

Construction Law

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Chair's Report

by Tom Larkin – Fidelity National Law Group – Seattle, WA

Greetings, Section Member! As those of you who attended our recent Midyear CLE know, I am honored to serve the Section and its members as Chair for the next year. I have been involved with the Section since 2006, starting as a council member and then serving as Vice Chair and Chair-Elect. Over the past 8 years I have seen the section excel in what it offers to its members by way of great CLEs and Forums, multiple model contracts, and an excellent newsletter that provides up-to-date analysis of the latest construction-related cases, developments, and legislative activities, to name just a few. Over the next year it is my goal to see that the council and executive committee continue to serve the section members in the best ways possible. In that light, I encourage all section members to reach out to me and the rest of the executive committee and council regarding how we can better serve you and let us know of any issues/topics you would like to see addressed during CLEs and forums.

Our departing Chair, Joe Scuderi, did an extraordinary job over the last year and I echo the feelings of the all section members in saying "Thank you for your service to the section." During Joe's term, the council drafted its third model contract, a design build, completed a set of model jury instructions for construction-related cases, and held two CLEs and one fo-

rum. Our midyear CLE, chaired by Ron English and Randy Thiel, was a huge success, drawing in 84 attendees, with over 20 percent viewing the webcast. The 84 attendees represent our biggest turnout in recent years. Joe's leadership was a big reason for the success of the CLE and his footprint will be left on the section for years to come.

I am extremely excited about the upcoming year. Look for the section to continue its annual fall forum, likely to be held in mid-October, travel to Vancouver and/or Eastern Washington for a spring CLE, and hold the midyear CLE in June as usual. I would also like

to welcome new council members Roy Lundin and Mark Berg. Roy and Mark both bring a diverse background to the council and will help us to continue to provide high-level service to the membership and the Bar. Finally, make sure to check out our section webpage at <http://www.wsba.org/Legal-Community/Sections/Construction-Law>. There you will find section announcements, past newsletters, our model contracts, contact information for the executive committee and council,

and much more. Once again, thank you for allowing me to serve as Chair and I look forward to working with all section members through the next year.

Your Input Is Needed!

The Construction Law Section Newsletter works best when Section members actively participate. We welcome your articles, case notes, comments, and suggestions concerning new developments in public procurement and private construction law. Please direct inquiries and submit materials for publication to:

Russell King or Athan Tramountanas
Short Cressman & Burgess PLLC
999 Third Avenue, Suite 3000
Seattle, WA 98104
rking@scblaw.com
athant@scblaw.com

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The Angry Introvert, Setting the Pace of Mediation

by Sherman Knight

We have all heard it before. Nothing really happens in mediation until after 4 p.m. True, participants are tired by the end of the business day, but, in every mediation resolved after 4 p.m., the pace of the mediation was typically determined by the same thing. The angry introvert.

Are You an Introvert?

Fifty one percent of the population in the U.S. is an introvert.¹ At mediation it is likely that a decision-maker for one of the parties will be an introvert. Although the extravert expects that everyone else on the planet thinks and processes like he or she does, the introvert cannot understand why the rush.

It is also likely that if one of the parties has more than one decision maker (business partner, joint owner, spouse, etc.), one of these will be an introvert. Shared decision-making is difficult on a good day, so a discussion concerning accepting an offer may sound something like this:

Extravert: "OK, I think that covers the issue; let's make a decision."

Introvert: "No, we need to think about it."

Extravert: "What do you mean, 'we need to think about it?' We just thought about it. That's what we've been doing."

Introvert: "No, we've been talking about it; now we need to think about it."

Extravert: "What have we been doing for the past hour? I just don't understand you sometimes."

Extraverts tend to process information using the auditory and speech areas of the brain. As they talk through their thoughts, the ideas become more clarified and more concrete. An extravert needs little information or time to process and makes public speaking look easy. Business people known to quickly "pull the trigger" are usually extraverts. In addition, the ability of extraverts to feed off the energy of those around them seems to be endless.

Introverts take in the information and then process the information internally – then maybe days later, they tell you what they think. The introvert may be just as good a public speaker, but only if given enough time to prepare for it. This type of business person is slower to "pull the trigger" because they need to fully process all the information. In addition,

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Construction Law Section 2012-2013

Officers

Joseph Scuderi, Chair
Cushman Law Offices
924 Capitol Way S
Olympia, WA 98501-8239
(360) 534-9183
joescuderi@cushmanlaw.com

Thomas P. Larkin II, Chair-elect
Fidelity National Law Group
1200 6th Ave., Ste. 620
Seattle, WA 98101-3125
(206) 223-4525 x106
tom.larkin@fnf.com

Scott Sleight, Vice-chair
Ahlers & Cressman PLLC
999 3rd Ave., Ste. 3800
Seattle, WA 98104-4023
(206) 287-9900
sleight@ac-lawyers.com

Ron J. English, Secretary
Seattle Public Schools Office of
General Counsel
MSC 32-151
P.O. Box 34165
Seattle, WA 98124-1165
(206) 252-0651
renglish@seattleschools.org

Annmarie Petrich, Treasurer
Attorney at Law
1900 Nickerson St., Ste. 209
Seattle, WA 98119-1650
(206) 282-1262
annmarie@abpetrich.com

Ex Officio Chairs

Lawrence Vance, Jr.
Newsletter Editor
Winston & Cashatt
601 W. Riverside Ave., Ste. 1900
Spokane, WA 99201-0695
509-838-6131
Fax 509-838-1416
lhv@winstoncashatt.com

Past Chairs

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Ron English (2005-06)
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Council Members

Term Ending 2013

Helaine Honig
Seattle City Attorney's Office
P.O. Box 94769
Seattle, WA 98124-4769
(206) 684-8222
helaine.honig@seattle.gov

Sherman Knight
Knight Mediation
5400 Carillon Pt.
Kirkland, WA 98033-7357
(425) 576-8777
knight@mediate.com

John Evans
Williams, Kastner & Gibbs PLLC
601 Union St., Ste. 400
Seattle, WA 98101-2380
(206) 628-6600
jeevans@williamskastner.com

Term Ending 2014

Alicia Berry
Liebler, Connor, Berry & St. Hilaire
1141 N. Edison St., Ste. C
P.O. Box 6125
Kennewick, WA 99336-0125
(509) 735-3581
aberry@licbs.com

Maris Bavand
Groff, Murphy PLLC
300 E. Pine St.
Seattle, WA 98722-2029
(206) 628-9500
mbavand@groffmurphy.com

Bill Linton
Inslee Best Doezie & Ryder, PS
777 108th Ave. NE, Ste. 1900
Bellevue, WA 98004-6144
(425) 450-4250
wlinton@insleebest.com

Term Ending 2015

Jason Piskel
Piskel Yahne Kovarik PLLC
522 W. Riverside Ave., Ste. 410
Spokane, WA 99201-0519
(509) 321-5930
jason@pyklawyers.com

Randy Thiel
Thiel Keaton PLLC
701 5th Ave., Ste. 4775
Seattle, WA 98104-7097
(206) 838-2515
rthiel@thielkeaton.com

Athan Tramountanas
Short Cressman & Burgess, PLLC
999 Third Ave., Ste. 3000
Seattle, WA 98104
(509) 321-5930
athant@scblaw.com

BOG Liaison

Judy I. Massong
DiamondMassong PLLC
1411 Fourth Ave., Ste. 765
Seattle, WA 98101
(206) 445-1258
judy@diamondmassong.com

Young Lawyers Liaison

Amber L. Hardwick
Green & Yalowitz, PLLC
1420 Fifth Ave., Ste. 2010
Seattle, WA 98101-4800
(206) 622-1400

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their energy levels are quickly worn down and the only way to recharge is to be alone, left to their own thoughts.

Neither of these methods of decision-making is better than the other; they are just different. Decisions made too quickly run afoul of the law of unintended consequences, requiring revisions to the decision later. Decisions made slowly can often avoid the need to make those revisions later. Often the introvert and the extravert arrive at the same final conclusion, with different methods of processing.

I recently witnessed an example of this in a divorce case. The husband was a trial attorney and made decisive decisions with little information or need to process that information. At family gatherings he was distant; his mind was somewhere else. The wife was the one who spoke at family gatherings and had an outgoing attitude about life – always laughing and with a smile on her face. However, he complained how long it took her to put together a simple family gathering, and she would struggle for weeks preparing and organizing her note cards so she could get up in front of her own family. Her processing took a long time. When I presented my impression to the husband that his wife was most likely an introvert, he refused to believe it. Although she presented the outward characteristics of an extrovert, she processed like an introvert.

So before the mediation, I recommended that the husband place his notebook of spreadsheets covering the various issues and assets on the kitchen counter before bed without saying anything. When he got up in the morning, the notebook was gone. Three days later, she set up a meeting and they had a meaningful discussion. At the end of the meeting, she asked “why didn’t we ever talk like this before?”

Once she was given a chance to process in her own way, the discussion of their dispute could continue. This difference in the way introverts process isn’t limited to disputes; it also occurs when working toward a common goal.

Prior to law school, I worked at an architectural firm with questionable efficiencies and poor morale. I was new to the job and had some great ideas. My new boss was brilliant, but introverted. Daily, I would enter her office and start “bouncing” ideas off her. The conversations were never productive and I could see she was becoming more and more frustrated with me. I’m certain that she was questioning her hiring decision. Frustrated, I stepped back and decided to approach it from a different angle.

I went back to my office and typed my ideas into a lengthy proposal. The next day, instead of my usual bouncing off the walls, I knocked on the door and handed my boss the proposal. “Here are some thoughts I have on some of the design work. Could you take some time and read them over? I’ll check back with you early next week.” Surprised and obviously not expecting this from me, she thanked me and took the paper. The following week I stopped by her office; and she was visibly more relaxed and enthusiastic. She had

set two chairs at the table and copies of my proposal were laid out for review. There were notes and marks, highlights and annotations throughout the paper. We talked for the next two hours about my ideas and hers. Together we came up with some refinements to my proposals and new ideas that neither of us would have thought of alone.

Both of us had the same information and goals, we just needed to process differently.

Just Plain Angry

Anger is triggered when you lose something: a loved one, money, or a simple opportunity. Once triggered, anger is an emotion that creeps up. A party’s anger level may have been creeping for years and somehow the mediator must find a way to restrain it in just a day. Because introverts process internally, friends and family may not realize just how angry the introverted personality is and it may not be immediately noticeable at mediation. But unless the anger of the introvert can be reined in, settlement may not be in the works.

Anger’s effect on a mediation was discussed in a recent survey concerning motivations to settle. Plaintiffs that completed a survey before and after mediation identified four primary motivators – money, fear, anger and justice.

Individuals motivated by money want to ensure they receive “value” for their case – at least as much value as the typical person in their shoes was able to obtain in unrelated cases. Because of differences in cases, no one really knows what that value is so the plaintiff is left with squeezing until the other side stops.

Plaintiffs primarily motivated by fear do not want to try their case. They would rather settle, even for a low amount, than face a jury.

Individuals motivated by anger feel unfairly treated. They perceive they did nothing to deserve what happened to them and feel their lives have been irreversibly altered. Plaintiffs motivated by anger can be persuaded to settle provided the amount offered reflects how the incident altered their life.

Those motivated by justice possess all characteristics of those motivated by anger plus one more. In addition to an amount that reflects their altered life, they become a seeker of justice where they assume the role of moral arbiter, to ensure that no one else has to suffer as they did.

It’s no surprise that all parties listed money as the primary motivator for settlement. But after that, motivators of anger or justice were much more important to the plaintiffs than any other participant.

Of plaintiffs surveyed, 74.5 percent “highly agreed” or “agreed” the settlement figure should be proportional to their sense of anger or need for justice. Only 54.2 percent of plaintiff attorneys, 58.9 percent of insurance company claims representatives and 48.9 percent of defense attorneys shared the plaintiff’s view.

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Looking closer at the numbers, the majority of plaintiffs (53.3 percent) “highly agree” that the settlement amount should diminish their anger. This compares with 35 percent of plaintiff attorneys, 2.1 percent of defense attorneys and 15.4 percent of insurance company representatives. All of these samplings were relatively unchanged pre- and post-mediation.

There was only one motivator that changed before the second survey *and it only changed in mediations that were successful*. The “highly agreed” anger rating for plaintiffs fell from 53.3 percent to 27.8 percent in the post-mediation survey. This last statistic, cutting the plaintiff’s anger in half, clearly indicates that reducing anger is important to a successful mediation.

Anger can be managed a number of ways. Before you can reduce the anger in the room, you first need to make sure that the anger is not inadvertently increased. When the risk is too high, shuttle-type mediations, typically seen in commercial, contract and construction defect cases, places the participants in separate rooms to avoid a face-to-face confrontation.

Prior to mediation, the introvert feels like no one is listening, which may infuriate him even more. Private caucus gives both parties a chance to satisfy their need to be heard, tell their story the way they want it told, without interruption from the bad guys, and make sure the mediator understands the facts and “gets it.”

Strong introverts are driven to process every piece of information whether it is relevant or not. When I recently asked a party to tell his story the way he wanted to tell it, he reached in his brief case and pulled out a 27-page, single-spaced historical transcript. In the next 45 minutes, he had reached page three, and had re-told that part of the story several times. It became quickly evident that if we proceeded with that level of detail, the mediation will never reach resolution.

Just listening was no longer good enough. I would need to show the party “I got it” long before page 27.

I had prepared the day before, so after several pages I started a discussion. A two-sided discussion required a knowledge of the facts and how they are tangled in the law. Demonstrating a knowledge of the facts shows you “get it” and anger levels fall rapidly. As anger falls, the introvert’s need to tell ALL the facts diminishes.

Because of the preparation, the discussion soon changed to asking the party if I could finish the story. This further streamlined the story with the client filling in some information every now and then. The party began to realize I really did “get it” and his need to fill in the blanks occurred less and less. Anger was reduced again along with the need to tell all the details. He never read past page four.

His attorney did a good job of educating him about the law of contracts and mechanics liens and showing him the appropriate value of various pieces of evidence. But, as an angry strong introvert, he had already made up his mind.

He was going to win his case because of something he heard that someone say. Even though the testimony was hearsay the client demanded it be presented to a judge.

His attorney trying to convince his client to assign a lower value to the evidence is an example of “client management.”

When a mediator demonstrates the reasons to lower the value of a certain piece of evidence, it is known as a “reality check.”

If the mediator cannot demonstrate the ability to “get it,” or is forced to move more rapidly than the introvert can comfortably process the information, the reality check falls on deaf ears.

The Angry Introvert with a Dead Battery

If you really want to slow the pace of mediation, make an angry introvert angrier and then deplete his battery.

Extroverts’ batteries are charged by crowded, constantly changing and stressful situations. On the other hand, the introvert’s personal battery is quickly drained by the same crowded, constantly changing and stressful situations. An introvert’s battery may fully discharge several times in a daylong mediation.

A drained battery presents itself in the form of emotional shutdown, no longer making eye contact and slumping shoulders. Remarkably, the introvert’s battery can be quickly recharged. They simply need to be alone. Taking them out in the hall, an empty office or lunchroom is all it takes. Don’t ask them if they understand or try to have a conversation, just let them think. If they need more information, they will ask for it.

The most interesting manifestation of a depleted battery presents itself when the party suddenly starts talking about a completely unrelated subject. It may appear the mediation is taking a big step backwards or the participant is just being difficult. The unrelated subject is often about their favorite son or daughter, their hobby or sport activity – something that makes them smile. This person’s battery is nearly depleted, and discussing something off subject or recalling a stress-free memory will allow it to be recharged.

The introvert cannot process without battery power. Although an extrovert will see these pauses as a waste of time, the introvert may not be able to accept the offer without them, even if it is a good one.

Conclusion

If all participants at mediation are extreme extroverts, the case may settle before noon. But the chances of having two extroverts are rare because those cases tend to settle long before mediation.

With a greater level of introversion, greater degree of anger and a nearly discharged battery comes a dramatically slower pace. Processing time is limited, so it is important to

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eliminate the low-value information and focus on the high-value information. If the participants believe the mediator “gets it,” they more readily accept the mediator’s “reality check.” As anger diminishes, the introvert starts looking seriously at the other side’s offers.

It’s 4 p.m.

Nearly every mediation contains at least one angry introvert.

Sherman Knight is a licensed architect and was project lead/construction administrator for custom residential work through large hospital expansion projects. He also practiced law in the state of Washington. Much of his practice concerned construction defect issues. His work in the construction arena spans more than three decades. Mr. Knight is now retired from law and is the owner of Knight Dispute Resolution where he mediates and performs as a neutral.

¹ Meyers, I.B. McCaulley, M.H Quick (1998) MBTI Manual, Consulting Psychology Press Sets introversion at 50.7 percent. A more recent version, MBTI Manual Step concludes introversion at 57 percent.

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Statutes of Limitations to Apply to Arbitrations (Again)

by Athan Tramountanas

Under a recent change to Washington law, statutes of limitation will apply to claims asserted in arbitration. Haven’t statutes of limitation always applied to arbitrations? Not according to the Washington Supreme Court.

In 2010, the court ruled that statutes of limitation do not automatically apply when parties have agreed to refer their disputes to arbitration. In *Broom v. Morgan Stanley DW, Inc.*, 169 Wn.2d 231, 236 P.3d 182 (2010), the court noted that the statutes of limitations at issue prevented a party from bringing an “action” after a specified number of years. The court held that arbitrations are not “actions” for the purpose of statutes of limitation, and that statutes of limitation did not apply to claims brought in arbitration.

The Washington Supreme Court did hold in *Broom* that parties could mutually agree to apply limitations periods to arbitrations: “If desired, parties may agree contractually to the applicability of state statutes of limitations, in which case those limits would be applied by the arbitral panel.” The AIA General Conditions Document A201 (2007) Section 15.4.1.1 is an example of contractual language that requires statutes of limitations to be applied to arbitrations:

... but in no event shall [a demand for arbitration] be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations.

As a result of the *Broom* decision, parties that agreed to arbitration without reference to statutes of limitation or contractual language similar to the AIA Document A201 found themselves subject to liability indefinitely.

The legislature has now essentially overruled the *Broom* decision. The legislation (HB 1065, Chapter 92, 2013 Laws) adds a new subsection (3) to RCW 7.04A.090 of Washington’s Uniform Arbitration Act: “A claim sought to be arbitrated is subject to the same limitations of time for the commencement of actions as if the claim had been asserted in court.”

The change goes into effect July 28, 2013. When analyzing whether a prior change to the law on statutes of limitation applied retroactively, the Washington Supreme Court analyzed whether the new law expressly stated it was meant to be retroactive, or whether it was remedial or curative. See *1000 Vertecs Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006). The new law does not state an intent to apply retroactively, and it does not appear to be remedial or curative, so it will probably not apply to contracts executed before July 28.

Mr. Tramountanas is a partner with Short Cressman & Burgess, PLLC.

Washington Supreme Court Limits Insurers' Right to Recoupment of Defense Costs

by Marjan Disler

Upon agreeing to defend a policyholder, an insurer will typically issue a reservation of rights letter, conditioning the defense upon reimbursement of defense costs in the event that a court ultimately finds that coverage does not exist. The issue of whether such a condition is enforceable has been treated differently across the nation. Originally, the majority of courts decided the question in favor of insurance companies, holding that equitable principles such as unjust enrichment supported an insurer's right to recoupment. The trend has recently changed, however, with the majority now following the view that such a condition in the reservation of rights letter is an impermissible unilateral attempt to modify the terms of the policy.¹ The Washington Supreme Court recently joined this modern trend with its decision in *National Surety Corp. v. Immunex Corp.*, 176 Wn.2d 872 (2013), holding that an insurer may not recover costs incurred under a reservation of rights defense undertaken during a time when the insurer's duty to defend was uncertain.

Background

From 1998 until 2002, Immunex Corporation (Immunex) carried excess and umbrella liability insurance policies with National Surety Corporation (National). In August 2001, Immunex notified National of state and federal government investigations that had been initiated into Immunex's wholesale drug pricing. Immunex indicated in its notice that it was prohibited from providing further information to National as a result of a confidentiality agreement. National acknowledged receipt of the notice and requested that Immunex provide it with copies of any complaints that might emerge.

Twenty-three lawsuits were eventually filed against Immunex for pricing manipulation, with the first of the lawsuits filed in 2001. In October 2006, Immunex tendered its claim for defense to National, asserting its rights to coverage for injury resulting from discrimination. In March 2008, National issued a letter to Immunex agreeing to defend Immunex but reserving the right to recoup defense costs in the event that a court found that there was no coverage. Contemporaneously with issuing the reservation of rights letter, National filed a declaratory judgment action in the King County Superior Court to determine coverage. In April 2009, the trial court determined that National did not have a duty to defend Immunex because the lawsuits against Immunex did not allege claims arising out of discrimination. Nevertheless, the court held that National was responsible for Immunex's defense costs incurred through the date of the April 2009 ruling, subject to modification for any prejudice to National as a result of Immunex's late tender. The Court of Appeals affirmed and National petitioned the Supreme Court for review.

An Insurer's Duty to Defend is Broad

The Supreme Court affirmed the Court of Appeals' decision, focusing largely on an insurer's broad duty to defend. Specifically, the court noted that an insurer has a duty to defend against all colorable claims and that such a duty arises whenever a claim has the potential to result in liability. The court also discussed the public policy concerns associated with insurance contracts, stating that such contracts are meant to provide "security and peace of mind" to the insured. 176 Wn.2d at 878.

Principles of Unjust Enrichment Do Not Apply

In contrast to the minority view embraced by other states, the court held that equitable principles such as unjust enrichment are irrelevant and do not support a right to recoupment. The court reasoned that there is no detriment to an insurer who defends based upon a reservation of rights. Rather, the insurer benefits from avoiding potential liability arising from an insured's claims of breach, bad faith, waiver, and coverage by estoppel in the event that the insurer decides not to defend. The insurer also benefits from the ability to monitor the defense of the insured and to "better limit its exposure." 176 Wn.2d at 884. Thus, according to the court, an insurer's decision to defend under a reservation of rights is simply another business decision that is based upon a balancing of risks.

Right of Recoupment Must be Mutually Agreed Upon

It is important to note that the court does not completely preclude an insurer from seeking recoupment. The court simply holds that if the insurance policy is silent on the issue of reimbursement, the insurer may not unilaterally modify the terms of the policy by asserting a right to recoupment in the reservation of rights letter.

As a result of the decision in *National Surety Corp. v. Immunex Corp.* and the growing trend among courts in other jurisdictions disallowing recoupment, insurers may now seek to rewrite or amend their policies to explicitly provide for reimbursement of defense costs.

Ms. Disler is an associate with Short Cressman & Burgess, PLLC.

¹ As of March 2011, five states allowed reimbursement (California, Colorado, Connecticut, Florida and New Jersey) and seven states barred reimbursement (Alabama, Arkansas, Illinois, Montana, Pennsylvania, Texas and Wyoming). See Bob Allen, Gary Thompson and Sara Thorpe, *Reversing Course: Can An Insurer Seek Reimbursement From Its Policyholder For Amounts Related To Noncovered Claims?* (March 2011). A number of federal courts have also joined in the trend to bar reimbursement. See e.g. *Welch Foods, Inc. v. Nat'l Union Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 17134 (D. Mass. 2011); *Blue Cross of Idaho Health Service, Inc. v. Atlantic Mutual Ins. Co.*, 2010 U.S. Dist. LEXIS 86737 (2010); *Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 448 F.3d 252, 258 (4th Cir. 2006).

Changes to Washington's Alternative Public Works Contracting Procedures

by Athan Tramountanas

Washington's Alternative Public Works Contracting Procedure statutes, located at Chapter 39.10 RCW, govern public bodies' use of the design-build and general contractor/construction manager (GC/CM) contracting procedures. On May 14, 2013, Governor Inslee signed Substitute House Bill 1466 into law, which revises and extends these statutes beyond the current sunset date of July 1, 2013. The changes law will go into effect on June 30, 2013. This article discusses the most significant changes to the statutes.

Project Review Committee's \$10 Million Threshold for Project Approval Deleted

Previous revisions to the Alternative Public Works statutes established the Capital Projects Advisory Review Board (CPARB) to evaluate public projects and the use of alternative procurement methods. CPARB was also charged with creating a Project Review Committee (PRC). The PRC has a gate-keeping role in determining whether a public body can use design-build or GC/CM. Where a public body has the experience and qualifications to determine which projects are appropriate for, and to carry out, an alternative contracting procedure, the PRC may certify the public body to utilize that method for appropriate projects for a specified period of time. Where a public body does not have the necessary experience and qualifications, but has a project that is otherwise appropriate for alternative procurement and has assembled an experienced project team to run the project, the PRC may certify that specific project.

Previously, the PRC could only certify public bodies to use the design-build or general GC/CM contracting procedures for projects with a total project cost of over ten million dollars. The PRC was also charged with the review and approval of the use of GC/CM by certified public bodies for projects with a total project cost of under ten million dollars. The statutory revisions delete the reference to ten million dollars in both places.

This change means there is no longer a minimum dollar threshold for certified public bodies to use GC/CM. The change has little practical effect on design-build projects, which are still required to have a total project cost of over ten million dollars under RCW 39.10.300 (except for parking garages and pre-engineered metal or portable buildings).

The new changes also allow the PRC to approve up to 15 individual design-build projects with project costs between two and 10 million dollars by non-certified public bodies (previously, the PRC could only approve 10 such projects). Also, certified public bodies may use design-build for up to five projects with project costs between two and ten million dollars (previously, the law did not allow any such projects).

Changes to the Types of Projects that are Appropriate for Design-Build

The design-build statutes set out three types of projects that, if the planned project costs exceed \$10 million, are appropriate for design-build. The changes to RCW 39.10.300 makes wholesale changes to the three project types. Now, in order for a public body to use design-build, the project must be over \$10 and meet one of the following criteria:

- The construction activities are highly specialized and a design-build approach is critical in developing the construction methodology; or
- The project provides opportunity for greater innovation or efficiencies between the designer and the builder; or
- Significant savings in project delivery time would be realized.

Notwithstanding the above changes, design-build is still allowed for all parking garages and pre-engineered metal buildings, and (under the statutory changes) for portable facilities as defined in WAC 392-343-018, regardless of the project cost.

Use of Small and Disadvantaged Business Enterprises is Encouraged as Evaluation Factor

A key attribute of alternative procurements is that, instead of awarding a project to the lowest responsible bidder, a public body awards the contract to the highest ranked proper based on published evaluation factors. The alternate procurement statutes set out some evaluation factors that public bodies are required to use, but public bodies have the ability to create and use other appropriate evaluation factors to select a contractor.

The new changes to the alternative procurement statutes allow public bodies to use evaluation factors that consider proposers' use of small business enterprises and disadvantaged business enterprises as subcontractors. A small business enterprise is one with 50 or fewer employees or a gross annual income of under \$50 million. A disadvantaged business enterprise is one that is certified with the Office of Minority and Women's Business Enterprises.

The change in the statute should not have any practical effect on alternative procurements – public bodies were always able to use additional evaluation factors, presumably including proposers' use of small and disadvantaged business enterprises. The changes were intended to encourage the participation of small and disadvantaged business enterprises

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in public works contracting. While this intent is laudable, the language in the final bill may have some unintended results.

First, the language added to the design-build statute seems to go beyond evaluating a proposer's use of disadvantaged business entities, to actually evaluating whether the proposer is a disadvantaged business entity:

Evaluation factors may also include: (A) the proposer's past performance in utilization of small business enterprises; and (B) disadvantaged business enterprises.

SHB 1466, Sec. 11, RCW 39.10.330(1)(d)(i). As drafted, this language appears to allow a public body to award evaluation points to a disadvantaged business entity, rather than based on a proposer's utilization of disadvantaged business entities. If strictly interpreted, the statute allows preferential treatment in public contracting based on race or gender, and is prohibited under RCW 49.60.400 (*i.e.*, the former I-200).

Second, the statutory language has always been interpreted to allow the public bodies to use additional appropriate evaluation factors for projects. The new language, however, states public bodies *shall* use certain required evaluation factors and *may* use the optional small and disadvantaged business enterprises evaluation factors. The implication now arises, supported by rules of statutory interpretation, that a public body may not use any other evaluation factors besides the required and optional ones stated in the statute.

It is unlikely legislature meant to allow public bodies to give preferential treatment to proposers based on race or gender, or to prohibit public bodies from considering other evaluation factors in their procurement decisions. The new language will probably not have a practical effect on alternate procurements, but if it is challenged, expect to see proposed changes in future legislative sessions.

Use of Price as an Evaluation Factor for Design-Build

The design-build statutes at RCW 39.10.330 previously required a public body to use "proposal price" as an evaluation factor for evaluating finalists' proposals. The new language has changed to require the public body to instead evaluate "cost or price-related factors that may include operating costs." The statute does not define "price-related factors" or "operating costs," but the change provides public bodies with more flexibility in the way they evaluate price in selecting a design-build contractor, instead of limiting the evaluation to the proposed project cost.

Requirement to Provide Opportunity for Protests During Selection Process

The changes to the alternative procurement statutes require public bodies to include protest procedures in their requests for proposals for both design-build and GC/CM projects. In both cases, the protest procedures must allow a proposer four days to file a protest from the date the public body announces its selection decision.

For design-build projects, a public body is required to notify all proposers after it selects finalists from the request for qualifications. The new law requires the public body to then wait two days after this notification before proceeding with the next phase of the procurement process. If a proposer files a protest, the public body may not advance to the next phase until two days after the public body transmits its final decision on the protest.

Once a public body makes a decision on the finalists' proposals, it must then make a selection summary available to all proposers within two days. If the public body receives a timely protest, it may not execute a contract until two business days after its final protest decision is transmitted to the protestor.

For GC/CM projects, a public body is not required to wait two days after selecting its competitive range of proposers. When it chooses the GC/CM contractor from this competitive range, however, it must notify all the finalists of its selection decision and make a summary of its decision available within two days. If the public body receives a timely protest after this notification, it may not execute a contract until two business days after its final protest decision is transmitted to the protestor.

Under certain circumstances, the selected GC/CM may select its mechanical and electrical subcontractors through a selection process based on evaluation factors (*i.e.*, like the selection process the public body uses for selecting the GC/CM). The changes to the law require the GC/CM to include protest procedures in its subcontractor solicitation and wait for the resolution of protests before executing a contract, like the public body must now do for the GC/CM procurement.

New Sunset Date of July 1, 2021

The alternate procurement statutes in Washington have always come with an expiration date. Legislature uses this "sunset" date as an opportunity to improve the procurement methods based on recommendations from CPARB. The prior sunset date of July 1, 2013, has been extended to July 1, 2021. Barring a drastic change, these new statutes will be in place for the next eight years.

Mr. Tramountanas is a partner with Short Cressman & Burgess, PLLC.

Recent Ninth Circuit Decision on Washington Bid Shopping Statute

by Greg Hixson

A general contractor may substitute a subcontractor listed on a public bid form, so long as the replacement was not made in furtherance of bid shopping or bid peddling. The Ninth Circuit Court of Appeals announced this rule in a recent unpublished decision interpreting RCW 39.30.060(2). *ETCO Servs., LLC v. Killian Constr. Co.*, 2013 U.S. App. LEXIS 11755 (9th Cir. Wash. June 11, 2013). This case is significant because, while it is unpublished, it is the first appellate court decision that applies RCW 39.30.060(2). Recognizing that the state of Washington has not defined bid shopping, the Ninth Circuit followed the criteria set out in *McCandlish Electric, Inc. v. Will Construction Co.*, 25 P.3d 1057 (2001). The result is not surprising, and underscores the flexibility a general contractor has in choosing its subcontractors, as well as the heavy burden a subcontractor has in proving a substitution was improper.

In the *ETCO Services* case, the prime contractor, Killian Construction (Killian), bid on the demolition and replacement of a residential hall at Central Washington University (CWU). ETCO Services, LLC (ETCO) submitted a bid to Killian to perform the plumbing scope at a cost of \$5,052,000. Another subcontractor, JRT Mechanical (JRT), submitted a bid to Killian to perform plumbing, HVAC, and Controls for a cost of \$5,500,000. Killian claimed it mistakenly believed that ETCO's bid included not only plumbing, but also HVAC and controls. Killian incorporated the ETCO bid into its prime contract bid to CWU.

CWU awarded Killian the contract on November 29, 2010. By this time, however, CWU realized it had made a "regrettable human error" by mistakenly believing that ETCO's bid included HVAC and controls. To correct this error, Killian substituted ETCO's bid with JRT's bid, which by that time was inexplicably reduced to \$5,446,000,

ETCO sued Killian, alleging the substitution violated RCW 39.30.060(2). This statute provides a remedy to subcontractors on public works projects that are victims of bid shopping, and places the burden of proof on the purported victim:

Substitution of a listed subcontractor *in furtherance of bid shopping or bid peddling* before or after the award of the prime contract is prohibited and the originally listed subcontractor is entitled to recover monetary damages from the prime contract bidder who executed a contract with the public entity and the substituted subcontractor but not from the public entity inviting the bid. *It is the original subcontractor's burden to prove by a preponderance of the evidence that bid shopping or bid peddling occurred. Substitution of a listed subcontractor may be made by the prime contractor for the following reasons:*

- (a) Refusal of the listed subcontractor to sign a contract with the prime contractor;
- (b) Bankruptcy or insolvency of the listed subcontractor;
- (c) Inability of the listed subcontractor to perform the requirements of the proposed contract or the project;
- (d) Inability of the listed subcontractor to obtain the necessary license, bonding, insurance, or other statutory requirements to perform the work detailed in the contract; or
- (e) The listed subcontractor is barred from participating in the project as a result of a court order or summary judgment.

RCW 39.30.060(2) (emphasis added).

The Ninth Circuit focused on the initial language of the statute, holding that "the statute *only* prohibits substitution on a listed subcontractor in furtherance of bid shopping or bid peddling..." (emphasis in original). The statute, however, does not define "bid shopping or bid peddling." The legislature passed RCW 39.30.060(2) in response to the *McCandlish Electric* decision in 2001, and since then, no appellate court has interpreted the "bid shopping or bid peddling" language. To fill this gap, the Ninth Circuit looked to the Washington Court of Appeals in *McCandlish Electric*, which in turn looked to a 1994 Attorney General Opinion to determine whether a contractor has engaged in bid shopping:

The [Final Legislative Report] describes a form of "bid shopping" in which a contractor obtains quotes from subcontractors that are used in preparation of the contractor's bid on the public works project. Then, after having been awarded the bid, the general contractor would either substitute another subcontractor who would be willing to do the work for less money (thus benefitting directly from the savings), or would use the threat of changing subcontractors to force the original subcontractor to reduce its price. This "bid shopping" practice is regarded as unethical by many in the building industry. Our review of the legislative history showed that there was support from both the general contractors and the specialty contractors for Substitute House Bill 1370. [The bill was codified as Wash. Rev. Code § 39.30.060.]

McCandlish Electric, 25 P.3d at 1061 (quoting 1994 Op. Att'y Gen. 14, at 4 n.2).

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Applying this definition of "bid shopping" to the facts of the case, the Ninth Circuit affirmed the District Court's summary judgment dismissal. The Ninth Circuit held that "ETCO failed to present any evidence that Killian engaged in bid shopping or bid peddling [or] used the threat of changing subcontractors to force ETCO to reduce its price." Absent such proof, there is no violation of RCW 39.30.060(2).

The result provides general contractors with some flexibility and comfort in replacing subcontractors identified on its public bid form. Substituted subcontractors, however, should think long and hard about challenging a substitution. Absent clear and obtainable evidence of bid shopping, the subcontractor may have to engage in substantial discovery to determine whether proof of bid shopping occurred.

Mr. Hixson is an associate with Short Cressman & Burgess, PLLC.



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WASHINGTON STATE BAR ASSOCIATION
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