

Contractors eyeing Washington must heed state statutes

New rule gives arbitrators power to combine proceedings, even without all parties' consent

Every state has its own statutes and case laws affecting the construction industry. For contractors intending to do business in Washington, you'll find this article is a good introduction to some issues that you may encounter in the state, especially pertaining to its Revised Code of Washington, the official collection of Washington statutes. Here's what you should know

- Preclaim notice to preserve lien rights.

Washington's contractor's lien statute requires a contractor to send certain information to the owner of the property at the beginning of a project in order to preserve its right to assert liens later on. A form of notice is provided in the law. Another Washington statute requires contractors to obtain a license, post a bond and give their customers notice of this license and bond. Contractors who fail to comply may be barred from asserting a lien. Note that this statute may require a contractor to give notice even if the lien statute does not.

- "No damages for delay" clauses are unenforceable.

Washington's revised code states that a clause in a construction contract purporting to waive a contractor's claim for damages caused by the owner is "void and unenforceable." A good place to begin research in this area is the case of *Scoccolo Construction Inc. v. City of Renton*, a 2006 case in which the Washington Supreme Court considered whether the owner could require the contractor to waive claims for damages caused by utility companies.

- Attorneys' fees in litigation.

Washington follows the general rule that prevailing parties in litigation do not routinely recover their attorneys' fees and costs from losing parties. There must be some contract provision, statute or other legal basis for recovery of fees. One example of a statute providing for attorneys' fees is Revised Code 60.04.181, which gives the court discretion to award fees and costs to the "prevailing party" in a lien foreclosure case.

Various Washington cases have discussed who is the "prevailing party" when each party wins some claims and loses others, as often happens in construction disputes. The law states that, when a contract provides that one party may recover attorneys' fees in litigation to enforce the contract, that provision applies to the other party as well. Contract clauses purporting to impose fees only "one way" are unenforceable.

- Arbitration.

In 2005 the state adopted a revised arbitration act. Among other things, the new act gives an arbitrator authority to combine two related arbitration proceedings, even without all the



CONSTRUCTIVE ADVICE

Karl F. Oles

parties' consent. This makes it more likely that design professionals and construction managers will be included as parties to owner-contractor arbitration disputes.

- Job site safety.

Under Washington law, general contractors have a duty to ensure the safety of all workers at the job site, even workers employed by a subcontractor. Subcontractors also have a duty to ensure safety for their own workers.

A good place to begin research on this issue is the case of *Gilbert H. Moen Co. v. Island Steel Erectors Inc.*, a 1996 case.

- Economic loss rule.

Washington follows the economic loss rule. For example, a contractor claiming added costs or lost profits can sue the owner with which he has a contract but can't sue other parties (such as the architect), even if the contractor believes that design errors were the ultimate cause of its losses.

To research this issue, begin with the case of *Berschauer/Phillips Construction Co. v. Seattle School District No. 1*, a 1994 case.

- Limitations on contractual indemnity.

Indemnity clauses are common in construction contracts. The law states that clauses purporting to indemnify one party against its own sole negligence are unenforceable. Most indemnity clauses will be enforced only to the extent to which the person owing indemnity was negligent. Special language must be included in an indemnity clause to make it effective if an injured worker brings a claim and the target of that claim (usually an owner or general contractor) seeks indemnity from the worker's employer.

Continued on page 2

Continued from Page 1

- Public works.

Public agencies in Washington generally must use competitive bidding on their construction projects, but there are various statutory exceptions allowing certain public agencies to use design-build, general contractor/construction manager and other “innovative” contracting methods. Chapter 39.12 requires the payment of “prevailing wages” on public works.

- Condominium defect statutes.

Washington has enacted a variety of statutes to regulate claims alleging defective construction of condominiums. The law states that people offering condominium units for public sale must warrant that the units are free from defective materials, constructed in a workmanlike manner and constructed in accordance with applicable laws. Sellers can, to a limited extent, disclaim these warranties, or they can comply with Chapter 64.35 of Washington code, which allows them to purchase insurance

that takes the place of the warranties. Before filing a lawsuit, people claiming construction defects must follow statutory claim procedures designed to give sellers and contractors a chance to inspect the alleged damage and offer repairs.

- Claim notice provisions enforced.

The Washington Supreme Court gained national attention in 2003 when, in *Mike M. Johnson Inc. v. County of Spokane*, it enforced a contract clause requiring the contractor to give certain formal notices to the owner as a condition of seeking additional money or additional time for changed or delayed work. Although the contractor discussed its claims with representatives of the owner for months, it never satisfied the formal contract requirements, so the court held that its claim was barred. Attempts are currently being made to change this outcome by statute.

Karl Oles is an attorney in the construction and design practice group at the law firm Stoel Rives. Contact him at kfoles@stoel.com or 206-386-7535.