

# Construction Law



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## Competitive Bidding/Bid Responsiveness/ Minor Irregularity/Inspections/Remedies

by Larry Vance – Winston & Cashatt

In *Quinn Constr. v. King County Fire Protection Dist.*, 111 Wn.App. 19 (2002) Division I of the Court of Appeals continued its trend of limiting the remedies of bid protestors and reinforced the concept of a "material irregularity" requiring a showing of unfair advantage of one bidder over the others. The Court did, however, lessen the burden of bid protestors somewhat by holding that if the temporary restraining order is dissolved, the defendants do not get to recover their attorney fees in dissolving the injunction.

The facts giving rise to the case were relatively simple. Two of the bidders were apparently sitting in the bid room just prior to the bid opening. One of the bidders (Korsmo) spent the last few minutes immediately prior to the bid talking on his cell phone (probably getting last minute sub or supply quotes or simply eating a peanut butter and jelly sandwich). In any event, when the fire chief announced that the "time" for submission of bids had expired, Korsmo's representative had completed filling out his bid, but was having trouble stuffing it in the envelope. Unfortunately, this resulted in Korsmo's bid being turned in 5 to 10 seconds late. Nevertheless, the fire chief accepted the late bid over the protest of several other bidders, including the plaintiff (Quinn Construction). The owner then opened all the bids and reviewed them. The owner's representative (the fire chief) advised the other bidders that the Board of

Commissions would take action at its next regular Board meeting (scheduled a couple of weeks later).

It was not immediately clear who the low bidder was because Korsmo's was low on only the base bid, but apparently not low if certain alternates were chosen. Ultimately, however, at the Board meeting, the Board voted to accept the low base bid of Korsmo. Quinn Construction promptly notified the Attorney General's office and requested that action be taken to prevent the award of the contract to Korsmo. Korsmo also filed a complaint in superior court asking the court to enjoin the award of the contract. On the same day of filing its complaint in court, Quinn's counsel faxed a letter to both the owner and Korsmo notifying them that at 1:30 p.m. that same day they would be seeking a Temporary Restraining Order. Apparently in response to that notification, the District and Korsmo signed the contract. Later that same day, the Court entered a TRO restraining the parties from entering into a contract.<sup>1</sup>

After the TRO had been entered, Quinn filed a motion for a preliminary injunction and based its request on two grounds: (1) the owner had wrongfully waived the irregularity (the tardiness of Korsmo's bid); and, (2) the owner had frustrated Quinn's right to relief by signing the contract as soon as they reviewed the notice of Quinn's intent to restrain the contract award.

*continued on next page*

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**COMPETITIVE BIDDING/BID RESPONSIVENESS/MINOR IRREGULARITY/INSPECTIONS/REMEDIES** from previous page

The Court ignored the standing issue entirely and assumed that the plaintiff bid protestor had standing. The trial court then denied Quinn's request for a preliminary injunction and ruled that the 5 to 10 second tardiness was a minor irregularity which could be waived by the owner. (Probably correct, since no other bids were opened prior to Korsmo's bid being delivered to the District.)

When the injunction was denied, the District moved for dismissal of the lawsuit which apparently triggered Quinn's request for discovery and a public records request. The Court stayed discovery (and apparently also stayed the Public Records request) pending the hearing on the District's motion to dismiss. The Court granted the district's motion to dismiss. The District subsequently moved for the award of its legal fees as damages for wrongful injunction, which the trial court denied.

On appeal, Division I upheld the trial court's determination that it was proper for the District to waive the late bid as a minor irregularity holding that there was simply no proof presented of actual prejudice to the other bidders. The Appellate Court also dodged the standing issue (just as the trial Court had done). In making this ruling, the Court also noted that the Association of General Contractors had filed an amicus brief in which it argued that the remedies of a disappointed bidder (a/k/a "bid protestor") were inadequate. The Court found it "unnecessary" to re-examine its prior holdings that had limited a disappointed bidder's remedies to injunctive relief "before a contract with another bidder is executed."

The Court further slammed the door on the rights of a bid protestor by holding that (a) there was no remedy or claim available for monetary damages in a bid protest, (b) that this rule also precluded any award of even bid preparation costs and (c) no claim existed under 42 U.S.C. §1983 because Washington law did not recognize a bidder's "property interest" in a contract it had merely submitted a bid on.

The only real bone that the Appellate Court threw to the plaintiff was affirming the trial court's denial of attorney's fees to the District as damages for a wrongful injunction.<sup>2</sup> Basically, the Court held that in the context of public bidding (where a bid protestor's only remedy is to seek a restraining order and injunctive relief prior to contract formation) it was not proper to award the defendant its legal fees if the Court later dissolved the TRO.

1 This is an interesting point because according to the Court's opinion, the contract had already been signed (thus, the contract already "entered into?")

2 The Appellate Court also held that the trial court erred in denying Quinn's access to public records even though its action was properly dismissed. The Court held that Quinn could still seek records under the PRA.

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## Materialmen's Liens/Foreclosure/Service Requirements (Necessary Parties)

by Heidi Appel – Winston & Cashatt

### ***Bob Pearson Construction v. First Community Bank,* 111 Wn.App. 174 (2002)**

RCW 60.04.141 requires a lien claimant to file an action to enforce a lien within eight months after filing a claim of lien and to serve the property owner within 90 days thereafter. In order to enforce a lien against other parties with recorded interests in the property the lien claimant must join those parties. However RCW 60.04.141 does not indicate whether those interested parties must also be served within the eight-month-plus-ninety day period.

In *Bob Pearson Constr. v. First Cmty. Bank*, Pearson contracted to construct a building for Mr. and Mrs. Price. Washington Mutual loaned the Prices money and recorded a deed of trust on the property. Pearson filed a lien claim on the property after the Prices halted construction. Thereafter, the Prices executed a deed of trust to First Community Bank (FCB), which FCB recorded. Pearson sued and served the Prices within the statutory time period, but failed to serve either of the banks. The banks argued that the trial court erred in allowing Pearson to add them as parties to the action because Pearson had lost any lien rights against the banks due to his failure to sue and serve them within the statutory time period. The court agreed with the banks.

The Washington Supreme Court determined in 1911 that a lien claimant must sue all interested parties, whether

considered necessary or proper, within the statutory time period. The statute was amended in 1975 to require that the lien claimant serve "all necessary parties." Case law under the 1975 statute held that a lien claimant lost his right to enforce the lien at all if a necessary party was not served within the statutory time period, while a lien claimant lost only lost his right to sue a proper party if that party was not served within the statutory time period. The statute was amended in 1991 to change "necessary parties" to "the owner of the subject property." The 1991 amendment requires that the owner be served to create a valid lien, but the statute does not address when other lienholders must be served. The court determined that the law was well-established that an interested party, whether necessary or only proper, had to be served within the statutory time period or the lien claimant's action was void against that party. In 1991, the legislature signaled no intent to change that long-standing law. The amendment merely eliminated confusion over what was required to create a valid lien. In summary, a lien claimant must serve the owner of the property within the statutory time period to create a valid lien. If a lien claimant wishes to enforce its lien against any other interested parties, the lien claimant must serve those parties within the statutory time period, as well, or the lien claim is void against those parties.

## Editor's Message

Until recently, this Section's Newsletter has not generally reported on cases or decisions from other jurisdictions. However, with the advent of the more liberal rules on reciprocity, it is likely that many of this Section's members will be practicing law in several of our nearby jurisdictions. Accordingly, although the Newsletter's primary focus will continue to be recent Washington law, we will also be publishing short articles on recent court decisions from other nearby jurisdictions when such cases are brought to the editor's attention. Contributions for case note are not generally solicited, but are always appreciated. Your input is both needed and welcome.

## Statute of Limitations/Statute of Repose/Defective Construction/Discovery Rule

by Bruce A. Cohen – Short Cressman & Burgess PLLC

In *Architectonics Construction Management, Inc. v. Khorram*, 45 P. 3d 1142 (Wn. App. Div. 1 2002), the Washington Court of Appeals Division I held that the “discovery rule” is applicable to breach of contract claims. The Khorrams, homeowners, contracted with Kensington Homes to build their home. The work was substantially completed in June 1993. In late 1998, the Khorrams noticed bubbling and peeling paint on the side of their house and garage and ultimately contracted with Architectonics Construction Management (“ACM”) to have remedial work performed. ACM discovered dry rot in the walls which insurance investigators concluded had been ongoing since the residence was constructed in 1992. In the lien suit brought by ACM, the Khorrams filed third-party claims against Kensington alleging breach of contract. The Khorrams claims were asserted in the summer of 2000, seven years after substantial completion. Kensington obtained summary judgment in the trial court arguing that the homeowners’ claims were barred by the six-year statute of limitations for breach of written contract and the construction statute of repose.

The homeowners argued on appeal that by virtue of the discovery rule, their breach of contract claim against the builder did not accrue until the breach was discovered in 1998, rather than the date the defective construction was installed in 1993. According to the homeowners, the statute of limitations on their breach of contract action did not expire until 2004, 11 years after substantial completion. Citing the widespread applicability of the discovery rule in tort cases, and the rationale behind the rule to protect “blamelessly uninformed” plaintiffs, the Washington Court of Appeals, in a departure from previous rulings, held for the first time that the discovery rule should also apply to breach of contract actions. Kensington Homes filed a Petition for Discretionary Review with the Washington Supreme Court on June 12 and it is anticipated that contractor trade organizations will be filing amicus briefs to encourage the Court to overturn the Court of Appeals’ decision.

## Intended Contractor and Contractor Registration

by Derek Crick – Short Cressman & Burgess PLLC

In *Bort d/b/a LB Construction v. Parker*, 110 Wn.App. 561 (2002), Division III reversed and remanded the trial court’s dismissal by summary judgment of a contractor’s lawsuit where the written contract did not state the registered name of the contractor, but stated a trade name.

David Parker as “Owner” entered into a construction contract with “Louie Bort d/b/a LB Construction,” as “Contractor.” Louie Bort d/b/a LB Construction was not a registered contractor pursuant to RCW 18.27. However, Louie Bort Company (“LBC”) was licensed in compliance with the statute and its registration number was stated in the contract. When Mr. Bort filed a lawsuit to collect unpaid sums, Mr. Parker moved to have the lawsuit dismissed based on the contractor’s failure to comply with RCW 18.27.080. Mr. Bort sought to amend its lawsuit and add LBC as a plaintiff. The trial court allowed Mr. Bort to amend its lawsuit, but granted Parker’s summary judgment dismissing the complaint.

Division III reversed. The Court determined that the record allowed reasonable factual inferences that LBC was the intended contractor. The Court found that prior to execution of the contract, Mr. Parker had submitted a material list to its lender identifying the contract as “Louie Bort Company.” In addition, Mr. Parker had signed the construction loan agreement describing the builder as “Louie Bort Company.” The Court explained that “reasonable inferences exist that the parties intended LBC, a properly registered contractor, to be a party to the contract.”

The Court also addressed alternate equitable theories available to Louie Bort Company, including (1) reformation based on scrivener’s error, (2) ratification, and (3) unjust enrichment or *quantum meruit*. The Court determined that there were genuine issues of material fact as to whether scrivener’s error affected the contract. The Court further determined that the contractor appeared to have a valid quantum meruit claim. The Court held the contractor was not prevented from pursuing the equitable theories if the contract claim failed.

## Arbitration Provisions and Contractual Arbitration Agreements: Statutory Arbitration and the 'Prohibitive Cost' Defense

by Andrew Mitchell – Paine Hamblen Coffin Brooke & Miller LLP

In *Mendez v. Palm Harbor Homes*, 111 Wn. App. 446 (2002), Division III of the Court of Appeals decided whether a plaintiff could be forced to arbitrate a claim pursuant to provisions in a purchase and sale agreement, and a separate contractual agreement, where the cost to the plaintiff of arbitration is prohibitive.

Palm Harbor is a dealer of manufactured and new and used mobile homes. Mendez purchased a used mobile home in 2000. On the reverse side of the purchase and sale agreement contained a pre-printed arbitration agreement. The clause called for compulsory and binding arbitration. Arbitration was to be pursuant to RCW 7.04. Mendez initialed the arbitration clause.

Mendez also signed a separate agreement to arbitrate as part of the retail installment contract. This arbitration was to be pursuant to the rules and procedures of the American Arbitration Association (AAA).

The separate arbitration agreement provided that any contest as to the validity and enforceability of the arbitration agreement would be settled by arbitration in accordance with the arbitration provision. Finally, the separate arbitration agreement provided "THE PARTIES KNOWINGLY AND VOLUNTARILY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL."

A dispute arose regarding payment and delivery. Mendez filed a complaint in the Yakima County Superior Court alleging violation of the Dealers and Manufacturers Act (RCW 46.70), the Contractors Registration Act (RCW 18.27), and the Consumer Protection Act (RCW 19.86). Palm Harbor moved to stay the proceedings, citing the arbitration provision and agreement and RCW 7.04. Mendez opposed the motion and argued that the costs of arbitration would be prohibitive. Mendez submitted information concerning the costs obtained from the AAA. Palm Harbor responded by contending Washington law does not carve out an exception to RCW 7.04 for people of limited financial means.

The Superior Court agreed with Mendez and filed a memorandum opinion denying the motion to compel arbitration. The Superior Court held "under the facts of the case, to invoke either of the arbitration clauses would deprive the Plaintiff of the opportunity for a hearing on the complaint." The Superior Court further held, with respect to the jury waiver, that the total absence of disclosure of the financial burdens on the Plaintiff resulted in denying Mendez of an informed choice about waiving his right to a jury trial.

Although the issue was not raised by either party on appeal, The Court of Appeals initially dealt with the issue

of Mendez's statutory claims. The Superior Court held that arbitration could not be compelled due to unconscionability. The Superior Court did not determine the threshold question: Are Mendez's statutory claims subject to arbitration? The issue was one of first impression in Division III. Although the Washington Supreme Court long ago held statutory claims are subject to arbitration under the FAA. See *Garmo v. Dean, Witter, Reynolds, Inc.*, 101 Wn.2d 585 (1984). In *Garmo*, the court did not make a determination as to state law. Justice Dolliver did note, in his concurring opinion, he would have enforced arbitration under state law absent federal preemption. Accordingly, the Court of Appeals examined other states' treatment of statutory claims with respect to arbitration. Based upon decisions from Kentucky and Tennessee, the Court of Appeals held statutory claims are "generally amenable" to arbitration.

The Court of Appeals then turned to the issue of whether unconscionability can validly prevent the enforcement of arbitration agreements. RCW 7.04.010 provides for the enforcement of arbitration "save upon such grounds as exist in law or equity for the revocation of any agreement." The Court of Appeals did not find fault with Palm Harbor's contracts. Thus, the Court of Appeals interpreted the legal aspect of unconscionability under an "access to justice" framework.

Although the Court did not find issue with any contractual provision drafted by Palm Harbor, it considered the financial impact to Mendez. In partially relying on *Green Tree Finance Corp. v. Randolph*, 531 U.S. 79 (2000), the Court of Appeals held a party attempting to avoid an arbitration provision can come forward with evidence that the costs of arbitration are prohibitive. This burden does not require a party to actually incur the costs in order to establish the prohibition. The burden is then on the party seeking to compel arbitration to come forward with contrary evidence. Because Palm Harbor failed to dispute Mendez's claim that arbitration under the AAA would be cost prohibitive, it failed to carry its burden and Mendez's argument went forward unopposed.

Washington's policy favoring arbitration is grounded on the proposition that arbitration allows litigants to avoid the formalities, expense, and delays inherent in the court system. This policy is defeated when an arbitration agreement triggers costs effectively depriving a plaintiff of limited pecuniary means of a forum for vindicating claims. In sum, Washington now recognizes a variation of the prohibitive cost defense, originally adopted in the federal system, to the enforcement of an arbitration agreement under RCW 7.04.

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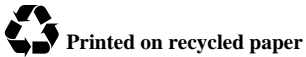
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