

Construction Law



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Chairman's Report

by Ken Yalowitz

Our section officers hold their positions for a term of one year. This fall, I gracefully transitioned to the honorable office of "past-chairman," and Arne Hedeem took over as chairman. The delight of one-year terms from the chairman's perspective is that there is only time for about two Chairman's Reports, an incoming Chairman's Report, and an outgoing Chairman's Report. This will serve as my outgoing Chairman's Report.

As I indicated in my last (i.e., first) Chairman's Report, the section's governing council has voted to change the section name to the "Construction Law" Section. The name change has been approved by the WSBA's Board of Governors. It was also approved by a majority of section members who voted in the name-change election.

The section's e-mail list serve has been up and running for nearly a year. There has been very little activity. If you are stumped by a construction-related issue (and willing to admit it), send an e-mail to: join-PPPCL@comm.WSBA.org and see if someone monitoring the list serve is willing to offer a suggestion.

The section put on two excellent programs over the past year, thanks to the efforts of Arne Hedeem (forum meeting), Karen Nyrop and Karl Oles (CLE seminar). Last February, King County Superior Court Judges Robert H. Alsdorf and Linda Lau spoke at a Judges' Forum held at the Washington Athletic Club. The judges provided tips and insights into the handling of complex construction cases before juries. In June, the section put on a construction defects seminar focused on "sick" buildings. The seminar was held at the University of Washington HUB. The issues discussed ranged from identifying parties responsible for building deficiencies, to finding and dealing with experts, to ethical issues arising in sick building cases. (Yes, attendees actually earned ethics credits.)

A forum meeting was held on September 25, 2001 at the Washington Athletic Club. The meeting was held in conjunction with the section's election of officers. Former Washington Supreme Court Justice Phil Talmadge was our guest speaker. ■

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Arbitration/Motion to Compel Arbitration/Right to Interlocutory Appeal

by Larry Vance, Winston & Cashatt

In *Stein v. Geonerco*, 105 Wn. App. 41 (2000), Division I addressed the appealability of a denial of a motion to compel arbitration. In May 1996, Jerry Stein purchased a house from Geonerco, Inc. with a 25-year manufacturer's warranty on the siding. In addition, Stein entered into a 10-year warranty agreement in which he also agreed to resolve any disputes in arbitration.

After living in the house for some time, Stein complained to Geonerco about the defects. Geonerco investigated the defects and applied a bleaching solution to the siding. Stein was not satisfied with the repairs and sued under the Consumer Protection Act. Next, Geonerco filed a motion to compel arbitration, citing the 10-year warranty agreement. The trial court denied the motion and Geonerco appealed.

Stein contended that Geonerco could not seek an interlocutory appeal of the trial court's order denying the contractor's motion to compel arbitration. The appellate court explained that RAP 2.2(a)(3) allows an appeal as a matter of right from "any written decision affecting a substantial right in a civil case which in effect determines the action and determines the action and prevents a final judgment or discontinues the action." Prior court decisions had ruled that the right to arbitrate is a substantial right. A court decision stopping an action for arbitration falls within the jurisdiction of RAP 2.2 (a)(3) because it involves issues completely distinct or separate from the merits of the dispute, and because an effective challenge to the order is not possible without an interlocutory appeal. Under RCW 7.04.040, a mini-trial may be set up deciding the issue of the validity of an arbitration agreement, even when there is no action on the merits. The objective of such a motion is to initiate a separate action in the forum of arbitration. In addition, the benefits of arbitration will be lost without an interlocutory right to appeal, because it forces the party seeking arbitration to proceed through costly litigation before having the opportunity to appeal.

As a result, the court held that an order denying a motion to compel arbitration is appealable as an interlocutory decision. The court then, reaching the merits of the appeal, held that the arbitration clause broadly covered all claims, disputes, demands, controversies and differences between the parties, thus covering the homeowner's claims of defective workmanship. ■

Construction Law Section Proposed 2001-2002 Officers and Council Members

Officers

Arne Hedeon, Chair
Hedeon & Caditz
1221 Second Avenue, #460
Seattle, WA 98101-3435
phone 206-903-9953
fax 206-903-9956
arne@hedeencaditz.com

Chris Soelling, Secretary
Short Cressman & Burgess PLLC
999 Third Avenue, #3000
Seattle, WA 98104-4088
phone 206-682-3333
fax 206-340-8856
csoelling@scblaw.com

Karin Nyrop, Chair-elect
University of Washington
P.O. Box 351260
Seattle, WA 98195-1260
phone 206-543-4150
fax 206-543-0779
knyop@u.washington.edu

Alan Bornstein, Treasurer
Jameson Babbitt Stites & Lombard
999 Third Avenue, Ste. 1900
Seattle, WA 98104
phone 206-292-1994
fax 206-292-1995
abornstein@jbsl.com

Karl Oles, Vice Chair
Danielson, Harrigan & Tollefson LLP
999 Third Avenue, 44th Fl.
Seattle, WA 98104-4088
phone 206-623-1700
fax 206-623-8717
karlo@dh-t.com

Council Members

Annamarie Petrich
Lane Powell Spears Lubersky, LLP
1420 Fifth Avenue, #4100
Seattle, WA 98101-2338
phone 206-223-7000
fax 206-223-7107

Tom Kuffel
King County prosecuting Attorneys
Office
516 Third Avenue, Room E550
Seattle, WA 98134
phone 206-296-9015
fax 206-296-0191
tom.kuffel@metrokc.gov

Bryan Caditz
Hedeon & Caditz
1221 Second Avenue, #460
Seattle, WA 98101-3435
phone 206-903-9953
fax 206-903-9956
bryan@hedeencaditz.com

Andy Maron
Short Cressman & Burgess PLLC
999 Third Avenue, #3000
Seattle, WA 98104-4088
phone 206-682-3333
fax 206-340-8856
amaron@scblaw.com

Rob Crick
Winston & Cashatt
601 W. Riverside Avenue, Ste. 1900
Spokane, WA 99201
phone 509-838-6131
fax 509-838-1416
rccrick@winstoncashatt.com

Dick Lambe
Ulin & Lambe, P.S.
320 108th Avenue NE, #304
Bellevue, WA 98004
phone 425-455-7252
fax 425-455-7321
rlambe@alum.mit.edu

Craig Rusk
Oles Morrison Rinker & Baker LLP
701 Fifth Avenue, #3300
Seattle, WA 98104-7082
phone 206-623-3427
fax 206-682-6234
rusk@oles.com

Bob Olson
Schiffman Olson Schlemlein &
Hopkins
2701 First Avenue, #300
Seattle, WA 98121
phone 206-268-2517
fax 206-448-8514
rlo@soslaw.com

Ron English
Seattle School District
District Logistics Center
4141 Fourth Avenue South
Seattle, WA 98134
phone 206-252-0651
fax 206-252-0111
renglish@seattleschools.org

Changes to the Contractor Registration Act

by John H. Guin, Winston & Cashatt

On July 22, 2001, changes to RCW Chapter 18.27 were scheduled to go into effect. The purpose of the changes is to target the ever-increasing problem associated with residential repair and improvement, but the changes will impact all contractors in one form or another. Some of the legislative changes include:

Increased bonding requirements: General contractors will now be required to post bonds or other security in the amount of \$12,000, and specialty contractors will be required to post bonds or other security in the amount of \$6,000. RCW 18.27.040(1) (as amended). This is an increase over previous bonding requirements of \$6,000 (general contractors) and \$4,000 (specialty contractors). In addition, the department may require that certain contractors post bonds or other security up to \$36,000 if the contractor has had a total of six final judgments in the previous five years involving residential single-family dwellings. RCW 18.27.040(10) (as amended).

Increased insurance requirements: Contractors must now provide insurance or financial responsibility in the following amounts: (1) property damage – \$50,000; (2) personal injury to one person – \$100,000; and (3) personal injury to more than one person – \$200,000. Revocation or cancellation of insurance results in an automatic suspension of registration. RCW 18.27.050(1) and (2) (as amended).

Actions against bonds: Previously, a claimant had to commence an action against the bond within one year of the date of expiration of the bond that was in effect at the time the labor or materials were furnished. The Legislature has now created two time limitations for commencing an action, depending on the claimant. If the claimant is a residential homeowner, the claimant must sue within two years after the contract work is “substantially completed or abandoned.” If the claimant is any *other* party, the claimant must sue within one year from the date the labor or materials were furnished or the date the contract was substantially completed or performed. RCW 18.27.040(3) (as amended).

Liability of bonds: Because the revisions to the statute are geared toward homeowners, the Legislature limited the amount that could be paid from bonds to non-homeowners. For general contractor bonds, no more than one-half of the bond can be paid to a non-homeowner. For specialty contractor bonds, no more than one-half of the bond or \$4,000 (whichever is greater) can be paid to a non-homeowner. RCW 18.27.040(5) (as amended).

Interest, costs and attorneys’ fees: The Legislature has added a provision whereby a claimant can recover costs, interest, and reasonable attorneys’ fees (but not in excess of the bond). RCW 18.27.040(6) (as amended). However, entitlement to these items appears to be limited to a certain class of claimants, i.e., a party to a construction contract who sues for breach of contract. Because the statute does not define the term “construction contract,” suppliers and other claimants may not be entitled to the benefit of this provision.

Effect of judgment against bond: If a final judgment impairs the full amount of the bond, the registration of the contractor is automatically suspended. RCW 18.27.040(7). To avoid this suspension, a contractor facing a final judgment needs to provide additional security to ensure that its full bonding requirements are met.

Extended registration period: Once contractors renew their registration under these new provisions, the registration period will extend for two years. RCW 18.27.060(1) (as amended). Previously, registration was only effective for a one-year period.

More extensive enforcement powers: The new act gives the department more defined powers for enforcement and collection of penalties and assessments. In addition, the new act mandates that the department deny an application for registration if the applicant *or any company affiliated with the applicant* has an unsatisfied final judgment under the act or has failed to pay fees or assessments due under the act. RCW 18.27.030(3)(a) (as amended). Likewise, if the department learns of any unsatisfied judgment or unpaid fee or assessment of a registered contractor or its affiliated company, the department must suspend the registration. RCW 18.27.030(3)(b) (as amended).

Notice to customers: The Legislature has also modified the form of the “Notice to Customer” that must be provided to customers on residential projects over \$1,000 or commercial projects less than \$60,000. Not only has the language been modified, but the statute now mandates that the notice be in “lower case and upper case twelve-point and bold type where appropriate.” RCW 18.27.114(1) (as amended). Failure to provide the notice in the form specified by the act could result in both the loss of lien rights and a violation of the Registration Act.

There are many other changes to the Registration Act. All contractors should be encouraged to review these changes to ensure their compliance with the new requirements. ■

Public Works Projects/ Competitive Bidding/Contract Splitting

by Larry Vance, Winston & Cashatt

In *Northwest Line Constructors v. Snohomish Co. Utility District No. 1*, 104 Wn. App. 842, Division I affirmed the trial court's decision to dismiss Northwest's claim against the Snohomish Utility District (PUD) for violating RCW 54.04.070 (the competitive bidding statute pertaining to PUDs.) The claim alleged that the PUD violated RCW 54.04.070 by using its own employees to perform electrical installation work exceeding \$50,000 without opening up the job to competitive bids required by statute. Also, it was alleged that the PUD failed to comply with the statute by splitting its contracts. In pertinent parts the statute states:

Any work ordered by a district commission, the estimated cost of which is in excess of ten thousand dollars exclusive of sales tax, shall be by contract, except that a district commission may have its own regularly employed personnel perform work which is accepted industry practice under prudent utility management without a contract. Prudent utility management means performing work with regularly employed personnel utilizing material of a worth not exceeding fifty thousand dollars without a contract: PROVIDED, That such limit on the value of the material being utilized in work being performed by regularly employed personnel shall not include the value of individual items of equipment purchased or acquired and used as one unit of a project.

In this case, the project was divided into electrical installation work and site preparation work, with the PUD performing the electrical half. The court determined that the plain language of the statute permitted the PUD to split the project and to use its own employees to perform the work, so long as it was an accepted industry practice and within the appropriate dollar amount. The issue of whether the PUD exceeded the \$50,000 limit was not decided due to deficient pleadings. However, the court did emphasize that the \$50,000 limit does not include the value of individual items of equipment purchased and used as one unit in a project, as provided in RCW §54.04.070. ■

Industrial Insurance/ Employment Relationship/ Dual Relationship

by Larry Vance, Winston & Cashatt

In *Sonnars v. Labor and Industries*, 101 Wn.App. 350 (2000), a case involving the issue of liability for industrial insurance premiums owed by a company hiring employees from an employee leasing company, the Court of Appeals Division II resolved a dispute about whether an employer whose entire workforce is leased from an employee leasing company must pay industrial insurance premiums to the Department of Labor and Industries. Barrett Business Services, Inc. ("Barrett") leased the entire workforce to Sonners, Inc., d.b.a. Interwest Insulation ("Interwest"). The lease agreement stated that Barrett would be the employer for the purposes of workers' compensation laws including workers' compensation insurance and workers' compensation self-insurance. In addition, Barrett would be the employer with control over "retention of direction and control over the employees including hire, discipline, and fire." Both Interwest and Barrett would be joint employers with respect to compliance of workers' compensation laws.

Interwest appealed the Superior Court's decision to affirm the Board of Industrial Insurance Appeals' decision that found Interwest, as the only employer, was required to pay premiums. According to RCW 51.14.010 and RCW 51.16.060, employers must be self-insured or provide industrial insurance for employees. With regard to industrial insurance, an employment relationship must exist between the employer and the employee. It must be shown that: (1) the employer has the right to control the servant's physical conduct in the performance of his duties, and (2) there is consent by the employee to this relationship.

Although the court agreed with Interwest that it was possible for an employee to have two employers for purposes of industrial insurance coverage, the court determined that such a dual employment relationship requires that both employers have the right to control the workers and the employee's consent to the dual relationship. The board made a factual determination that the employees did not consent to be employees of Barrett, and that Barrett had no control over the employee's physical conduct. The court found that although there was some conflicting testimony, there was substantial evidence in the record to support these conclusions. The court affirmed the board's decision that Barrett did not have the requisite level of control to be liable as an employer in this situation. Therefore, Interwest was the only employer liable for paying industrial coverage. ■

9th Circuit Holds ERISA Does Not Preempt Union Trust Funds from Pursuing State Law Bond Remedy — Is *Trig Electric* in Jeopardy?

by John Ahlers, Barokas & Martin

The Washington State Supreme Court, in *IREW v. Trig Electric*, 142 Wn.2d 431, 13 P.3d 633 (2000), held that a union trust fund did not have a cause of action against a general contractor's bond for unpaid employee benefit-plan contributions. Before the *Trig Electric* decision, union trust funds which were owed contributions by defaulting subcontractors and sub-tier subcontractors on public works projects, brought claims against the general contractor's bond and recovered. In many instances, the claims were only made at the end of the project after the subcontractors had been completely paid off and were "long gone." The general contractor was in the inevitable unenviable position of being caught off guard by the subcontractor's trust fund claim and in having to pay twice (once to the subcontractor and again to the union trust fund), thus "stealth lawsuits." The *Trig Electric* decision, a case supported by a Seattle AGC friend-of-the-court brief, put an end to bond claim lawsuits by subcontractors' union trust funds.

A recent case from the 9th Circuit may put the holding in *Trig Electric* in jeopardy — *Southern California IREW-NECA Trust Funds v. Standard Industrial Electric Co.*, 247 F.3d 920 (9th Cir. 2001). The general contractor on a California school district project posted a payment bond. One of the subcontractors signed a collective bargaining agreement with the local union of the IBEW. Under the collective bargaining agreement, a portion of the subcontractor's employees' compensation was paid in the

form of contributions to benefit-plan trusts. During the construction of the project, the subcontractor became delinquent in its contribution to the benefit-plan trust.

Pursuant to California statutes, the trust made a claim against the general contractor's payment bond. The trust sued the general contractor in U.S. District Court (not in state court) to collect the delinquent contributions, and included the cause of action against the payment bond.

The general contractor and its bonding company brought motions to dismiss the cause of action against the payment bond on grounds that the payment bond remedy was preempted by ERISA. The contractor won in district court, but the 9th Circuit Court of Appeals held that bond claim is not preempted by ERISA. The 9th Circuit distinguished a number of 9th Circuit cases on the grounds that the test for ERISA preemption had been modified in light of the U.S. Supreme Court decision *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995). "[T]he breadth of federal preemption which governed our decisions prior to *Travelers* is no longer applicable." Though the *Trig Electric* holding is likely sound in an action brought by a union trust fund in state court, were the action commenced in federal court, the outcome would likely be swayed by the *Standard Industrial* case holding. ■

Prevailing Wages/Fringe Benefits/ERISA Preemption

by Heidi Appel, Legal Intern, Winston & Cashatt

In *IREW v. Trig Electrical Construction*, 142 Wn.2d 431 (2000), the Washington Supreme Court in a 5-4 decision reaffirmed ERISA's pre-emption of the Washington's public works lien statutes, RCW 39.08 and 60.28, to the extent they provide an alternative mechanism for enforcing employee benefit plan payments as previously held in *Puget Sound Elec. Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565 (1994).

Trig, a subcontractor, became delinquent in making employee benefit contributions. The Electricians' Union (IBEW) filed a claim against the general contractor's (Lydig) payment bond, as required under RCW 39.08 and against Lydig's retainage

under RCW 60.28. The trial court dismissed IBEW's claim on summary judgment based on deficient lien notices and lack of standing. The Washington Supreme Court, however, in its de novo review, decided the case on the issue of ERISA pre-emption. The Employees' Retirement Income Security Act (ERISA) §514(a) states that "this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." IBEW invited the Court to overrule the *Merit* case based on the narrowing of the ERISA doctrine between the time of *Merit* and this case, but the court declined.

The Court in *Merit* concluded that to the extent the enforce-

(continued on next page)

Industrial Insurance/Temporary Employees

by Larry Vance, Winston & Cashatt

In *Rafn Company v. Dept of Labor & Industries*, 104 Wn.App. 947 (2001), Division II affirmed that RCW 51.16.060, requiring employers to pay the industrial insurance premiums of temporary workers when the temporary help company fails to do so, is constitutional.

Rafn is a general contractor engaged in large commercial construction contracts. On occasion, Rafn employs laborers hired from temporary agencies such as Madden Temporary Services, Inc. and Quik Labor, Inc. Rafn pays the temporary agencies the full hourly rate for each worker, with no deductions for taxes or industrial insurance premiums. The temporary agency is considered the employer and is required to pay the taxes and premiums under RCW 51.16.060, and is thus primarily responsible for making the payments. The statute provides that if the temporary agency does not pay the premiums, then the hiring company must pay them.

On September 16, 1997, and January 2, 1998, the Department of Labor and Industries (L&I) put Rafn on notice that Madden and Quik Labor had not paid industrial insurance premiums for workers hired out to Rafn for the last two quarters of 1996 and the first two quarters of 1997. L&I tried to collect the premiums from Rafn under RCW 51.16.060. Rafn requested

reconsideration, was denied, and then sought declaratory and injunctive relief in the superior court.

Rafn claimed that its right to procedural due process was violated because the statute arbitrarily imposes liability on employers for the debts of others. The court held that RCW 51.16.060, as an imposition of secondary liability on employers for industrial insurance premiums of temporary workers, is not arbitrary and therefore does not violate procedural due process.

Rafn also challenged RCW 51.16.060 on economic substantive due-process grounds, arguing that the means used to cover unpaid premiums are unduly oppressive and not reasonably necessary. Rafn suggested that a better alternative would be for L&I to require all temporary companies to post bonds large enough to cover any unpaid premiums. Rafn also argued that the statute is oppressive because it will not benefit from its own safety record, since L&I calculates the premiums based on the safety record of the delinquent temporary agency. Finally, Rafn argued its concern that it might be liable in tort to injured temporary workers even when it also paid their insurance premiums. The appellate court explained that these arguments addressed the wisdom of RCW 51.16.060, not its constitutionality, and thus are not properly reviewable by the court. ■

Prevailing Wages . . . (continued from previous page)

ment and collection mechanism of the Washington's public works lien statute, RCW 60.28, imposed liabilities on general contractor's bonds for delinquent subcontractor benefit plan payments, it provided an alternative enforcement mechanism to those provided in ERISA, and therefore related to ERISA for pre-emption purposes. IBEW argued that the scope of ERISA had been significantly curtailed in regards to supplanting existing state law. IBEW cited substantial case law from the 9th Circuit and other jurisdictions holding there was no preemption for lien actions against a contractor's bond. However, these cases involved general contractors (or their substitute obligors) as direct employers. In response, the court found a significant distinction

between an employee seeking to foreclose a lien on its employer as opposed to a third party that owes no duty to pay funds into ERISA on behalf of a subcontractor's employees, the former presenting a contractual right and the latter allowing an alternative enforcement mechanism triggering ERISA pre-emption.

Four judges dissented from the majority opinion urging that under the current case law ERISA should not be read expansively. The dissenters reasoned that the court should start with the presumption that Congress does not intend to supplant state law and that generally applicable statutes (*i.e.*, lien laws) must be in direct conflict with federal law in order to be preempted. ■

In Memoriam

by Larry Vance, Winston & Cashatt

Many of you already know, but Dale Ulin, of Ulin & Lambe in Seattle, recently passed away. Dale was a well-known construction lawyer for many years. Few people practiced law with the passion and dedication that Dale did. Dale was always prepared; he was an excellent advocate for his client; and he was tough, but also fair. Even though he was tenacious in his legal battles, he also had a wonderful sense of humor. Those who had cases in opposition with Dale knew they had to be "on their toes" and also well prepared. Simply stated, Dale was a very good lawyer.

I personally handled several cases against Dale over the years. While we often fought like cats and dogs during a case over many bitterly contested points, when the case was finally over, all was forgotten. Dale was never, in my experience, a person who took any of this personally.

Dale will be missed by his many friends and colleagues, but most of all by his family. Dale was born on May 25, 1945 in Port Angeles, Washington. His cherished memory is left with his wife of 31 years, Karen Ulin, daughter Stephanie (Troy) Howard, son Chris Ulin, granddaughter McKenzie Howard, brother Bud (Bonita) Ulin, and sister Cheryl (Sherman) Shortridge.

Constitutionality of Six-Year Statute of Repose/Improvements on Real Estate

by: Larry Vance, Winston & Cashatt

In *Lakeview Boulevard Condominium Association v. Apartment Sales Corporation*, 29 P.3d 1249 (2001), the Supreme Court affirmed on August 30, 2001, that the six-year statute of repose is alive and well in Washington. This case arose from several condominiums damaged by a landslide in the Capitol Hill area of Seattle in early 1997. Construction work was completed on the units in 1990. The owners sued the contractors, Apartment Sales Corporation, and the City of Seattle. The contractors argued that the claim was barred by the six-year statute of repose and were granted summary judgment, which was affirmed on appeal. The Court granted review of the Association's challenges to the constitutionality of the statute on equal protection and access to the courts grounds. The court conducted a rational basis review of the statute and found that the law was rationally related to a number of state interests. The court noted several legitimate interests including preventing plaintiffs from bringing stale claims when evidence and witnesses may not be available and preventing contractors from being liable when they no longer retain control over the premises. The court further concluded that excluding manufacturers and owners from the protection of the statute had legitimate purposes. In contrast to manufacturers, contractors generally make unique products, work in ever-changing environments, and contribute to structural aspects of real estate improvements. A contractor's exposure is different than that of an owner in that contractors have no way to protect or prevent harm from third parties on the property and no ability to inspect and maintain the property after the contractor's work is completed. In regards to the access to the courts issue, the Court agreed with other State Supreme Courts that the legislature can limit the availability of certain causes of action to benefit the public interest. However, the Court declined to actually determine whether Article I, Section 10, of the state constitution contains a right to a remedy. In sum, the court unanimously agreed that RCW 4.16.310 is constitutional. ■

Subcontractor Listing Statute/Bid Shopping/Bid Protest

by: John Guin, Winston & Cashatt

Division III, in *McCandlish Electric v. Will Construction*, 107 Wn.App.85 (2001), determined that former RCW 39.30.060, the subcontractor listing statute, does not provide a remedy for subcontractors aggrieved by a contractor's bid shopping. Will Electric submitted its bid on the Wastewater Treatment Plant Upgrade project in Leavenworth, listing McCandlish as its electrical subcontractor, as required under RCW 39.30.060. Will discovered that its bid was \$200,000 lower than the next lowest bid and sought either to have McCandlish reduce its bid or to substitute Calvert Technologies as the electrical contractor. McCandlish agreed to reduce its costs and Will accepted the public works project. The next day, Will informed the City that it had made a mistake by listing McCandlish (claiming it was a scrivener's error) and wanted to substitute Calvert as its electrical subcontractor. Reluctantly, the City agreed to allow Will to substitute Calvert based on Will's agreement to hold harmless and indemnify the City from any lawsuit that might arise from the substitution.

Although the trial court found that Will had engaged in bid shopping, it determined that RCW 39.30.060 provided no remedy to McCandlish, stating that McCandlish's only remedy was to sue to enjoin the City from awarding Will the contract. In examining the legislative history and the opinion of the Attorney General, the Appeals Court found that while contractors are expected to utilize the subcontractor listed in the bid, RCW 39.30.060 does not definitively prohibit a contractor from substituting another subcontractor for the one listed, nor does the statute give the aggrieved subcontractor a private right of action against the contractor once the contract with the City has been entered into. The court concluded, "RCW 39.30.060 was not enacted for the financial benefit of potential subcontractors on a public works project, but rather to standardize and regulate the competitive bidding process in public works contracts." RCW 39.30.060 was amended in 1999 to include the sentence. Note: The *McCandlish* case has been appealed to the Washington Supreme Court. ■

Bonding Statute/Service of Process

by: Larry Vance, Winston & Cashatt

In *Collection Services v. McConnachie*, 106 Wn.App. 738 (2001), Division III decided whether or not the new language in RCW 18.27.040, the Washington bonding statute, allows service of process on a contractor through the Department of Labor and Industries for a debt not covered by the contractor's bond. McConnachie had a payment dispute over materials with Wilson Floor Coverings. Wilson assigned its interest in the account to Subcontractors and Suppliers Collection Services ("Subcontractors"). Subcontractors brought suit against McConnachie's bonding company, with service through the Department of Labor and Industries pursuant to the bonding statute, of which McConnachie was given notice. The statute of limitation to sue the bonding company had passed and the superior court dismissed Subcontractor's claim against McConnachie for failure to personally serve him.

After *Mid-City Materials, Inc v. Heater Beaters Custom Fireplaces*, 36 Wn.App. 480 (1984), which held that RCW 18.27.040 was specifically limited to suits brought on a bond, the legislature added language to the statute. Rather than read "Service of process in an action upon such bond shall be exclusively by service upon the department," the 1988 amendments make the statute read "Service of process in an action against the contractor, the contractor's bond, or the deposit shall be exclusively by service upon the department." The statute is entitled "Bond or other security required-Actions against- Suspension of registration upon impairment." The opening language in the statute only refers to bringing suit against a bond or deposit. The court looked at the overall focus of the statute and held that RCW 18.27.040, though "muddied" by the added language, is still limited to realizing on a contractor's bond or deposit and does not confer personal jurisdiction over the contractor. ■

Changed Conditions/Subsurface Rock/ Foreseeability

by: John Guin, Winston & Cashatt

In *Basin Paving v. Johnson*, 107 Wash. App. 61 (2001), Division III denied a contractor additional compensation based on its finding that extensive subsurface rock excavation did not constitute a changed condition. Mike M. Johnson (MMJ) was awarded the contract for Lind's waste water and water system project. Lind conducted boring tests on the site and included the results of those tests in the project plans. MMJ claimed that it encountered more rock than it anticipated from the boring tests given in the plans and was entitled to additional compensation for the changed conditions. The court denied recovery based on its findings that (1) the contract repeatedly stated the subsurface conditions were unclassified, (2) the contract indicated the boring tests were not to be taken as representations of the material to be excavated, and (3) the contractor was required to examine the pipeline routes to their own satisfaction. Further, the court deemed MMJ's admission in deposition that it "might be possible" that he could encounter rock formations not shown by the data as supportive of the fact that the condition was foreseeable. The court repeatedly cited *Bignold v. King*, 65 Wn.2d 817 (1965), for the proposition that a contractor cannot recover for a changed condition when it was reasonably foreseeable or anticipated by either party to the contract. However, several of the findings relied upon by the court to deny the changed condition claim have been rejected by both federal courts and Boards of Contract Appeal. For example, broad disclaimers regarding non-reliance on information in the specifications have not been well received by federal Boards of Contract Appeals. ■

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