOR ON CONSTRUCTION LAW § 13:58 (2019 Update). Moreover, acceptance is generally the commencement of any warranty period set out in the contract. Id. State Construction's suggestion that the City issued a final acceptance before Porter Brothers fully performed its contractual obligations is not supported by the record.

(1929) (materialmen's notice of claim, filed more than 30 days after school board accepted contract as complete, was deemed untimely); Pearson, 99 Wash. at 600 (materialman's claim against bond deemed untimely when filed 31 days after port commission passed resolution accepting warehouse as completed); C-Star Concrete Corp. v. Hawaiian Ins. & Guar. Co., 8 Wn. App. 872, 874, 509 P.2d 758 (1973) (filing period runs 30 days after acceptance of work).

Finally, State Construction asks the court to conclude that it "substantially complied" with the bond statute by filing a lien claim 34 days—rather than 30 days—after the City's acceptance of the Project. This argument runs contrary to well-established law that a person claiming the benefits of a statutory lien must demonstrate strict compliance with the time deadline in the statute. Kinskie v. Capstin, 44 Wn. App. 462, 464, 722 P.2d 876 (1986); see also Shope Enters., Inc. v. Kent Sch. Dist., 41 Wn. App. 128, 131, 702 P.2d 499 (1985) (courts strictly construe time deadlines in lien statutes).

> A party asserting substantial compliance must demonstrate:
>
> (1) that some notice must be filed with the proper body; (2) that it must be filed within at least [30] days from the completion of the contract and acceptance of the work; (3) that there must be some identification of the bond, surety, and work; and (4) that there must be some notice of an intent to claim against the bond.

Foremost-McKesson Sys. Div. of Foremost-McKesson, Inc. v. Nevis, 8 Wn. App. 300, 303-04, 505 P.2d 1284 (1973) (quoting Fid. & Deposit Co. of Md. v. Herbert H. Conway, Inc., 14 Wn.2d 551, 558, 128 P.2d 764 (1942)). A subcontractor cannot establish substantial compliance if it failed to meet the 30-day deadline.

Keller Supply Co., Inc. v. Lydig Construction Co., Inc., 57 Wn. App. 594, 789 P.2d 788 (1990), on which State Construction relies, does not provide

otherwise. In Keller, a plumbing materials supplier sent a timely preclaim lien notice to a project owner. Id. at 596, 599. The only alleged deficiency in the notice was the failure to state specifically that the supplier would look to the contractor's bond or retainage for any claim in the case of nonpayment. Id. at 596, 598. This court deemed the form of the notice substantially complied with the statute because it identified the job for which Keller supplied materials and specifically stated that Keller intended to claim a lien if it was not paid. Id. at 599-600.

But Keller's holding—relating to the form of a notice—has never been extended to resuscitate an untimely notice. To the contrary, in Pearson, the Supreme Court held that a subcontractor's bond claim, filed 31 days after the port commission certified a building as complete and accepted it, was one day late and thus untimely. 99 Wash. at 598-600. Pearson remains good law.

State Construction was required to file its bond claim no later than March 23, 2017. The City did not receive it until four days later. As a result, State Construction's right to assert a claim against the performance bond under RCW 39.08.030 expired, and the trial court properly dismissed its claim against the bond.

2. RCW 60.28.011(2)—Retainage Fund

State Construction makes similar arguments regarding its retainage fund claim. If a contractor fails to pay a subcontractor, the subcontractor may seek recovery directly from the retainage fund according to a specific statutory procedure:

> Every person performing labor or furnishing supplies toward the completion of a public improvement contract has a lien upon moneys reserved by a public body under the provisions of a public

> improvement contract. However, the notice of the lien of the claimant must be given within [45] days of completion of the contract work, and in the manner provided in RCW 39.08.030.

RCW 60.28.011(2). The timeliness of State Construction's retainage lien claim thus depends on whether it served notice on the City within 45 days of the "completion of the contract work."

Hartford contends State Construction's lien was not timely filed because it was sent almost a year after the date of substantial completion, April 1, 2016, the date the City certified as the date of "completion of the contract work." It again argues the City's certification is legally conclusive and cannot be challenged factually by State Construction. We agree. State Construction is bound by the City's determination that the contract work was complete as of April 1, 2016.

State Construction argues, however, that the statute does not set as the trigger date the date of "substantial completion of the contract work," and Hartford is impermissibly injecting a word into the statute that does not exist. It also contends the trigger date for filing a retainage fund lien claim should be the same as the trigger date for filing a bond lien claim—February 21, 2017. To support this argument, State Construction submitted a publication from the Municipal Research and Services Center (MRSC), a non-profit organization that helps local governments in Washington serve their citizens "by providing legal and policy guidance on any topic."[13] State Construction's President, Phuong Busselle, testified that she relied on this publication in closing out some of the company's public works contracts. In the MRSC overview of "required steps that local

[13] About MRSC, MRSC: LOCAL GOVERNMENT SUCCESS, http://mrsc.org/Home/About-MRSC.aspx.

governments in Washington State must take to officially complete a public works contract," it provides the following "Practice Tip:"

> The contract documents should clarify that for the purposes of the retainage statute (RCW 60.28.011), "completion of all contract work" is the same as "date of final acceptance" in the performance and payment bond statute (RCW 39.08.010). This means that the trigger date for retainage release will be the same as the trigger date for filing claims.

The problem with relying on an Internet summary of the law, however, is that it may be incorrect. The retainage statute does not refer to "completion of all contract work." It merely states "completion of the contract work." While the retainage statute may allow a local government to contractually deem the date of "completion of the contract work" to be the date of final acceptance, rather than the date of substantial completion, we find nothing in the language of the statute mandating that outcome.[14]

Indeed, the general conditions of a construction contract often define what constitutes completion of the contract work. See ROBERT L. OLSON, Payment, in WASH. STATE BAR ASS'N, WASHINGTON CONSTRUCTION LAW DESKBOOK § 10.3(2)(c), at 10-11 (2019). It appears well-established that parties may contractually select as the date of completion of the work either the date of substantial completion or the date of final completion. 5 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 15:14 (2019 Update). But

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[14] We similarly reject State Construction's argument that the date of "completion of the contract work" should be the date the City filed its Notice of Completion with the state agencies under RCW 60.28.051. This argument would require us to import words into the statute that do not exist. RCW 60.28.011(2) makes no reference to the date the owner notifies state agencies of the completion of the contract work. Our rules of statutory construction prohibit reading additional words into a statute. Densley v. Dep't of Ret. Sys., 162 Wn.2d 210, 219, 173 P.3d 885 (2007). The date the City filed a statutorily required Notice of Completion is not the date that triggered the 45-day deadline.

> [u]nless otherwise defined by the contract to mean "final completion[,]" the date on which the work is 100 [percent] complete, "completion" ordinarily is understood to mean "substantial completion"—the date on which all material elements of the work are sufficiently complete in conformance with the contract so that the owner can use the work for its intended purpose.

Id. at § 15:15 (emphasis added).

Furthermore, under paragraph 9.8.4 of the General Conditions, the City's architect was required to inspect the work and issue a "Certificate of Substantial Completion." WERNER SABO, LEGAL GUIDE TO AIA DOCUMENTS § 4.56 SUBSTANTIAL COMPLETION: ¶ 9.8, at ¶ 9.8.4 (6th ed. 2019). This certificate would have established the date of substantial completion and started the warranty period. Id. "Final completion" would only have occurred after the contractor notified the owner that all the work was ready for final inspection, the architect inspected the work and deemed it acceptable under the contract documents, and the architect issued a certificate for final payment. Id. at § 4.58 FINAL COMPLETION AND FINAL PAYMENT: ¶ 9.10, at ¶ 9.10.1.

Although we have no certificate of substantial completion in the record before us, State Construction does not challenge that, as of April 1, 2016, a sufficient amount of construction had been completed so that the City could use the community and aquatic center for its intended purpose. Instead, State Construction argues, without evidence, that the City did not decide, until February 2017, ten months after-the-fact, that Porter Brothers had reached substantial completion on April 1, 2016. But there is no evidence in the record that the City failed to follow the process for determining and certifying substantial completion here.

Even if the City's certification were not legally conclusive, State Construction has not established a genuine issue of material fact that the substantial completion date provided by the City was not the date of "completion of the contract work" for purposes of RCW 60.28.011(2). Therefore, the contract work was completed on the Project as of April 1, 2016, and State Construction's notice of lien claim, filed on March 27, 2017, was untimely as it was not filed within the 45 days required by statute.

C. State Construction's Due Process Claim

State Construction next argues it had no notice that April 1, 2016 was the trigger date for filing a retainage lien claim and, as a result, the City violated its due process rights by failing to provide it notice.

Article I, section 3 of the Washington State Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." The Washington Supreme Court has held that the state due process clause is no broader than its federal counterpart. In re Dependency of E.H., 191 Wn.2d 872, 884-85, 427 P.3d 587 (2018). The loss of lien rights to funds held in trust under RCW 60.28.011 implicates a property interest protected by due process. The question is what process is due to protect subcontractors like State Construction against the erroneous deprivation of that property interest.

A procedural due process challenge under the state constitution turns on whether the increased accuracy afforded by additional procedures is outweighed by the government's legitimate reasons in denying more protections. Id. at 891. Our Supreme Court has employed the balancing test adopted by the United States Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d

18 (1976), to assess procedural due process challenges on a case-by-case basis. E.H., 191 Wn.2d at 891-92. The Mathews test requires a court to compare the status quo to the procedures sought and identify (1) the private interest involved, (2) the risk of an erroneous deprivation of that interest, and (3) the government's interest. 424 U.S. at 335.

The first Mathews factor requires us to identify the nature and weight of the private interest affected by the challenged action. Prostov v. Dep't of Licensing, 186 Wn. App. 795, 811, 349 P.3d 874 (2015) (quoting City of Redmond v. Moore, 151 Wn.2d 664, 670, 91 P.3d 875 (2004)). In this case, we agree that subcontractors like State Construction have a substantial interest in being paid by contractors and receiving full payment on public projects. The money deposited into the retainage fund was deducted from State Construction's invoices to Porter Brothers and, but for the retainage requirement, would have been paid to State Construction for its work. This factor weighs in favor of State Construction.

Under the second Mathews factor, we consider whether the risk of an erroneous deprivation of this private interest under the existing statutory scheme is unreasonable. See Prostov, 186 Wn. App. at 813-14. Here, if a subcontractor is unaware that the public owner and contractor have contractually agreed that the date of substantial completion will trigger the retainage lien statute, or does not know that a contractor has reached substantial completion, there is a risk that this subcontractor will miss the deadline to file a notice of lien claim.

But State Construction has not demonstrated that that risk is unreasonable. Subcontractors have multiple ways to protect their interest in the retainage fund, including negotiating with the contractor for advance notice of the lien filing

deadline, tracking the contractor's progress on the project and requesting records from the public owner as to the status of the contractor's progress, or filing lien claims regularly throughout the project. Courts have noted on several occasions that a claimant need not wait until project completion and acceptance to file a claim. Airefco, Inc. v. Yelm Cmty. Schs. No. 2, 52 Wn. App. 230, 232-34, 758 P.2d 996 (1988); see also Pearson, 99 Wash. at 598-600; Title Guar. & Sur. Co. v. Coffman, Dobson & Co., 97 Wash. 211, 213-15, 166 P. 620 (1917) (unnecessary to wait until end of project to file claim); Denny-Renton, 93 Wash. at 110 ("This works no hardship upon a reasonably prudent laborer or materialman. He is not required to wait for completion or acceptance of the work. He can file his claim as soon as he finishes furnishing labor or materials."); WASHINGTON CONSTRUCTION LAW DESKBOOK § 10.4(2), at 10-29 (acknowledging that it is safer to submit claim upon completion of subcontractor work instead of waiting for main contract completion). State Construction had methods by which it could protect its private interest in the retainage fund without imposing new notice requirements on the City. The second Mathews factor weighs against State Construction.

The third Mathews factor addresses the government's interest in the fiscal and administrative burden that additional procedural requirements would entail. Prostov, 186 Wn. App. at 816. The City has an interest in minimizing the administrative burden of having to track the identity of multiple subcontractors and suppliers on large public works projects and having to notify each one when the contractor achieves substantial completion.[15] The public works contracts and

[15] It is for this reason that State Construction argued, see supra note 14, the trigger date for filing lien and bond claims should be the date the Notice of Completion is filed with the state agencies,

certificates of substantial completion are available to the public, even if not available from the contractor. The third factor weighs against State Construction.

Given the subcontractors' ability to manage the risk associated with filing a timely notice of lien, and the burden a notice requirement would pose on public bodies managing large construction projects, we conclude that State Construction's due process rights were not violated by the City when it failed to notify it that Porter Brothers had achieved substantial completion under the contract.

D. Porter Brothers' Assignment of Retainage Funds

Next, State Construction maintains that because retainage funds are trust funds that cannot be assigned, Porter Brothers' assignment to Hartford is invalid. And if the assignment is invalid, it argues its judgment takes priority over any claim Hartford may have to the retainage funds. We reject both arguments and conclude that Porter Brothers had a property interest in excess retainage funds under RCW 60.28.021, and it lawfully assigned that interest to Hartford. Therefore, Hartford's assignment predated State Construction's judgment and has priority over it.

First, under RCW 60.28.021, any excess retainage funds, after payment of all taxes, timely lien claims, foreclosure costs, and attorney fees, must be paid to the contractor. In Johnson Service Co. v. Roush, 57 Wn.2d 80, 87, 89, 355 P.2d

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i.e., subcontractors can search public records to ascertain when a public works contract has been completed. While this might be expeditious for all parties, that is not what the statutes provide, and we cannot rewrite or modify statutory language under the guise of statutory interpretation or construction. Garcia v. Dep't of Soc. & Health Svcs., __ Wn. App. 2d __, 451 P.3d 1107, 1123 (2019). We must give full effect to the plain language of the statutes, even when the results may seem harsh. Geschwind v. Flanagan, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993).

815 (1960), the Supreme Court held that the Internal Revenue Service (IRS) could not attach money on deposit in a retainage fund for taxes owed by a contractor because the funds were held in trust for payment to subcontractors and suppliers, "except to the extent that the claim of the [contractor] exceeds the aggregate of the claims of the subcontractors and the State Tax Commission." Because the retainage was exhausted by payment of timely lien claims, there was no balance to remit to the contractor and nothing to which the federal tax lien could attach. Id. at 89. But had there been funds sufficient to remit to the contractor, the IRS could have attached those funds to prevent their payment to the contractor.

RCW 60.28.011(1)(a) makes the retainage fund a "trust fund for the protection and payment" of claims arising under the contract. But once an owner determines that all taxes and timely lien claims have been paid, the contractor is entitled to the remaining funds. RCW 60.28.021; see also Fid. & Deposit, 14 Wn.2d at 568-69 (duty to remit remaining funds to contractor because "[i]t was clearly the contractor's money, and any retention would constitute an unlawful deprivation of the money").

Porter Brothers' assignment to Hartford only conveyed title to contract funds that were "due now or in the future." Under RCW 60.28.021, no retainage funds were due to Porter Brothers until all taxes and timely liens were paid. Just as Porter Brothers will not receive any excess funds from the retainage until all taxes and timely liens are paid, neither will Hartford. See Levinson v. Linderman, 51 Wn.2d 855, 861, 322 P.2d 863 (1958) ("An assignment of a sum of money due or to become due will pass to the assignee only so much as a construction of the instrument shows was intended to pass.") (quotation and citation omitted). We

conclude that Porter Brothers lawfully assigned to Hartford any excess retainage funds that it may be entitled to receive under RCW 60.28.021.

Second, because State Construction's lien was untimely, its lien against the retainage fund ceased to exist. "'The right to a lien ceases to exist when the designated period is over.'" Thompson v. Peninsula Sch. Dist. N. 401, 77 Wn. App. 500, 505, 892 P.2d 760 (1995) (quoting Shope, 41 Wn. App. at 131). Once State Construction's lien ceased to exist, the funds in the account based on State Construction's work became available to other lien claimants and, if any excess exists, to Porter Brothers or its secured creditors. The record is insufficient for the court to determine whether the retainage fund has any excess funds that would be payable to Porter Brothers. The City's certification lists over 20 lien claimants (in addition to State Construction) whose combined claims well exceed the $1.3 million in the retainage fund.

To the extent any excess funds in the retainage fund are due to Porter Brothers, Hartford, as a secured creditor, has a claim to those funds that takes priority over State Construction's judgment. A debtor's general assignment for the benefit of a creditor passes to the creditor all title to the property vested in the debtor and that title is superior to any unsecured creditor who acquires a judgment against the debtor thereafter. Steinberg v. Raymond, 50 Wn.2d 502, 503, 312 P.2d 824 (1957). Because Porter Brothers executed a valid assignment for the benefit of Hartford that included title to any excess funds that would otherwise be owing to Porter Brothers, and that assignment preceded State Construction's judgment, Hartford's interest is superior to that of State Construction.

E. Attorney Fee Award to Hartford

Lastly, State Construction argues that Hartford is not entitled to attorney's fees for two reasons—first, under RCW 60.28.030 and RCW 39.08.030, only the party claiming against the retainage fund and the bond may recover fees; and second, under RCW 39.04.240, State Construction's action does not arise out of a public works contract.

Washington courts may only award attorney fees "when doing so is authorized by a contract provision, a statute, or a recognized ground in equity." King County v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV, 188 Wn.2d 618, 625, 398 P.3d 1093 (2017). Generally, attorney fee awards are reviewed for an abuse of discretion. Guillen v. Contreras, 169 Wn.2d 769, 774, 238 P.3d 1168 (2010). But the "underlying question of which fees may be awarded pursuant to the statute is a question of law reviewed de novo." Olympic Peninsula Narcotics Enf't Team v. Real Prop. Known as (1) Junction City Lots 1 Through 12 Inclusive, Block 35, (2) Lot 2 of the Nelson Short Plat Located in Jefferson County, 191 Wn.2d 654, 661, 424 P.3d 1226 (2018).

Hartford's motion for attorney fees and costs was based on RCW 39.04.240(1), which provides:

> The provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party, except that: (a) The maximum dollar limitation in RCW 4.84.250 shall not apply; and (b) in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.

Under RCW 4.84.250 through .280, if a defendant makes a settlement offer to a plaintiff and the plaintiff subsequently recovers nothing or recovers an amount equal to or less than the settlement offer, the defendant is deemed the prevailing party entitled to recover attorney fees.

Hartford represented, and State Construction does not dispute, that it offered to settle State Construction's claims for $0 on August 29, 2017, a date within the deadlines prescribed in RCW 39.04.240 and RCW 4.84.280. State Construction did not accept this offer. Because State Construction recovered nothing in its suit, Hartford argued it was the prevailing party under RCW 4.84.270 and, as a result, entitled to attorney fees under RCW 39.04.240. The trial court agreed.

State Construction argues that RCW 60.28.030 and RCW 39.08.030 only permit a lien claimant to recover attorney fees. It contends the more general public works attorney fee statute, RCW 39.04.240, conflicts with the lien statutes and is thus inapplicable. It relies on Housing Authority of City of Everett v. Kirby, 154 Wn. App. 842, 856, 226 P.3d 222 (2010),[16] for this proposition. We decline to extend Kirby to public works contract disputes because of the mandatory nature of the language in RCW 39.04.240.

In Kirby, the Housing Authority brought an unsuccessful unlawful detainer action against Kirby, who then sought attorney fees under multiple statutes, including RCW 4.84.250 and .270. 154 Wn. App. at 846, 848. The Housing Authority noted that applying these statutes to residential unlawful detainer actions

[16] Abrogated on other grounds by Hous. Auth. of City of Seattle v. Bin, 163 Wn. App. 367, 260 P.3d 900 (2011).

would, in certain situations, create a conflict between them and the specific statute, RCW 59.18.290, that allowed landlords to recover attorney fees in residential unlawful detainer actions. Id. at 856. We affirmed the denial of Kirby's request for attorney fees, reasoning that it made no sense that a tenant, found guilty of non-payment of rent and subject to eviction, could become the prevailing party entitled to an award of attorney fees by offering to settle for less rent than the landlord claimed was owed. Id. at 856-57. Such an outcome, we concluded, would conflict with RCW 59.18.290, which authorizes a discretionary fee award to the landlord who prevailed in recovering possession of the premises. Id. We determined that RCW 59.18.290 superseded RCW 4.84.250 and .270. Id.

But the public works statute under which Hartford sought an award of attorney fees is distinguishable from the general language of RCW 4.84.250 and .270. RCW 39.04.240 provides that the provisions of RCW 4.84.250 through .280 "shall apply to an action arising out of a public works contract in which the state or a municipality . . . is a party." Additionally, the right to recover attorney fees under the settlement offer process set out in RCW 4.84.250 to .280 "may not be waived by the parties to a public works contract" entered into after June 11, 1992, and any contractual provision providing for such a waiver is void against public policy. RCW 39.04.240(2).

When the legislature uses the word "shall," we deem it to be mandatory. Khandelwal v. Seattle Mun. Court, 6 Wn. App. 2d 323, 337-38, 431 P.3d 506 (2018). In addition, the statute contains a significant legislative statement of public policy. The mandatory language of RCW 39.04.240 undermines State Construction's suggestion that the legislature intended RCW 60.28.030 and RCW

39.08.030(1)(b) to supersede it. We therefore conclude that RCW 60.28.030 and RCW 39.08.030(1) do not supersede RCW 39.04.240.

Finally, State Construction contends that RCW 39.04.240 does not apply because Hartford was not a party to the public works project contract and because its lien foreclosure action did not arise out of a public works contract. But State Construction misreads RCW 39.04.240.

By its language, RCW 39.04.240 applies when the state or a city is a party to a public works contract and is a party to a lawsuit arising out of that contract. The statute does not require that the party seeking attorney fees is a party to the underlying contract. See Puget Sound Elec. Workers Health & Welfare Tr. v. Lighthouse Elec. Grp., No. C12-276 RAJ, 2014 WL 2619921 (W.D. Wash. June 12, 2014) (granting the surety and the general contractor their attorney fees for time period that the State was a party to the action); see also Am. Safety Cas. Ins. Co. v. City of Olympia, 162 Wn.2d 762, 773, 174 P.3d 54 (2007) (awarding RCW 39.04.240 fees to the city as prevailing party in lawsuit brought by surety as assignee of the general contractor's rights under a public works construction project). It is undisputed that the City was a party to the dispute.

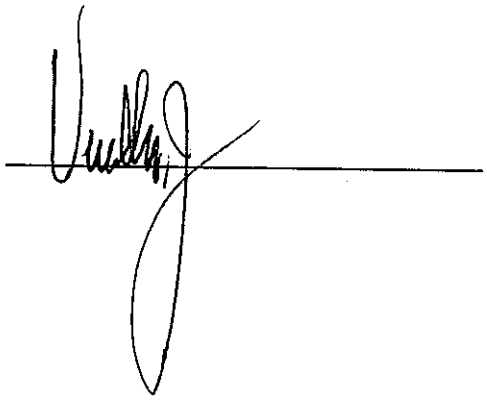
We also conclude that State Construction's action arose out of a public works contract. A public works contract is a condition precedent to a bond or retainage lien claim. See RCW 39.08.010(1) (public owner must require contractor to obtain bond); RCW 60.28.011(1) (public works contracts must set up retainage trust fund). Retainage and bond lien claims brought pursuant to RCW 39.08.010 and 60.28.011 thus arise out of a public works contract. Puget Sound Elec. Workers Health & Welfare Tr., 2014 WL 2619921, at *1.

We affirm the trial court's award of Hartford's attorney fees pursuant to RCW 39.04.240. Furthermore, because Hartford is the prevailing party on appeal, we award it attorney fees and costs pursuant to RAP 14.2, subject to its compliance with RAP 18.1.

Affirmed.

Andrus, J.

WE CONCUR:



Chun, J.

HARTFORD APPENDIX NO. 2

2014 WL 2619921
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

PUGET SOUND ELECTRICAL WORKERS HEALTH AND WELFARE TRUST, et al., Plaintiffs,
v.
LIGHTHOUSE ELECTRICAL GROUP, et al., Defendants.

No. C12–276 RAJ.
|
Signed June 12, 2014.

Attorneys and Law Firms

Jeffrey G. Maxwell, Ekman Thulin, P.S., Seattle, WA, for Plaintiffs.

ORDER

RICHARD A. JONES, District Judge.

***1** This matter comes before the court on a motion for attorney's fees pursuant to RCW 39.04.240 by defendants Travelers Casualty and Surety Company of America ("Travelers") and Jody Miller Construction, Inc. ("JMC") (collectively, "defendants"). Dkt. # 63. Plaintiffs oppose the motion only on the basis that RCW 39.04.240 does not apply to the claims asserted in this action. Dkt. # 68 at 3–8.

RCW 39.04.240 provides:

> The provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party, except that: (a) the maximum dollar limitation in RCW 4.84.250 shall not apply; and (b) in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.

RCW 39.04.240(1). [1] RCW 4.84.250 provides that "in any action for damages ... there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorney's fees." RCW 4.84.284 [2] addresses the timing of offers of settlement with respect to determining attorney's fees.

Thus, whether RCW 39.04.240 applies depends on whether this action arose out of a public works contract in which Washington State or other public body that contracts for public works is a party, and whether defendants are prevailing parties.

On April 3, 2013, plaintiffs amended their complaint to add Travelers, JMC, and the State of Washington [3] as defendants. Dkt. # 19. The lien and retainage bond claims against JMC and Travelers arise out of a construction project at Seattle Central Community College ("SCCC Project"). Dkt. # 19 (Am.Compl.) ¶¶ 3.52–3.58, 4.7–4.14. JMC was the general contractor, and Lighthouse Electrical Group Limited Partnership ("Lighthouse") was the subcontractor from April 2010 through January 2012. *Id.* ¶ 3.52. JMC was required to provide and maintain a performance bond covering the project pursuant to RCW 39.08 et seq. and RCW 60.28.011. *Id.* ¶ 3.53. Travelers, as surety, issued a Payment and Performance Bond to JMC to cover the SCCC Project pursuant to RCW 39 .08.010. *Id.* ¶ 3.54.

However, a public works contract is a condition precedent to a lien or retainage bond claim. *See* RCW 39.08.010(1) (government and person performing work for government must enter contract that requires person to obtain surety and to pay all laborers, among other things) & 60.28.011(1) (public improvement contracts must provide a contract retainage as a trust fund for protection and payment of claims arising under contract). Thus, any lien or retainage bond claims necessarily flow from the public works contract.

Accordingly, the court finds that plaintiff's lien and retainage bond claims under RCW 39.08.010 and 60.28.011 arise out of a public works contract. *See Am. Safety Cas. Ins. Co. v. Olympia,* 162 Wash.2d 762, 773, 174 P.3d 54 (Wn.2007) (awarding RCW 39.04.240 fees to the city as prevailing party in lawsuit brought by

surety on performance and payment bond as an assignee of the general contractor's rights under a public works construction project).

*2 Defendant also argues that there is no public agency party in this action. However, plaintiffs named the State of Washington as a defendant in the amended complaint, and only dismissed the State of Washington on November 5, 2013, after defendants had already filed their motion to dismiss and incurred significant fees defending this action. Dkt. # 48. The court believes that defendants are entitled to reasonable fees incurred until November 5, 2013. Since the State of Washington has not been a party to this action since that date, defendants have not demonstrated that they are entitled to attorney's fees beyond that date. *See* RCW 39.04.240(1) (requiring "the state or a municipality, or other public body that contracts for public works" to be a party in the action to recover attorney's fees).

Plaintiff does not dispute that defendants were the prevailing party under RCW RCW 4.84.250 or that the amount of attorney's fees requested is reasonable. The court has reviewed the billing records, and finds the amount requested through November 5, 2013 to be reasonable. Accordingly, the court awards defendants $14,634.95 in attorney's fees.

For all the foregoing reasons, the court GRANTS in part and DENIES in part defendants' motion for attorney's fees.

All Citations

Not Reported in F.Supp.3d, 2014 WL 2619921

Footnotes

1 The court disagrees with plaintiff regarding whether the phrase "an action arising out of a pubiic works contract" is ambiguous. Washington courts have consistentiy heid that the term "arising out of" is not ambiguous and means "originating from" or "flowing from." *See e.g., Everett v. Am. Empire Surplus Lines Ins. Co.,* 64 Wash.App. 83, 89, 823 P.2d 1112 (1991).

2 "Offers of settiement shall be served on the adverse party in the manner prescribed by appiicable court rules at ieast ten days prior to trial. Offers of settiement shaii not be served until thirty days after the compietion of the service and fiiing of the summons and complaint. Offers of settlement shall not be filed or communicated to the trier of the fact until after judgment, at which time a copy of said offer of settlement shall be filed for the purposes of determining attorneys' fees as set forth in RCW 4.84.250 ." RCW 4.84.280.

3 Washington State remained a party in this action until they were voluntarily dismissed by stipulation on November 13, 2013, after defendants had already filed their motion to dismiss that the court ultimately granted. Dkt. # 48.

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HARTFORD APPENDIX NO. 3

2013 WL 12237750
Only the Westlaw citation is currently available.
United States District Court,
W.D. Washington,
at Seattle.

CARPENTERS HEALTH AND SECURITY TRUST OF WESTERN WASHINGTON, et al., Plaintiffs,
v.
PARAMOUNT SCAFFOLD, et al., Defendants.

CASE NO. 12-1252-RSM
|
Signed 09/25/2013

Attorneys and Law Firms

Jeffrey G. Maxwell, Ekman Cushing Maxwell, P.S., Seattle, WA, for Plaintiffs.

Aldo E. Ibarra, Louis J. Cisz, III, Nixon Peabody LLP, San Francisco, CA, Mary Quinn Oppenheim, Summit Law Group, Seattle, WA, for Defendants.

ORDER ON DEFENDANTS' RULE 54 (D)(2) MOTION FOR ATTORNEY FEES

RICARDO S. MARTINEZ, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

*1 This matter comes before the Court upon Defendants' Fed. R. Civ. P. 54(d)(2) motion for attorneys' fees. Dkt. # 49. For the reasons set forth below, Defendants' motion is GRANTED.

II. BACKGROUND

Defendants filed this motion following the Court's January 31, 2013 Order, dismissing Plaintiffs' state law claims with prejudice. *See* Dkt. # 48. Plaintiffs sought to foreclose on a lien in the amount of $64,905.48 for a public works project at the University of Washington. The Court determined that the compulsory counterclaim rule and res judicata precluded Plaintiffs from pursuing their action in federal court once the state court issued a declaratory judgment on the matter. Pursuant to RCW 39.04.240, Defendants allege they are entitled to attorneys' fees, because "if a defendant to a lawsuit arising out of a public works contract offers to settle the lawsuit, the offer is rejected, and the defendant prevails, then the defendant is entitled to attorneys' fees as outlined in RCW 4.84.250-280." Dkt. # 49, p. 2. After the complaint was filed on July 20, 2012, Defendants provided Plaintiffs with an offer of settlement on October 10, 2012 in the amount of $43,945.60. The offer went unanswered and was deemed rejected. Dkt. # 50, Ahlers Dec. ¶ 2. Since the Court dismissed the lien claim, Defendants seek approximately $41,278.02 in attorneys' fees and costs of defending the action. Dkt. # 49, p. 6. Plaintiffs have not filed an opposition to the motion.

III. DISCUSSION

A. Rule 54(d)(2) Attorneys' Fees

Pursuant to Rule 54(d)(2), claims "for attorneys' fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." Fed. R. Civ. P. 54(d)(2)(A); *see Port of Stockton v. W. Bulk Carrier KS*, 371 F.3d 1119, 1121 (9th Cir. 2004). The motion must be brought within 14 days of the entry of judgment. Fed. R. Civ. P. 54(d)(2)(B)(i). "[T]he movant must point to a statute or contract to show that attorneys' fees are available in order to overcome the default rule that 'the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.' " *Providence Health & Services-Wash. v. Benson*, No. 09-1668 TSZ, 2011 WL 2473303, at *1 (W.D. Wash. June 22, 2011) (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)). "In an action where a district court is exercising its subject matter jurisdiction over a state law claim, so long as 'state law does not run counter to a valid federal statute or rule of court ... state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.' " *MRO Communications, Inc. v. American Tel. & Tel. Co.*, 197 F.3d 1276, 1281 (9th Cir. 1999) (quoting *Alyeska*, 421 U.S. 240 at 259 n. 31).

Defendants timely filed the motion, citing RCW 39.04.240 as the basis for attorneys' fees. The statute applies "to an action arising out of a public works contract in which the state or a municipality, or other public body that

contracts for public works, is a party." RCW 39.04.240(1). It incorporates the provisions of RCW 4.84.250-280, in which an award of attorneys' fees to the prevailing party is mandatory. [1] A defendant is the prevailing party where the plaintiff either recovers nothing or recovers less than the amount for which the defendant offered to settle. RCW 4.84.270. The time period for serving offers of settlement must be "not less than thirty days and not more than one hundred twenty days" after completing service and filing the summons and complaint. RCW 39.04.240(1)(b).

***2** This matter arose from a public works contract in which a public body, the University of Washington, is a named defendant. After Plaintiffs filed the federal complaint, Defendants provided Plaintiffs with an offer of settlement within the proscribed time frame. The Court later dismissed Plaintiffs' lien claim, making Defendants the prevailing party. Plaintiffs have not filed an opposing brief, conceding that this motion has merit. *See* Local Rule CR 7(b)(2). Since the Court finds that all applicable procedures and requirements were met, an award of attorneys' fees is appropriate in this case.

B. Fee Calculation

Defendants request approximately $41,278.02 for the costs of defending the federal action, which includes a motion to dismiss and reply thereto, opposition to Plaintiffs' motion for summary judgment, a supplemental brief on the motion to dismiss, and the instant motion. As evidence of the requested fees, Defendants submit a Declaration and a red-lined time sheet that delineates the hours worked on this matter. While Plaintiffs have not opposed the fees, the amount requested must nonetheless be reasonable.

In calculating reasonable attorney fees, the court uses a "hybrid lodestar / multiplier approach." *McElwaine v. US West, Inc.*, 176 F.3d 1167, 1173 (9th Cir. 1999). The "lodestar" amount is calculated by multiplying the number of hours reasonably expended by the attorney(s) on the litigation by a reasonable hourly rate. *Id.* The court may then apply a "multiplier" to raise or lower the lodestar amount based on a number of factors. *Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

> The factors include: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill required, (4) the preclusion of other employment, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or circumstances, (8) the amount involved and results obtained, (9) the experience, reputation and ability of the attorney, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with client, and (12) awards in similar cases. *Id.*

The court may adjust either the components of the lodestar or the lodestar itself to reflect the results obtained. *See Schwarz v. Sec'y of Health & Human Services*, 73 F.3d 895, 901 (9th Cir. 1995). The fee applicant has the burden of proving the reasonableness of the requested fees and must submit evidence supporting the hours worked and the rates claimed. *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000). "The non-moving party has the "burden of rebuttal" that requires submission of evidence challenging the accuracy and reasonableness of the hours charged." *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992).

1. Hourly Rate

The reasonable hourly rate is not determined by the actual rates charged by the prevailing party, but by reference to the prevailing rate in the community for "similar work performed by attorneys of comparable skill, experience, and reputation." *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210-11 (9th Cir. 1986). Generally the court uses the rates of attorneys practicing in the forum district for comparison. *See Gates*, 987 F.2d at 1405-06. Defendants' counsel of Ahlers & Cressman PLLC declare the following fees per member who worked on the matters for the federal litigation:

1) Mr. Ahlers—founding partner with 30 years of experience who customarily bills $370/hour.

***3** 2) Mr. Hill—partner with eight years of experience who customarily bills $250/hour.

3) Mr. Yamada—associate with seven years of experience who customarily bills $240/hour. Dkt. # 50, ¶¶ 6-8.

The Court finds these rates to be comparable to the prevailing rates typically charged by attorneys in the Western District of Washington. *E.g. Rebic v. Credit Intern. Corp.*, No. 10-5323, 2011 WL 4899979, at *3 (W.D. Wash. Oct. 14, 2011) (finding associate attorney hourly rates ranging from $175.00 to $300.00 to be reasonable).

2. Hours Expended

The party seeking fees must justify the hours claimed by submitting detailed records. *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 945-46 (9th Cir. 2007). The court should reduce the hours for which counsel seeks compensation if "documentation of the hours is inadequate; if the case was overstaffed and hours are duplicated; [or] if the hours expended are deemed excessive or otherwise unnecessary." *Chalmers*, 796 F.2d at 1210. After extensive review of the timesheet submitted by Defendants, the Court determines that the total time spent on the various tasks is 139.1 hours: [2]

1) Mr. Ahlers billed a total of 8.5 hours, consisting of mainly research and email communications pertaining to the federal action.

2) Mr. Hill billed a total of 33.1 hours, consisting of research, settlement negotiations, research and briefing.

3) Mr. Yamada billed a total of 97.5 hours, consisting of research and drafting of the various motions and briefs.

A significant amount of time was incurred in researching, analyzing, drafting or conferring on legal strategy. As a firm that specializes in construction matters, Defendants do not explain how the extensive number of hours was reasonable in preparing a motion to dismiss and related briefing on this matter. *See, e.g. Washington Shoe Co. v. A-Z Sporting Goods, Inc.*, No. 09-1042 RSL, 2013 WL 4094697, at *2-3 (W.D. Wash. Aug. 12, 2013) (reducing requested attorneys' fees by nearly half because counsel spent significant amounts of time on procedural and relatively simple threshold matters). Thus relying on its own experience, the Court will reduce the time spent by each attorney by 50 percent, reducing the total time from 139.1 hours to 69.55 hours. *See Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011) ("The district court is in the best position to discern what work was unnecessary.").

3. Costs

Defendants claim that a total of $433.52 is owed on administrative costs, encompassing various courier fees. Since Plaintiffs have not opposed the costs, the Court finds the itemized expenses to be both reasonable and necessary to the litigation.

4. Total Calculation

The total amount in reasonable attorneys' fees owed to Defendants, including the associated costs of the action, is **$17,843.52**. [3] Plaintiffs shall pay the attorneys' fees in full within thirty (30) days of this Order.

IV. CONCLUSION

***4** Having reviewed the relevant pleadings, the declarations and exhibits attached thereto, and the remainder of the record, the Court hereby finds and ORDERS:

(1) Defendants shall be awarded attorney fees in the amount of $17,843.52, as set out above. Plaintiffs shall pay in full within thirty (30) days of this Order.

(2) The Clerk is directed to forward a copy of this Order to plaintiffs and to all counsel of record.

All Citations

Slip Copy, 2013 WL 12237750

Footnotes

1 RCW 4.84.250 provides "there shall be taxed and allowed to the prevailing party as part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees."

2 Defendants have not provided the Court with documentation evidencing the hours expended in bringing the instant motion and reply thereto. Thus, the estimated $3,000.00 billed on the motion for attorneys' fees shall not be considered in the fee calculation.

3 To arrive at this amount, the Court reduced the attorneys' claimed hours by 50 percent. After the reduction, the total amount is: $370.00(4.25) + $250.00(16.55) + $240.00(48.75). Thus, Mr. Ahlers ($1,572.50) + Mr. Hill ($4,137.50) + Mr. Yamada ($11,700.00) = $17,410.00. The costs ($433.52) were added to the total attorneys' fees.

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WILLIAMS KASTNER

April 17, 2020 - 9:13 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98318-6
Appellate Court Case Title:	State Construction, Inc. v. Hartford Fire Insurance Company

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