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No. 98318-6

WASHINGTON STATE SUPREME COURT

STATE CONSTRUCTION, INC.,

Petitioner,

v.

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

Respondents.

**MEMORANDUM OF *AMICUS CURIAE* AMERICAN
SUBCONTRACTORS ASSOCIATION IN SUPPORT OF STATE
CONSTRUCTION, INC.'S PETITION FOR REVIEW**

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I. INTRODUCTION AND IDENTITY OF AMICUS

For public works, Washington state law requires public owners to reserve “a contract retainage not to exceed five percent of the moneys earned by the contractor as a trust fund for the protection and payment of” subcontractors and material suppliers. RCW 60.28.011(1)(a). Such subcontractors and suppliers have an automatic lien on that trust fund. RCW 60.28.011(1)(b)(2).

By making the retainage a “trust fund,” the Legislature also made public owners trustees who have to ensure that subcontractors and suppliers get paid. To assert their rights, subcontractors and suppliers must give the public body notice of their retainage claims “within forty-five days of completion of the contract work.” RCW 60.28.011(2).

To ensure public notice of the “completion of the contract work,” public owners are required to file a notice of completion with the Department of Revenue “upon completion of the contract.” RCW 60.28.051. Because subcontractors and suppliers are not in contractual privity with the public owner, and may be on the project for only a short amount of time, subcontractors and suppliers have to rely on such public notice to know when to file their retainage claims.

The Court of Appeals' decision in this case upends the settled structure of the retainage statute (RCW Ch. 60.28) and creates unnecessary uncertainty, especially for innocent unpaid subcontractors. First, the Court of Appeals' decision mistakenly allows the public entity to claim a date of contract completion other than the date it gives public notice of such completion. The decision then holds that the public entity's allegations regarding such completion date become irrefutable facts, not subject to discovery or cross-examination. Slip Op., at 9-10, 16. That holding has no support in modern case law or the retainage statute.

The Court of Appeals compounded that error by conflating "substantial completion" (as may be defined in the contract or otherwise agreed to between the owner and the general contractor) with "completion of the contract work" as required by the retainage statute. Slip Op., at 17-18. The Legislature deliberately removed reference to "substantial completion" in the retainage statute enacted in 1992, as explained below.

The American Subcontractors Association ("ASA") is a non-profit corporation supported by the membership dues paid by thousands of construction subcontractors and suppliers throughout the United States. ASA promotes the equitable treatment of subcontractors nationwide, and

has regularly intervened in legal actions that affect the rights of subcontractors and suppliers. On behalf of subcontractors and suppliers throughout the State of Washington, as well nationwide, the ASA respectfully requests that this Court accept review of the petition filed in this case to correct the Court of Appeals erroneous decision.

II. ARGUMENT: THE PETITION INVOLVES A MATTER OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT.

The decision of the Court of Appeals is found in the Appendix to the Petition for Review, and is now published. *State Construction, Inc. v. City of Sammamish*, ___ Wn. App. ___, 457 P.3d 1194 (2020). Amicus ASA joins in and supports the issues identified in the Petition, as well as in the Petitioner's Statement of the Case. The petition involves issues of substantial public interest that affect every subcontractor and material supplier in the State of Washington, and merits Supreme Court review. RAP 13.4(b)(4).

A. Public Works Jobs Are Different.

Unpaid subcontractors and materialmen working on private construction projects can file mechanics liens against the owner's property, and the time for them to do so starts to run when they complete

their own work. RCW 60.04.091. However, construction liens do not attach to public property. *Estate of Hazelwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 500, 210 P.3d 308 (2009). Instead, the Legislature has provided subcontractors and material suppliers alternate security in the form of: (1) a claim against the required payment bond (RCW Ch. 39.08) and (2) a claim against the required retainage (RCW Ch. 60.28).

On private construction projects, it is easy for the subcontractor to know when to file a notice of lien, as the period commences when the subcontractor finishes its own work. RCW 60.04.091. In contrast, the period for filing a retainage claim on a public works project begins upon “completion of the contract work.” RCW 60.28.011(2).¹ Thus, a subcontractor may finish its own work months or years before “completion of the contract work.”

Here, petitioner State Construction did not complete its work until June of 2016 (CP 55); yet the City declared the Project “substantially complete” on April 1, 2016. CP 309. The City admitted that work under

¹ It is undisputed that the phrase “completion of the contract work” refers to completion of all the work required by the contract between the general contractor and public owner, not just the work of the subcontractor.

its contract with the general contractor continued through February 2017. CP 322. On February 21, 2017, the City passed a resolution accepting the Project as complete. CP 146. State Construction filed its notices of bond and retainage claims on March 27, 2017. CP 162. On April 13, 2017, the City filed its “Notice of Completion of Public Works Contract” with the Department of Revenue as required by RCW 60.28.051. CP 335.

B. The Legislature Rejected a “Substantial Completion” Standard, and Required Public Notice to Signal “Completion of the Contract Work.”

The current version of the retainage statute was enacted in 1992 as part of the Prompt Payment Act. SHB 1736, Ch. 223, Laws of 1992. In the original 1991 version of the Prompt Payment Act (House Bill 1736), the draft bill defined “substantial completion” (§1(5)) and proposed that the “retainage shall be released no later than ninety days from the date of substantial completion of the work of improvement.” HB 1736, §4(3). Even in that early version of the bill, the public owner was required to hold the retainage in trust for payment of subcontractor, supplier, and other claims.² HB 1736, §§2, 4

² As trustee of the retainage fund, public owners (like all trustees) owe subcontractors and suppliers the highest degree of good faith and integrity, and have a duty to deal fairly

In the bill’s final form (as Substitute House Bill 1736), the Legislature eliminated “substantial completion” as starting the clock for retainage claims. The Legislature kept the concept of retainage as “a trust fund for the protection and payment” of subcontractors. SHB 1736, §2(1). The new act gave subcontractors and material suppliers “a lien upon moneys reserved by a public body under the provisions of a public improvement contract: PROVIDED, that the notice of the lien of the claimant shall be given within forty-five days of completion of the contract work, and in the manner provided in RCW 39.08.030.” SHB 1736, §2(2) (now codified at RCW 60.28.011(b)(2)).

Further, the Legislature provided that “[u]pon *completion of a contract*, the state, county or other municipal officer charged with the duty of disbursing or authorizing disbursement or payment of such contracts *shall forthwith* notify the department of revenue of *completion* of contracts over twenty thousand dollars.” SHB 1736, §4 (emphasis added)(now codified at 60.28.051). Thus, the Legislature created an

with them to protect their interests. *In re Wash. Builders Ben. Trust*, 173 Wn. App. 34, ___, 293 P.3d 1206 (2013).

objective, publicly-verifiable way for subcontractors to know when their 45-day notice period for filing a retainage claim started to run.

Finally, the Legislature made clear that any contractual provision that tried to vary that procedure, or accelerate the date for filing retainage claims, was void: “The rights provided in this act may not be waived by the parties and a contract provision that provides for waiver of the rights provided in this act is void as against public policy.” SHB 1736, §6(1). Further, the act “is to be liberally construed to provide security for all parties intended to be protected by its provisions.” SHB 1736, §6(2). The Court of Appeals decision ignores that liberal construction mandate and creates confusion as to when retainage claims must be filed.

C. The Court of Appeals’ Decision Adopts A Deadline Rejected by the Legislature, and Make Allegations Conclusive Evidence.

As explained above, the original version of the SHB 1736 made retainage payable ninety days after “substantial completion” and did not require the subcontractor to do anything. The Legislature ultimately removed that language, and replaced it with the current regime that requires unpaid subcontractors to file a notice of claim within forty-five days of “completion of the contract work.” RCW 60.28.011(2).

The Court of Appeals mistakenly adopted the “substantial completion” date as may be agreed between the owner and the general contractor³ as the date of actual “completion of the contract work.” Slip Op., at 16-17. But those are different concepts, and the Legislature specifically rejected use of the “substantial completion” date for triggering retainage rights. As shown by the facts here, State Construction was working on the Project for months after the alleged date of “substantial completion.” CP 55.

Moreover, relying on case law from over a century ago (well prior to adoption of the Civil Rules in 1967 and the retainage statute in 1992),⁴ the Court of Appeals has now declared that the public owner’s own proclamations regarding the completion date (as may then be reflected in its statutorily-required answer) are “legally conclusive” as to the date of “completion of the contract.” Slip Op., at 9-10, 16. In retainage actions,

³ Construction contracts often use the date of “substantial completion” as the triggering date for imposition of liquidated damages for delay. It is not unusual in large public works projects for the owner and general contractor to agree that “substantial completion” has been met so as to avoid such liquidated damages even as the project continues. “Substantial completion” is usually the date by which the project is sufficiently complete that it can be used for its intended use; work under the contract may continue but the owner by then has beneficial use.

⁴ *Denny-Renton Clay & Coal Co v. National Surety Co.*, 93 Wash. 103, 160 P.1 (1916); *Pearson v. Puget Sound Machinery Depot*, 99 Wash. 596, 169 P. 961 (1918)

the public owner is only required to answer by filing a pleading that identifies:

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 the claimants, and amounts claimed.

RCW 60.28.030. “Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.”

CR 8(d). That the public owner certifies those facts does not make them verities that cannot be challenged with contrary evidence.

D. Proper Interpretation of Retainage Rights is a Matter of Substantial Public Interest.

As the Respondent Hartford admitted in its Motion to Publish in the Court of Appeals, the decision here is “of Vital Importance to the Public Works Construction Industry,” “clarified an issue that has not been addressed in Washington for over 100 years,” “is the first of its kind in Washington,” and addresses numerous unsettled questions of law regarding public works projects. Motion to Publish, at 2, 4, 5-7. As Hartford also agreed, resolving these issues is “of vital importance to both

the construction and surety industry, as well as the general public.”

Motion to Publish, at 8, 11.

Although ASA disagrees with many of Hartford’s arguments, it agrees with Hartford’s statements above. The issues addressed in the Court of Appeals decision are ones of great importance to Washington’s multi-billion dollar construction industry, and should be determined by this Court. RAP 13.4(b)(4).

III. CONCLUSION

ASA is proud to support State Construction’s petition for review, and urges this Court to take review of the Court of Appeals’ decision.

DATED this 18th day of May, 2020.

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