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Chair's Report

by Andrew Maron

Our Construction Law Section consists of over 600 lawyers who practice construction and public procurement law, or are interested in doing so. We are from big cities and smaller towns, work in the private and public sectors, and represent all aspects of the construction world, including owners, design professionals, consultants, general contractors, subcontractors, suppliers, and manufacturers.

The Section each year presents the successful June "Mid-year" seminar, schedules periodic forums on various interesting topics, publishes a newsletter, and assists in the evaluation of proposed legislation. The Section is governed by a 13-member council composed of lawyers with demographics similar to our membership.

This year the council has spent some time considering whether we should add to or alter the offerings we present

to our members. To that end, we have made a survey available to determine the wishes and desires of our members. Thanks to all of you who have completed the surveys. The council will soon be considering the results as we craft future activities.

This is your Section. Please let any of the officers and councilmembers (listed elsewhere in this newsletter) know of your desires and preferences.

And, please join us at this year's Mid-Year seminar on June 13, 2008. See you there.

Andrew Maron
Short Cressman & Burgess PLLC
Section Chair, 2007-08

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Written Notice in Construction Contracts: It's Time for a Legislative Change

by John P. Ahlers – Ahlers & Cressman PLLC

In *Mike M. Johnson v. Spokane Co.* ("MMJ") the State Supreme Court ruled that a contractor must strictly comply with the contract notice and claim submission and documentation provisions to protect its payment rights, regardless of how difficult or onerous these contractual written notice and claim submission requirements may be. If a contractor fails to comply, a court is no longer allowed to examine the facts of the case or the merits of the claim or determine whether or not the owner has been prejudiced at all by the failure to comply with these claim provisions. Essentially, the judge must dismiss the claim, even if the owner knew of the event giving rise to the claim, directed

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the contractor to proceed with the extra or changed work and watched and approved the extra work. Contractors can be left holding the bag and bear the full cost of changes to public construction contracts if they fail to give proper written notice of changes.

In *MMJ*, the Owner (County of Spokane) directed the contractor to do additional work, was fully informed of all relevant information known by the contractor, and observed the contractor perform the work. The Court nevertheless held that the contractor was not entitled to fair compensation merely because the contractor did not also conform to additional highly technical notice of claim and claim submission requirements and procedures. In December 2007, the Washington State Supreme Court issued its decision in *American Safety Casualty Insurance Company v. City of Olympia*, which re-affirmed the *MMJ* decision. The Court held that only if the contractor proved that the owner unequivocally waived the contract's claim requirements, was the contractor relieved of same.

The Contractor's Dilemma

Changes to the work (both express and constructive) are common, if not inevitable, on most construction projects. Changes to the work occur in a variety of ways. The owner requests extra work, asks for a change in the project or directs the contractor to perform work in a certain manner which the contractor contends is outside the scope of its original contractual undertaking, or the contractor encounters conditions on a project which are either different than originally represented or reasonably anticipated, which require additional work. If the contractor performs this changed work, the contractor reasonably expects to be paid for same. Typically, buried in the contract documents, however, is a requirement that a contractor must notify the owner in writing (within a very short period of time) and follow a particular (and often elaborate) claims submission and documentation process.

Typical Contract Provisions

Construction contracts typically have a notice of claim provision with three hurdles that the contractor must overcome to make a claim for a change order or extra work: (1) written notice of the event that is the changed/extra work; (2) a written estimate of the cost and /or time that the changed/extra work will take; and (3) a requirement to follow a particular dispute resolution process, which often has time limits for filing a lawsuit or commencing arbitration. If the contractor falters in any respect on any one of the three hurdles, an otherwise valid request for time or money is generally in serious danger of forfeiture.

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The purpose of the first two of these requirements (notice of claim and claim submission/documentation) is essentially to protect the owner from incurring costs that it may not want to incur or which possibly could be avoided or mitigated. Contractors would probably have no quarrel with **reasonable** notice of claim requirements (step one above). Quite frankly, however, if strict compliance is the sole measuring stick (no matter how unreasonable the notice of claim requirements are) then there is obviously nothing to prevent an owner (or a general contractor dealing with a subcontractor) from simply making the initial notice of claim requirements of their contract or subcontract agreement as onerous as possible. Unfortunately, and predictably, the Supreme Court's enunciation and declaration of a "strict compliance" standard has spawned unreasonable notice requirements to be included in the contracts and subcontracts of many owners and general contractors. Indeed, it is not uncommon to now see notice of claim requirements requiring written notice of claim being submitted within 24 hours or 48 hours of the claim-triggering event (basically, requiring the field personnel to both immediately report and document virtually every possible or conceivable claim triggering event and somehow properly reduce to it to writing—at the risk of claim forfeiture).

Step two of the claim submission and documentation requirements (quantification and/or documentation of the **estimated cost** and/or time impact to the project by the change) admittedly serves a useful purpose as well. However, once again there is a question of reasonableness which is entirely lacking in the current legal (court) analysis. Basically, there is currently nothing to prevent an owner (or a general contractor dealing with a subcontractor) from making the claim documentation and/or claim submission requirements virtually impossible for the contractor or subcontractor to **practically and economically** comply with.

The requirement of strict compliance with **unreasonable** contract notice and claim submission and documentation procedures is obviously a bad deal for contractors, but ultimately and less obviously also the taxpayers. Because responsibility for the cost of a project change is no longer determined solely on the merits of a claim, owners and contractors are unnecessarily pitted against one another. Contractors are basically forced to create mounds of paperwork simply to preserve their rights to be paid. Public agencies must hire staffs to process it, and the extra costs necessary to "strictly" comply with these added requirements are more than likely going to be passed on to the public. Fewer contractors (especially smaller contractors) may also be inclined to bid on public works projects in order to avoid both the hassles and the serious risks

resulting from the *MMJ* ruling and its rule of strict compliance.

MMJ Is Out of Step With Industry Practice

The decision in *MMJ* and *American Safety* is not merely unjust, it is out of step with Washington law. As Justice Chambers, dissenting in the *MMJ* decision, observed:

"... an owner can demand additional work outside the scope of the original contract, observe the contractor perform that additional work, discuss the work with the contractor, and yet deny fair compensation for services rendered if within 15 days [the notice deadline in the *MMJ* contract] and before the owner's plans are even completed, the contractor fails to submit a written request for additional time for the demanded extra work or fails to produce an itemized invoice in a precise technical format."

The rule in Washington (and most other states) up until the *MMJ* case, had been that where the contractor notifies the owner of changed conditions, failure to precisely follow claims procedures will not defeat the contractor's right to compensation unless that procedural error caused **prejudice** to the owner, that is unless the owner was in some manner harmed by the contractor's tardy notice, the mere failure to comply with the technical requirements of the contract did not result in a forfeiture of the contractor's claim.¹

The Court's decision in *MMJ* is unreasonable, out of step with industry practice, contrary to the law in most states, fails to take into account the totality of the project circumstances, and is bad public policy. Rather than five Supreme Court Justices (*MMJ* was a 5 to 4 decision), our legislature should determine the policy on this issue in this state. The Court's decision in *MMJ* elevates "form over substance." The legislature should step in and reestablish a balanced and fair public policy for notice and claim submission requirements in construction contracts.

Several state agencies already recognize the practice of enforcing forfeiture only when the owner is "prejudiced" (harmed by the contractor's lack of notice). The Department of General Administration ("GA") and the University of Washington ("UW"), as well as the federal government, purchase millions of dollars of construction services each year and pride themselves on fair and reasonable notice provisions and claims processing provisions. GA and UW have provisions in their current contracts that state:

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"Failure to properly give such written notice shall, to the extent Owner's interests are **prejudiced**, constitute a waiver of Contractor's right to equitable adjustment." (Emphasis added).

In the event a contractor fails to provide the GA or UW with timely notice or timely documentation supporting its claim, such oversight by the contractor does not result in the automatic forfeiture of the claim to the extent the owners are not prejudiced. These two public entities have found that, in the long run, the prejudice standard is appropriate and provides the owner with a fair contract document. Should the contractor's lack of compliance with the written notice requirements of the contract prejudice GA or UW, a remedy is contained in the contract. In other instances, however, where the owner suffers no prejudice, that is where the owner is not harmed by the lack of notice, the mere fact that notice did not arrive on the prescribed date or that the claim did not meet the precise strictures of the contract, does not result in a forfeiture of the contractor's claim. Neither GA nor UW have changed their general conditions pertaining to notice and claim procedures in light of the *MMJ* decision.

Legislative Change

It is time for a change. In light of the *MMJ* decision and now the *American Safety* case, it is time for our legislators to determine Washington's public policy as to contractor claims. Clearly, if public works owners are not damaged by the untimely notice or the tardy submission of claim documentation, the penalty to a contractor should not be a complete forfeiture of its claim.

The only appropriate measure that should be employed is to have legislation which weighs "what harm, if any, did the owner suffer," by the untimely written notice. If the owner suffers no harm or very little harm, the contractor's claim should be discounted only by the proportion of the harm. In the end, the only way to fairly and equitably dispose of the late notice issue is on a case-by-case basis weighing the reason for the late notice against the harm, if any, that the owner suffers as a result of untimely notice. This is the province of our judges, arbitrators, and other alternative dispute neutrals to determine. It should not be determined on a wooden strict compliance basis, which unfairly penalizes the contractor, and provides the owner a windfall when it suffers no harm.

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- 1 Ironically, and inconsistently, in the recent Washington Supreme Court case of *Colorado Structures v. Insurance Co. of the West*, 167 P. 3rd 1125 (2007), Justice Madsen (who authored the majority opinion in the Mike M. Johnson case) stressed that under previously "well-established Washington law" the surety was not generally relieved of its performance bond obligations "even [if] inadequate notice of the principal's default was given by the obligee." Further, the same opinion by Justice Madsen indicated that Washington courts have consistently followed the rule of prejudice when notice of default requirements of a performance bond are not strictly followed. ("The surety cannot complain when it can show no loss or substantial damage by reason of a failure to receive notice, in the exact and technical language of the contract, or make it appear that its failure to receive notice has prevented it from taking proper steps for its protection.")

American Safety v. Olympia Decision (Claim Submission Requirements)

by Athan E. Tramountanas – K&L Gates

On December 27, 2007, the Washington Supreme Court published its unanimous decision in *American Safety Cas. Ins. Co. v. City of Olympia*. The Court reversed Division II of the Court of Appeals, and held that an owner does not waive its procedural contract defenses by entering into negotiations with a contractor on a request for equitable adjustment.

In this case, the contractor, Katspan, Inc., failed to comply with the contract's notice of claims procedures. However, during construction, Katspan sent letters to Olympia, purportedly reserving its right to bring claims at the end of the project. Olympia responded that, since Katspan did not follow the procedures outlined in the contract, Katspan had waived any purported claims. At the completion of the contract, however, American Safety (Katspan's surety) filed a request for equitable adjustment with Olympia on behalf of Katspan.

Olympia did not respond to the request for equitable adjustment, and the contractual limitations period for American Safety to file suit lapsed. American Safety's counsel then called Olympia's counsel, and asked if the parties could meet to discuss a resolution of the case short of litigation. Olympia's counsel stated that the City would discuss resolution of the case if American Safety provided necessary information to support the claim. In a follow-up letter, Olympia noted that its willingness to negotiate with American Safety was "[w]ithout waiving any of its defenses." For the next two-plus years, American Safety attempted to compile information supporting the request for equitable adjustment. When American Safety finally

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contacted Olympia and said it had all the supporting documentation, Olympia refused to consider the information and stated it had denied the request for equitable adjustment. American Safety sued in Thurston County Superior Court. The court granted summary judgment to Olympia, but Division II overturned the decision, finding a genuine issue of material fact to exist.

In its pleadings, American Safety did not argue Katspan met the contract's procedural claims provisions. Instead, American Safety focused on Olympia's willingness to enter into negotiations on the request for equitable adjustment, arguing Olympia waived the right to rely on the contract. The Supreme Court followed its prior holdings, including *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d 375(2003), which state that waiver by conduct requires unequivocal acts of conduct evidencing an intent to waive contractual provisions. While Division II held that Olympia's willingness to negotiate created an issue of fact as to whether it intended to waive the contract provisions, the Supreme Court held that Olympia's willingness to negotiate, coupled with Olympia's letters to Katspan stating that it required compliance with the contract's procedures and that it was not waiving its defenses, at most constituted equivocal conduct. The Court held: "Equivocal conduct by definition cannot be unequivocal, and the Court of Appeals thus erred when it found that 'the equivocal nature of the City's conduct' warranted a trial on the merits."

In the *Mike M. Johnson* case, the Supreme Court held that negotiations between parties do not waive contractual claims procedures when the parties are negotiating other issues at the same time. Here, the Supreme Court noted Washington's strong public policy favoring settlement over litigation, and held there is no reason to so limit the rule that negotiations do not waive contractual defenses.

Another Perspective for Contractors and Owners on *American Safety Casualty Ins. Co. v. City of Olympia*

by Mary DeVuono Englund

In *American Safety Cas. Ins. Co. v. City of Olympia*, 174 P.3d 54 (2007), the Washington Supreme Court made clear that an owner will not waive its contractual defenses to a contractor's claim by entering into negotiations on the claim at issue. The facts and holding also imply another principle – that payment for extra work will not revive a

contractor's right to claim. While this concept was not expressly stated in the court's holding, the court's rationale would apply to unilateral payment, as well as to negotiations.

One of the important factual underpinnings of the court's decision in the *American Safety* case is the undisputed fact that the contractor, Katspan, Inc. failed to follow the contractual protest and claims procedures in 2001, long before it filed its untimely lawsuit in 2004. On April 2, 2001, the City notified Katspan that by failing to complete the contract on time it had breached the contract and liquidated damages would be assessed. With regard to Katspan presenting claims for extra work, the City stated that it "reserved its right to strict compliance with ... the required procedure for protest by the Contractor." On April 18, 2001, the City notified Katspan that "because ... [it] had failed to follow the procedures set forth in the contract, it had waived its claims." The Court's opinion does not address whether the waiver was due to a missed deadline or failure to substantiate the claims.

After the City notified Katspan that it considered all of Katspan's claims waived, the City paid Katspan for extra work. In the process of closing out the contract in May 2001, the City's project control engineer requested a final cost proposal from Katspan. After the project engineer's second inquiry, Katspan responded that it was "compiling data." Although the project engineer did not receive any information from Katspan, "it reviewed the files and changes to the original contract and computed what it considered to be reasonable costs for the additional work." The City sent Katspan a change order with the City's calculated amount for the cost of additional work. Katspan never signed the proposed final payment, and "on September 10, 2001, the City unilaterally closed out the project." Presumably the closeout included payment of the unilateral change order for "the reasonable costs for the additional work," or, at least, an offset of that amount against the liquidated damages that Katspan owed the City for the late project completion. Whether or not the change order was for the additional work that was the subject of the later request for equitable adjustment by American Safety (Katspan's surety), it was a payment or a credit for extra work, after Katspan had "waived its claims."

The Court's rationale for holding that any settlement negotiations, including those on a disputed claim, do not negate the owner's rights to a contractual claim defense would also apply to a unilateral change order for extra work. The Court's rationale was twofold. First, the Court pointed out the long-standing rule that an implied waiver must be based on unequivocal actions and, logically, "equivocal conduct by definition cannot be unequivocal." Second, the Court emphasized that the "express public policy of this state ... strongly encourages settlements."

Under the first element of the Court's reasoning, the City's actions (the reservation of rights to contract compli-

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ance, the notice that claims were waived, the invitation to submit costs, and the issuance of a change order) must be assessed to determine whether they demonstrate an unequivocal intent to waive a right. Collectively, these acts were equivocal about the status of Katspan's right to a claim for additional work. Viewed in this context, the issuance of a change order for "reasonable costs" was not an unequivocal act evidencing an intent to waive the contract procedures.

Applying the second element of the Court's rationale, payment for extra work furthers the public policy favoring settlement of cases. Even though the contractor's claims had been waived, the City paid Katspan a reasonable sum, according to its calculations, for what it deemed to be work outside the contract scope. It seems likely, that at least in some cases, this would have ended the matter, thus facilitating settlement rather than litigation.

Of course, a payment unilaterally computed by the owner will not always settle the matter. It is likely that in some instances contractors would dispute the sufficiency of the payment. However, it would not be in the best interests of contractors who receive such payments to contend that a payment constitutes waiver of the owner's claim defenses, because that would discourage owners from making payments in the future. In the instances when contractors attempt to argue that a payment constitutes the owner's waiver of its claim defenses, courts should apply the rationale of *American Safety* to payments as well as negotiations. If owners can be confident that by paying a reasonable amount for additional work they are not waiving their contractual defenses to claims, they will continue to make such payments.

Compromise and Settlement/ Settlement Agreement/Informal Writings

***Evans & Son v. City of Yakima*, 136
Wn. App. 471 (2006)**

by Larry Vance – Winston & Cashatt

In the case of *Evans & Son v. City of Yakima* (*supra*), Division III of the Court of Appeals dealt with the issue whether informal writings can constitute a settlement of a claim. In the *Evans & Son* case, a contractor hired by the City to develop a park sought delay damages from the city for losses it incurred as result of delays allegedly caused by the

City. Prior to filing the lawsuit the parties, through their legal counsel, exchanged several letters, as well as a proposed release and settlement agreement regarding the settlement of the contractor's delay claim.

The underlying facts giving rise to the claim were that the contractor, which had a contract to develop a park for the City, was instructed to stop its work. As result of the City's stop work order the contractor submitted a claim for roughly \$153,000. The City, apparently through its attorney, offered to settle for \$40,000 in a letter dated September 23, 2004. The offer also said, however, that "the settlement is contingent upon execution of a settlement agreement, which I will draft" [presumably, the City attorney]. The contractor's attorney responded and accepted the \$40,000 offer "to resolve all issues pertaining to the park construction contract." The contractor's attorney then requested a copy of the settlement and release agreement that the City's attorney had drafted.

The City's attorney sent a draft of the settlement agreement to the contractor's lawyer. Predictably, the contractor's lawyer revised the agreement. The City's attorney again reminded the contractor's lawyer that "settlement was contingent on execution of the settlement agreement that I will draft." Other letters from the City's attorney also requested the appropriate signatures before returning the settlement agreement.

The contractor's attorney allegedly found the release provision contained in the City's proposed settlement agreement unacceptable. Basically, the contractor's attorney concluded that the provision did not limit the settlement to only the delay damage claim on the park construction project, but also released "any and all claims Contractor may have against City." Note: This is where the Court's opinion gets a bit fuzzy.

The original draft release agreement sent by the City's attorney had language in it including release of all claims on "past contracts, projects or work for the City ***** or any other projects." Note: It is unclear from the opinion whether the contractor had other projects or contracts with the City. However, the City's original release agreement was subsequently changed (apparently, in response to the contractor's objection to this language). (Note: However, the revised language of the release still arguably failed to limit itself to claims known or unknown on the park project.) The legal department of the City, however, then sent a check to the City's attorney that was payable to the contractor along with a letter stating that "we assume you will deliver the settlement check when you receive the signed settlement and full release agreement." The contractor refused to sign this final draft of the settlement agreement and also refused to cash the check. (Apparently, the City attorney tendered the check before receiving the signed settlement agreement.)

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The contractor then sued the city for delay damages, and in response the City sought to enforce the \$40,000 settlement it believed it had reached with the contractor. The trial court granted summary judgment for the City (enforcing the \$40,000 settlement agreement) and the contractor appealed. In reversing the trial court, the Court of Appeals concluded that the contractor's attorney explicitly stated his intention to limit the release to all issues pertaining to the park project and that subsequent drafts of the settlement release agreement did not reflect that. However, after also concluding that there was "no suggestion that the letters themselves are the binding agreement," [136 Wn. App. 478] the Court also, inexplicably, concludes that "questions of fact remain over whether the exchange of correspondence here was the agreement between these parties." [136 Wn. App. at 479].

Attorneys' Fees Recoverable in Performance Bond Coverage Litigation

by Jason M. Kettrick – Carney Badley Spellman, P.S.

On September 20, 2007 the Washington State Supreme Court filed its opinion in *Colorado Structures, Inc., v. Insurance Company of the West, Inc.*, __ Wn.2d __, 167 P.3d 1125 (2007). In the majority opinion authored by Justice Tom Chambers, a four-member majority of the Court affirmed the Washington State Division II Court of Appeals' ruling that *Olympic Steamship Co., v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 973 (1991), applies in the context of performance bond coverage litigation, meaning where claims are wrongfully denied, attorneys' fees may be awarded exceeding the penal amount of the bond.

The dispute arose from the construction of a Wal-Mart store in Vancouver, Washington. Wal-Mart entered a prime contract with Colorado Structures, Inc., which subcontracted the site utility work to Action Excavating and Paving, Inc. ("Action"). The subcontract required Action to obtain a performance bond, which it purchased from Insurance Company of the West, Inc.

The site utility schedule was tight, and timely completion by Action was critical to Colorado Structure's ability to obtain an occupancy permit for the Wal-Mart store, meet the substantial completion date and avoid liquidated damages. Two months into the three-month site utility schedule, however, Action was seriously behind. To avoid the additional delay of formally declaring Action in default and terminating the subcontract, Colorado Structures de-

cidated instead to supplement Action's crews in an effort to accelerate completion. At the same time, Colorado Structures faxed a letter to Insurance Company of the West setting forth Action's breaches and the remedy it chose to employ – i.e., supplementing Action's crews with additional manpower and equipment in an effort to complete the subcontract and project as scheduled.

Unfortunately, even with Colorado Structure's assistance, Action did not timely complete its work. After the expiration of contract time but before the work was substantially complete, Colorado Structures notified Insurance Company of the West that portions of Action's work had been rejected by the City of Vancouver, and that it would look to the bond for compensation of costs exceeding Action's subcontract.

Colorado Structures ultimately sued Insurance Company of the West, Action and its owner, and judgment was entered on Action's material breach. Nevertheless, Insurance Company of the West denied performance bond coverage on the basis that Colorado Structures failed to formally declare Action to be in default before substantial completion of the bonded subcontract. According to Insurance Company of the West, a formal declaration of default prior to substantial completion was a condition precedent to bond coverage. The trial court, Court of Appeals and Supreme Court disagreed, holding instead that by the plain terms of the bond (AIA Form A311), Colorado Structures was not required to formally declare Action in default and that, regardless, adequate notice of default was provided.

The subcontract between Colorado Structures and Action contained an attorneys' fee provision, upon which the trial court relied in awarding fees to Colorado Structures. The trial court, however, declined to also award attorneys' fees under *Olympic Steamship*, with the net effect of limiting Colorado Structures' principal/fee award to the penal amount set by the bond.

On appeal, Division II and the Supreme Court held that *Olympic Steamship* applies to performance bonds. In *Olympic Steamship*, the Washington Supreme Court held that "an insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorneys' fees." *Olympic Steamship*, 117 Wn.2d at 54. In reaching this conclusion, the Court reasoned that insurance companies face minimal incentive to perform on their contracts if the maximum loss they may incur is the policy limit, especially since the transaction costs of litigation are likely to dissuade insureds who would otherwise assert their right to full payment in court. To that end, insurance policies are purchased with the payment of a premium, upon receipt of which the insurance company has all it will ever get from the contract. It is therefore in the financial interest of insurance companies, according to the Court in *Olympic Steamship*, to deny claims and withhold

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payment, because ideally, premiums are collected but no claims are paid. On this basis, the Court in *Olympic Steamship* held attorneys' fees exceeding policy limits are recoverable in coverage actions to encourage the prompt payment of claims.

The *Colorado Structures* Court found little or no grounds to distinguish construction performance bonds from other forms of insurance. Most significantly, the Court reasoned that, like insurance companies, if the maximum risk to the surety is the penal amount of the bond, a surety has nothing to lose in denying claims. In such circumstances, without the application of *Olympic Steamship* and exposure to attorneys' fees in addition to the bond's penal amount, sureties would have no incentive to refrain from litigation over even the most clear coverage provisions.

Going forward, the law in Washington is that obligees compelled to litigate to obtain the benefit of performance bonds are entitled to attorneys' fees in excess of the bond's penal amount. On one hand, this rule may achieve the objective of the Court and reduce instances where claims are wrongfully denied. But on the other hand, the additional exposure to sureties writing bonds in Washington may increase the premiums paid by contractors. In either event, the new rule will play a pivotal role in the negotiation and prosecution of future bonded claims.

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Responsible Bidder Defined

Newly Enacted Law Sets Responsible Bidder Criteria

by Jason T. Piskel

During the 2007 regular session, the Washington State Legislature passed an act relating to bidder responsibility, which adds a new section defining bidder responsibility requirements for public works contracts. The bill requires that a public works contract cannot be executed unless a bidder meets the defined responsibility criteria. While this bill has no direct fiscal impact for public works owners, it certainly could impact the bid procedure for contractors, financial or otherwise.

This legislation was a priority for the Capital Project Advisory Review Board (CPARB) a group of industry participants created in 2005 who review alternative public

works contracting procedures and provide guidance to state policymakers on ways to further enhance the quality, efficiency and accountability of public works contracting methods. The responsible bidder bill was unanimously supported by the CPARB.

In general, the bill has three important pieces: (1) it puts in one place all the requirements contractors must meet when bidding on public works projects; (2) it makes contractors responsible for making sure the subcontractors meet all the same requirements; and (3) it provides outreach and education to make sure the contractor has the skill necessary to carry out the project. The AGC supported the bill; however, Associated Builders and Contractors (ABC) did not. ABC argued that the bill unnecessarily created additional burdens on small employers, and the vague and arguably nonexistent definition of supplemental criteria is a breeding ground for further confusion.

The effective date of this newly enacted statute was July 22, 2007. The first change included new definitions for the following terms: award, contract, municipality, public work, responsible bidder, and public work.

The new sections added by the Legislature defines responsible bidder. It also requires that before an award can be made to a bidding contractor that contractor must meet certain minimum requirements. That definition of responsible bidder is:

- (a) at the time of bid submittal have a valid certificate of registration in compliance with RCW 18.27;
- (b) have a current state unified business identifier number;
- (c) have, if applicable, industrial insurance coverage for the bidder's employees as required by Title 51, an Employment Security Department number as required in Title 50 RCW, and a State Excise Tax Registration number as required in Title 82 RCW; and
- (d) not be a disqualified bidder under other statutes.

The statute also allows the public owner to adopt *relevant supplemental* criteria which will be placed in the bidding documents issued by the owner and will be incorporated into the definition of a responsible bidder. The potential for subjectivity in this part of the bill was one of the major concerns raised during the bill's debate. To allay those fears a modification process was put in place, along with the inclusion of the word relevant, both appeasements will most likely be tested by lawyers. To that end, if there are supplemental criteria the bidder has the option, prior to bid, to request the state and municipality to modify those supplemental criteria. The owner will then respond before the bid submittal deadline and issue an applicable addendum if necessary.

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RESPONSIBLE DEFINED from previous page

There is an appeal process if it is determined the bidder is not responsive; the owner must provide in writing the reasons for the determination and the bidder has an opportunity to appeal. If the final determination affirms that the bidder is not responsible, the owner must wait a total of two business days before entering into another contract with any other bidder.

The Capital Projects Advisory Review Board will be creating suggested guidelines to assist the public owners to develop supplemental bidder responsibility criteria. Those guidelines will be posted on the Board's website.

One potential trip area in this new legislation is found in Section 3 of RCW 39.04, where the contractor must verify the responsibility criteria for each first-tier subcontractor or it plans on using for the project. Further, a subcontractor of any tier that hires other subcontractors must on its own verify the responsibility criteria for each of its subcontractors. This verification requires that at the time of the *subcontract execution* the general verifies that the subcontractor meets the responsibility criteria listed in Section 2, Paragraph 1 of this Act. Importantly, the verification requirement as well as the responsibility criteria must be included in every public works contract and subcontract of every tier. Thus, it is important for lawyers to advise contractors to modify their subcontracts to ensure compliance with this statute.

The hammer in this new legislation is the possibility of bid rejection due to not properly verifying a subcontractor's responsibility prior to executing a subcontract, or more likely utilizing a subcontractor's bid at time of opening only to learn it does not meet the defined criteria. Thus, one may lose a subcontractor's bid that it used to create an overall bid to the owner because the subcontractor does not meet the necessary criteria. This may result in financial implications and the possibility of exceeding the bid estimate if a low bidding subcontractor cannot meet the responsibility criteria.

On balance, the responsible bidder bill defines a previously amorphous term. Attorneys are advised to inform their Contractor clients to carefully review bid documents for any supplemental criteria included by the public owner. It may well be that this first attempt at defining responsible bidder may well end up in front of the courts, and eventually we will see revisions in the future. For now, contractors, architects, engineers, and lawyers have a semblance of guidance in a once cloudy area.

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Waiver of Industrial Insurance Act Must Be Express

L. Hatch v. City of Algona, 140 Wn.App. 752, 167 P.3d 1175 (2007)

by Ryan D. Yahne – Winston & Cashatt

While an employer that participates in Washington State's Industrial Insurance system (also known as Industrial Insurance Act or "IIA" set forth in Title 51 RCW) may voluntarily undertake a contractual obligation to reimburse a third party for damages paid to the employer's employee arising from a tort claim, the waiver of immunity must be explicit according to the Division I, Court of Appeals for the State of Washington.

In the early 90s, Boeing sought to plant a series of trees next to one of its welded-duct facilities based in the City of Algona. After some discussions with the City, Boeing went ahead and planted the trees in the City's right of way near a City-owned sidewalk. Boeing agreed to repair, at its own expense, any future damage to "the adjacent sidewalk, curb, gutter, water main and street" caused by growth of the trees. This agreement was memorialized in a letter sent from the Boeing Company.

Over the next 12 years the roots of the trees caused the sidewalk to raise slightly; however, neither Boeing nor the City appeared to have inspected the sidewalk after the 1992 agreement and no repairs were made. In March 2004, a Boeing employee named Jorda Hatch tripped and fell on the raised portion of the sidewalk and sustained injuries. After Hatch received workers' compensation benefits, she initiated a civil lawsuit against the City.

The City implied Boeing, based on the argument that it had an "implied in fact contractual indemnity obligation," to reimburse the City for any damages paid due to the condition of the sidewalk. The City argued that with Boeing's promise to repair damage to the sidewalk, based on the 1992 letter, that it also waived its IIA immunity and agreed to assume the City's tort duty to maintain the sidewalk at issue. The trial court dismissed the City's claim against Boeing on summary judgment, and the City appealed the decision.

The court first held that barring any waiver of the IIA, that this was the type of claim that would normally fall under IIA immunization. The court, assuming that Boeing had in fact agreed to assume Algona's tort duty to maintain the sidewalk, held that this would have placed this claim squarely within the ambit of IIA. Thus, unless Boeing waived its IIA immunity, Hatch would have no claim against Boeing, thus negating the City's indemnification claim.

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The court, citing *Brown v. Prime Construction Co.*, reiterated that Washington does allow employers that participate in the IIA to voluntarily undertake a contractual obligation to reimburse a third-party for sums of money that the third paid to the employer's employee, arising from a tort claim against the third party by the employee. However, the court reiterated that such a waiver of the immunity under the Act has to be expressly written in the agreement. The court held that the letter from Boeing to the City of Algona was not a waiver of its IIA immunity such that such a waiver is only enforceable if it appears in writing in the contract at issue and is explicit. Thus, the court affirmed the trial court's decision to dismiss the City's claim against Boeing on summary judgment.

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