

MEMORANDUM

TO: CPARB Members
FROM: Various Stakeholders
DATE: December 1, 2014
SUBJECT: Proposed Revision to RCW 36.01.050 (Venue Statute)

Summary of Proposal

RCW 36.01.050 provides that any person commencing a lawsuit against a county may file the lawsuit in the county itself or in either of the two nearest judicial districts. The statute has been on the books in Washington for over 100 years.

Despite the plain language of RCW 36.01.050, Washington counties have been including venue clauses in their public works contracts that require the contractor to forgo its rights under RCW 36.01.050. These venue clauses provide that the contractor can only file a lawsuit in the superior court of the county that is issuing the contract. These venue clauses frustrate the purpose of RCW 36.01.050.

The proposal is to modify the current language of RCW 36.01.050 to provide that “Any provision in a public works contract with any county that requires actions arising under the contract to be commenced in the superior court of the county is against public policy and the provision is void and unenforceable.” A copy of the current statute with all of the proposed language shown in redline form is attached to this memo as **Attachment A**.

Who Supports the Proposal?

This proposal is currently supported by various Washington associations, including Associated General Contractors of America (“AGC”), National Utility Contractor’s Association (“NUCA”), American Council of Engineering Companies (“ACEC”), and the American Institute of Architects (“AIA”).

What is the Purpose and History of RCW 36.01.050?

The Washington state supreme court stated that the purpose of RCW 36.01.050 is to “provide plaintiffs with alternative forums without the need to demonstrate bias or impartiality in any other forum. The statute affords a degree of protection to plaintiffs suing counties without unduly burdening the county officials who must respond to the charges.” *Cossel v. Skagit Cnty.*, 119 Wn.2d 434, 438, 834 P.2d 609 (1992) (emphasis added). The Legislature cited the above language in *Cossel* with approval. House Bill Report SB 5831, as passed April 10, 1997.

In 2000, the Legislature again amended RCW 36.01.050 to replace “counties” with “jurisdictional districts” because some counties share a judge. 2000 c 244 § 42. The stated

purpose of this amendment was to help “avoid the possible perception of partiality by a judge hearing a matter involving the judge’s own county, especially on fiscal matters.” House Bill Report HB 2721, as passed February 8, 2000 (emphasis added).

Why is this Proposal Necessary?

This proposal is necessary because many counties have been including language in their public works contracts requiring that any suit brought against the county must be filed in the superior court where the county is located. These contract clauses contravene the intent of the legislature in drafting RCW 36.01.050 and render the statute meaningless for contractors dealing with counties in Washington. Attached to this memo at **Attachment B** are examples of venue clauses from county contracts that require the contractors to forgo their rights under RCW 36.01.050.

Contractors have attempted to renegotiate these venue clauses in county contracts but counties have refused to do so – forcing contractors to forgo their statutory rights as a condition to receiving a contract.

Why Does This Concern CPARB?

This matter concerns CPARB because it is related solely to public works contracts. The Legislature created CPARB in 2005 to review alternative public works contracting procedures and provide guidance to state policy makers on ways to further enhance the quality, efficiency and accountability of public works contracting methods.

This proposal will enhance the quality, efficiency and accountability of public works contracting because it will require county public works contracts to comply with existing Washington law (RCW 36.01.050) and it will preserve the statutory rights of business contracting with counties on public works projects. This proposal is necessary to preserve the integrity and impartiality of public works contracting with counties in Washington state.

Attachment A

RCW 36.01.050. Venue of actions by or against counties

(1) All actions against any county may be commenced in the superior court of such county, or in the superior court of either of the two nearest judicial districts. All actions by any county shall be commenced in the superior court of the county in which the defendant resides, or in either of the two judicial districts nearest to the county bringing the action.

(2) The determination of the nearest judicial districts is measured by the travel time between county seats using major surface routes, as determined by the administrative office of the courts.

(3) Any provision in a public works contract with any county that requires actions arising under the contract to be commenced in the superior court of the county is against public policy and the provision is void and unenforceable. This subsection shall not be construed to void any contract provision requiring a dispute arising under the contract to be submitted to arbitration.

Credits

[2005 c 282 § 42, eff. July 24, 2005; 2000 c 244 § 1; 1997 c 401 § 1; 1963 c 4 § 36.01.050. Prior: 1854 p 329 § 6; No RRS.]

Wash. Rev. Code Ann. § 36.01.050 (West)

Attachment B

**Construction of Aircraft Rescue and
Firefighting (ARFF) Facility at King County
International Airport**

Contract C00914C14

AIP # 3-53-0058-051-2014

Volume 1 of 4

**Bidding Requirements and Forms
General Terms and Conditions
General Provisions**

November 2014



King County

Department of Transportation
Airport Division

Subcontractor. Subcontractor or Contractor, as the case may be, of all relevant information concerning the dispute.

10.7 LIQUIDATED DAMAGES AGAINST CONTRACTOR

A. The liquidated damage amounts, set forth elsewhere in the Contract Documents, will be assessed for Contractor's failure to achieve Substantial Completion within the Contract Time or Final Acceptance. These Liquidated Damages are not a penalty, but will be assessed against the Contractor for failure to achieve these Contract requirements. These Liquidated Damage amounts are fixed and agreed upon by and between the Contractor and the County because of the impracticability and extreme difficulty of fixing and ascertaining the actual damages the County would in such events sustain. These amounts shall be construed as the actual amount of damages sustained by the County, and may be retained by the County and deducted from payments to the Contractor. Assessment of Liquidated Damages shall not release the Contractor from any further obligations or duties pursuant to the Contract Work.

1. Failure to Achieve Substantial Completion

Timely performance and completion of the Work is essential to the County and the time limits stated in the Contract are of the essence. The County will incur serious and substantial damages if Substantial Completion of the Work does not occur within the Contract Time.

2. Failure to Achieve Final Acceptance

Final Acceptance of the Work is essential to the County and the time limits as identified by the County are of the essence. The County will incur serious and substantial damages if Final Acceptance of the Work does not occur as the County requires.

10.8 HEADINGS

The headings used in the Contract are for convenience only and shall not be considered a part of or affect the construction or interpretation of any contractual provision therein.

10.9 CHOICE OF LAW

In the event that either party shall bring a lawsuit or action related to or arising out of this Contract, such lawsuit or action shall be brought in the Superior Court, King the County, Washington. This Contract shall be governed by, and construed and enforced in accordance with the laws of the State of Washington.

10.10 SEVERABILITY

The provisions of this Contract shall be effective in all cases unless otherwise prohibited by Washington State Law or applicable Federal Law. The provisions of this Contract are separate and severable. The invalidity of any sentence, paragraph, provision, section, Article, or portion of this Contract shall not affect the validity of the remainder of this Contract.

END OF SECTION

**PIERCE COUNTY
INVITATION TO BID**

NUMBER 1400

FOR

STICK BUILT HOMES WEATHERIZATION AND REPAIR

BIDS MUST BE SUBMITTED TO:

CLERK OF THE COUNCIL

930 TACOMA AVE S RM 1046

TACOMA WA 98402-2176

AND WILL BE RECEIVED UNTIL 1:00 P.M., DECEMBER 12, 2014

AT WHICH TIME THEY WILL BE PUBLICLY OPENED

AND READ ALOUD IN THE COUNCIL CHAMBERS, 10TH FLOOR COUNTY-CITY BUILDING

930 TACOMA AVE S, TACOMA WA

**PURCHASING DEPARTMENT
615 SOUTH 9TH STREET SUITE 100
TACOMA WASHINGTON 98405-4674**

ACTING FOR:

COMMUNITY CONNECTIONS

- g. Other categories as specified by the Contractor or the County.
- h. A notarized statement shall be submitted to the Architect/Engineer containing the following language:
Under penalty of law for perjury or falsification, the undersigned,

(name)

(title)

(company)

of

hereby certifies that the claim for extra compensation and time, if any, made herein for work on this contract is a true statement of the actual costs incurred and time sought computed as in the contract provided, and is fully documented and supported under the contract between the parties,

Dated /s/

Subscribed and sworn before me this _____ day of _____, _____.

Notary Public
My commission expires: _____.

It will be the responsibility of the Contractor to keep full and complete records of the costs and additional time incurred, and of the facts and reasons for any alleged claim. The Contractor shall permit the Contracting Officer to have access to those records and any other records as may be required by the Contracting Officer to determine the facts or contentions involved in the claim. The Contractor shall retain those records for a period of not less than three years after final acceptance, or the conclusion of litigation arising out of the contract, whichever is longer.

The Contractor shall pursue administrative resolution of any claim with the Contracting Officer or the designee of the Contracting Officer.

Failure to submit with the Final Contract Voucher Certification such information and details as described in this section for any claim shall operate as a waiver of the claims by the Contractor as provided in Section 1.09.9.

Provided that the Contractor is in full compliance with the provisions of this section and after the formal claim document has been submitted, the County will respond, in writing, to the Contractor as follows:

1. Within 45 calendar days from the date the claim is received by the County if the claim amount is less than \$100,000.
2. Within 90 calendar days from the date the claim is received by the County if the claim amount is equal to or greater than \$100,000.
3. If the above restraints are unreasonable due to the complexity of the claim under consideration, the Contractor will be notified with 15 calendar days from the date the claim is received by the County as to the amount of time which will be necessary for the County to prepare its response. Failure by the County to respond within the time provided in this section shall not be evidence that the Contractor is entitled to the relief requested, nor shall it estop the County from denying that relief requested is proper, but shall only allow the Contractor to proceed with arbitration, litigation or other remedies authorized by the contract without awaiting a decision by the County, if all other requirements of the contract have been met by the Contractor.

Full compliance by the Contractor with the provisions of this section is a contractual condition precedent to the Contractor's right to seek judicial relief.

1.09.11(3) Time Limitation and Jurisdiction

For the convenience of the parties to the contract it is mutually agreed that any claims or causes of action which the Contractor has against the County arising from the contract shall be brought within 180 calendar days from the date of final acceptance (Section 1.05.12) of the contract by the County; and it is further agreed that any such claims or causes of action shall be brought only in the Superior Court of Pierce County. The parties understand and agree that the Contractor's failure to bring suit within the time period provided, shall be a complete bar to any claims or causes of action. It is further mutually agreed by the parties that when any claims or causes of action which the Contractor asserts against the County arising from the contract are filed with the County or commenced in court, the Contractor shall permit the County to have timely access, in Pierce County to any records deemed necessary by the County to assist in evaluating the claims or action.