

# Construction Law

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## Chair's Report

Many have noted that the older you get, the faster time goes. Truer words were never spoken and on June 10, Marisa Bavand will take over as your chair, assisted by Athan Tramountanas as chair-elect. It has truly been a privilege, not to mention enjoyable, to serve as chair and I cannot adequately thank the section council, members and assisting WSBA staff.

Speaking of June 10, 2016, mark your calendar for our annual all-day CLE to be held at the new WSBA Conference Center at Fourth and Union in Seattle. This year's program will provide you with everything you ever wanted to know about calculating and proving (or disproving) damages in construction claims. We are also fortunate to have three King County judges discuss the dos and don'ts of trying a construction case in their respective courtrooms. Last but not least, we will have our traditional case and statutory law updates and Chris Soelling will provide you with an entertaining hour of ethics credit. Look for a flyer in your mail and sign up early as the WSBA space has limited capacity for in-person attendance. However, there is no limit to the number who can attend the live webcast!

I do not want to write my last column without a reminder that for those of you who on occasion have reason to prepare a single-family residence construction contract, we have posted on the WSBA website two neutral contract forms available for your use at no charge. Just click on "Resources" on the Construction Law Section's website for both lump sum and cost plus form contracts as well as our guide to jury instructions in construction cases. In the near future, we hope to add a new form on owner architect agreements, again in a neutral format.

Thanks to all of you,

*John Evans*

## New This Year: Midyear CLE Post-Event Reception (Hosted Event)

Directly after this year's annual Mid-Year, the Construction Law Section, along with the University of Washington School of Law and Seattle University School of Law will host a reception that all section members are welcome and encouraged to attend. We have invited students from the law schools to attend this event as a meet-and-greet opportunity with the section members. The reception will be held at *Trace, 1112 4th Avenue, Seattle*, and hosted means beverages with some scrumptious appetizers. Again, all section members are welcome to attend whether or not you attend the CLE.

## Third Annual Dinner Meeting – Another Success

*By Robert Olson – Schlemlein Goetz Fick & Scruggs, PLLC*

The Section held its third annual dinner meeting/mini CLE at Cutter's Crabhouse in the Pike Place Market on Thursday evening, February 25, 2016. A lively crowd of 28 members socialized over drinks before dinner and then heard an entertaining and informative slide show presentation by Mike Purdy.

Mike is the former contracting manager at three major public agencies: the City of Seattle, the Seattle Housing Authority, and the University of Washington. For many years he was the insightful and prolific author of Mike Purdy's Public Contracting Blog. Although he recently closed that blog, he continues to publish the Presidential History Blog ([www.PresidentialHistory.com](http://www.PresidentialHistory.com)) that enables him to pursue his other major interest.

Combining his construction expertise and his interest in presidential history, Mike's talk was entitled "**Barely Avoiding Disaster: Lessons Learned from the White House**"  
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### UPCOMING EVENTS

**Midyear CLE** – June 10, 2016 (WSBA Conference Center)

**Post CLE Reception** – June 10, 2016 (Trace Seattle)

**Fall CLE** – November 4, 2016, Vancouver/Portland area (location TBA)

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*THIRD ANNUAL DINNER MEETING – ANOTHER SUCCESS  
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**Reconstruction Project during Harry Truman’s Presidency.”**  
In the late 1940s the White House was unsafe and was virtually falling apart – sagging plaster ceilings, cracked walls, old and brittle beams, “floors that sagged and sloped like a roller coaster.” Concerns for the president’s safety spurred a major design and reconstruction effort in a public works project that was beset with problems and issues familiar to all of us who practice in this area – unclear project management, cost overruns, schedule delays, poor quality control, etc. Mike provided the fascinating details of this little-known project and concluded with lessons learned that are applicable today to any major public works project.

Those attending received one hour of CLE credit in the newly labeled “other” category. Considering that the libations and dinner and the CLE credit cost only \$50, the event was one of the all-time great bargains for Construction Law Section members. We intend to continue the tradition next February. We hope you can join us.

## Recent Realization That Allowable DBE Allocations for Certain Services Are Not Consistent with Washington State Retail Sales Tax Rules

*By Diane Utz – Watt, Tieder, Hoffar & Fitzgerald LLP*

We recently handled a bid protest on a public works project that raised an interesting question relating to how certain trades are treated for DBE allocation purposes versus how the same trades are treated for Washington State retail tax purposes. The underlying project in our protest involved federal highway money so included a Disadvantage Business Enterprise Condition of Award Goal (“DBE COA Goals”). The gist of the phone call from the client was, “The low bidder can’t claim a DBE that is certified for “operated crane rental services” as a subcontractor and allocate 100 percent of the price for DBE participation because Washington has specifically determined that “operated crane rental services” are not subcontractor services. In Washington, we don’t pay sales tax on subcontractor services, but we do for “operated crane rental services” because they are classified as a “retail sale” under the state revenue act. It has to be one way or the other!”

So, the question is this: In Washington, should “operated crane rental services” be classified as an equipment rental or a subcontractor for DBE allocations? For purposes of DBE classification on projects that are subjected to federal rules through the receipt of federal funding, 49 CFR 26.55 classifies

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## Construction Law Section 2015-2016

### Officers

**John Evans, Chair**  
John Evans Law, PLLC  
1001 4th Ave., Ste. 4400  
Seattle, WA 98154  
206-389-1527

**Marisa Bavand, Chair-elect**  
Groff, Murphy PLLC  
300 E. Pine St.  
Seattle, WA 98104  
(206) 628-9500  
mbavand@groffmurphy.com

**Athan Tramountanas, Vice-chair**  
Short Cressman & Burgess PLLC  
999 3rd Ave., Ste. 3000  
Seattle, WA 98104  
(206) 682-3333  
athant@sclblaw.com

**Ron J. English, Secretary**  
Seattle Schools, General Counsel,  
retired  
15624 111th NE  
Bothell, WA 98011  
206-321-2455  
rjenglish@yahoo.com

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

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**Scott Sleight** (2014-15)

### Council Members

#### Term Ending 2016

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

**Mark Berg**  
P.O. Box 13410  
Seattle, WA 98198-1006  
(206) 310-9482  
mark.berg@alaskaair.com

**Roy Lundin**  
Oseran Hahn Spring Straight &  
Watts PS  
10900 NE 4th St., Ste. 1430  
Bellevue, WA 98004-8357  
(425) 455-3900  
rlundin@ohswlaw.com

#### Term Ending 2017

**Amber L. Hardwick**  
Green & Yalowitz, PLLC  
1420 5th Ave., Ste. 2010  
Seattle, WA 98101-4800  
(206) 622-1400

**Jennifer McMillan Beyerlein**  
Lane Powell PC  
1420 5th Ave., Ste. 4200  
Seattle, WA 98111-9402  
(206) 223-7000

**Brett Hill**  
Ahlens & Cressman PLLC  
999 3rd Ave., Ste. 3800  
Seattle, WA 98104-4023  
(206) 287-9900  
bhill@ac-lawyers.com

#### Term Ending 2018

**Bart Reed**  
Stoel Rives LLP  
600 University St., Ste. 3600  
Seattle, WA 98101  
(206) 624-0900

**Janelle Brennan**  
Garco Construction, Inc.  
4114 E Broadway Ave.  
Spokane, WA 99202-4531  
(509) 789-1505  
janelleb@garco.com

**Diane Utz**  
Watt, Tieder, Hoffar & Fitzgerald  
1215 4th Ave., Suite. 2210  
Seattle, WA 98161-1016  
(206) 204-5800 x5812  
dutz@watttieder.com

#### Special Projects Chair

**Jason Piskel (2015-16)**  
Piskel Yahne Kovarik, PLLC  
522 Riverside Ave. #410  
Spokane, WA 99201  
(509) 321-5930  
jason@pyklawyers.com

#### BOG Liaison

**Keith Black**  
13302 53rd Ave NW  
Gig Harbor, WA 98332-8865  
(253) 851-7401  
keithblack.law@gmail.com

#### Young Lawyers Liaison

**Daniel Berner**  
Cushman Law Offices, P.S.  
924 Capitol Way S  
Olympia, WA 98501-1210  
(360) 534-9183  
danielberner@cushmanlaw.com

RECENT REALIZATION THAT ALLOWABLE DBE ALLOCATIONS FOR CERTAIN SERVICES ARE NOT CONSISTENT WITH WASHINGTON STATE RETAIL SALES TAX RULES  
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a firm that owns, operates, or maintains an establishment that leases equipment as a "Regular Dealer." Under 49 CFR 26.55, if a Regular Dealer is properly certified, a contractor may claim 60 percent of the total amount attributable to the Regular Dealer for DBE COA Goals. On the other hand, if a certified DBE company is classified as a subcontractor, a contractor may claim 100 percent of the total amount attributable to the subcontractor for DBE COA Goals. But, what if the leased equipment includes an operator? Is that DBE still a "Regular Dealer"?

Interestingly, 49 CFR 26.55 and other related regulations do not specifically address "operated crane rental services" in order to properly identify whether such services should be considered a "Regular Dealer" or a subcontractor for allocation purposes. Instead, 49 CFR 26.55 (c)(1) provides guidance through an analysis of whether the services provide a "commercially useful function." ADBE performs a "commercially useful function" when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. If a DBE performs a commercially useful function, then a contractor may allocate 100 percent of the price for its DBE COA Goals. In order for "operated crane rental services" to perform a commercially useful function, the operator would have to be responsible for activities such as determining when and where crane picks occur and otherwise supervise all crane-lifting work.

On the other hand, the Appeals Division of the Washington State Department of Revenue has specifically addressed this question through its Determination No. 11-0345 ("Determination"). The Determination cites to WAC 458-20-211 as the administrative rule that addresses leases or rentals of tangible personal property and also provides clarification on when items qualify as rentals of equipment with an operator. This rule defines both "rental equipment with an operator" and "subcontractor" so that the key distinctions between the two are: (1) who determines how the work is performed; and (2) whether the party is hired primarily for the knowledge, skills, and expertise to perform the task rather than operating the equipment. The Determination goes on to state that a renter of equipment with an operator generally performs work under the direction of the lessee, who directs the crane lifts. In short, the renter of equipment does not perform work to contract specifications but performs work at the lessee's direction. Accordingly, a contractor must pay retail sales tax for "operated crane rental services."

When the specific statements regarding the role of "operated crane rental services" included in WAC 458-20-211 are applied to the "commercially useful function" test of 49 CFR 26.55(c)(1), the logical answer is that "operated crane rental

services" do not provide a "commercially useful function" so that a contractor may allocate 100 percent of the costs for purposes of the DBE COA Goals. But, alas, this was not the determination of the authority in response to our protest. As a result, a contractor may designate "operated crane rental services" as subcontractor work for purposes of DBE COA Goals, but that same contractor must pay retail sales tax on the services because they are considered "retail sales" by the state. This inconsistent outcome will likely continue until the issue is addressed in future Project Bid Procedures that are subjected to the same rules (e.g., the Project Bid Procedures specifically designate a certified DBE that provides "operated crane rental services" as a "Regular Dealer.") or a clarification is issued to 49 CFR 26.55.

## Termination for Convenience Clauses Are Not Illusory Promises and Not Limited By the Implied Covenant of Good Faith and Fair Dealing

By *Ceslie Blass – Ahlers & Cressman PLLC*

Recently, Division I of the Court of Appeals addressed two issues of first impression in private construction contracts: (1) whether a Termination for Convenience ("TforC") clause is an illusory promise and, therefore, unenforceable; and (2) whether a TforC clause is limited by the implied duty of good faith and fair dealing. Ultimately, the court held that partial performance of a contract provides adequate consideration to render a TforC clause not illusory, and that the implied duty of good faith and fair dealing does not trump express terms or unambiguous rights in a contract.

The case at issue, *SAK & Associates, Inc. v. Ferguson Constr., Inc.*,<sup>1</sup> involved two private construction companies who entered into a fixed-sum subcontract for concrete materials and paving services on the construction of hangars at an airport. The subcontract contained a TforC clause, which permitted the General Contractor to terminate the subcontract "for its own convenience and require Subcontractor to immediately stop work."<sup>1</sup> A few months into the project, the General Contractor gave notice and terminated the Subcontractor from the project for convenience. Upon termination, the General Contractor paid the Subcontractor the proportionate share of the subcontract price for the work actually performed. The Subcontractor subsequently sued the General Contractor alleging breach of contract for unilateral termination without cause.

A TforC clause "affords the owner or general contractor the flexibility to alter its course and eliminate unnecessary expenditures without repudiating its performance or materially breaching the contract." These clauses have long

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TERMINATION FOR CONVENIENCE CLAUSES ARE NOT ILLUSORY PROMISES AND NOT LIMITED BY THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

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been employed by the government in contracting and found their way into private contracts. In *SAK & Associates, Inc. v. Ferguson Constr., Inc.*, the Subcontractor challenged the enforceability of the TforC clause, arguing it was an “illusory promise” (or that it lacked “consideration”) and was therefore unenforceable. In construction contracts, “consideration” is a requirement that there be reciprocal promises of the parties to perform work and to pay for the work performed. The court held that because the Subcontractor performed 24 percent of the contract and the General Contractor paid the Subcontractor for that portion of the work, such partial performance provided adequate consideration to make the TforC clause enforceable.<sup>2</sup>

The Subcontractor also argued the notice given by the General Contractor was merely false and a pretextual excuse for increasing its profits from the project. The court found this argument unpersuasive. The notice stated that, among other reasons, the General Contractor was terminating the Subcontractor for convenience. If the parties wanted termination to be contingent upon meeting a list of demands or certain content of the notice, the parties were free to negotiate and incorporate those contingencies into the subcontract—but they did not do so. Thus, the TforC clause required that nothing more be stated than convenience, and the court held that the undisputed facts showed that the General Contractor gave such sufficient notice.<sup>3</sup>

Interestingly, the court took the opportunity to address whether a TforC clause can be limited by the implied duty of good faith and fair dealing, even though the argument was not even raised by the Subcontractor. The court quickly rejected the argument stating that, “as a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.”<sup>4</sup> When a party invokes a TforC clause to which both parties agreed, an unambiguous TforC clause will not be limited by the implied duty of good faith and fair dealing. Because the TforC clause in this case was agreed to by the parties and was only contingent upon notice (which was provided), the court found the clause to be enforceable.

Prior to this decision, it was unclear whether Washington would follow the federal courts’ lead, which allow TforC clauses to be limited. However, a Washington court has now spoken to the issue, lending guidance on how courts will rule in the future. Although the Subcontractor submitted its Petition for Review to the Supreme Court two days late, the court is currently considering whether to accept its Petition.

**Comments:** Termination for Convenience clauses can be beneficial in both government and private contracting. However, the parties should negotiate and include any relevant contingencies upon termination that they wish to enforce at a

later date. Washington Courts are likely to continue enforcing the express terms of negotiated contracts rather than read in or imply terms that could have been negotiated at the outset, including such terms can help to mitigate unnecessary, time consuming, and expensive litigation during performance.

1 198 Wn.App. 405, 357 P.3d 671, 674 (2015)

2 *Id.* at 676.

3 *Id.* at 678.

4 *Id.* at 676 (emphasis added).

## Industrial Insurance Benefits are Personal Entitlements

By Athan E. Tramountanas – Short Cressman & Burgess PLLC

A recent Washington appellate decision allowed a divorced man to vacate a decree of dissolution that gave his ex-wife 50 percent of an L&I injury settlement. In *In the Matter of the Marriage of Holly Persinger*, 188 Wn. App. 606, 355 P.3d 291 (2015), the parties submitted an agreed proposed division of assets during their divorce proceedings. The agreement stated they would each receive 50 percent of the husband’s L&I settlement that the husband was negotiating at the time. One year after the court entered a decree of dissolution that accepted the agreement, the Board of Industrial Insurance Appeals found that the husband was “permanently totally disabled” and was entitled to disability compensation. Apparently now not wanting to share this compensation, the husband sought to vacate the dissolution decree.

The trial court denied the husband’s CR 60(b)(5) Motion for Relief from Judgment. He appealed the denial, and Division III considered whether the trial court erred in denying the motion, and specifically whether the decree’s division of L&I benefits is void under RCW 51.32.040(1). This statute states, in relevant part: “[N]o money paid or payable under this title shall, before the issuance and delivery of the payment, be assigned, charged, or taken in execution, attached, garnished, or pass or be paid to any other person by operation of law, any form of voluntary assignment, or power of attorney. Any such assignment or charge is void ....”

The Court of Appeals analyzed the language of the statute and prior cases interpreting the statute. It ultimately held that in a dissolution, a party does not have a right to receive a portion of L&I benefits from the party’s ex-spouse because those benefits are a “statutory entitlement” personal to the ex-spouse. The Court of Appeals cautioned that RCW 51.32.040(1) “does not expressly limit a court’s ability to take into account such benefits in making a just and equitable property division,” but did not make any holdings on that ability because this issue was not part of the appeal.

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WASHINGTON STATE BAR ASSOCIATION  
Construction Law Section  
1325 Fourth Avenue, Suite 600  
Seattle, WA 98101-2539

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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:

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

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October 1, 2015 – September 30, 2016

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