

State Supreme Court Holds That RCW 18.27 Provides Attorney Fees Only In Actions Against Contractor's Bond, Not Contractor

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On December 28, 2006, the Washington State Supreme Court decided in *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.* that the state's registration of contractors act, RCW 18.27, provides for attorney fees for the prevailing party in an action against the bond, but not in an action against the contractor.

The case arose when Miller Brewing Company hired Ondeo Degremont, Inc., to design an onsite wastewater treatment facility, and other development work, for its brewery in Tumwater, Washington. Ondeo subcontracted with Cosmopolitan Engineering Group, Inc. for engineering services. Cosmopolitan was not paid for all of its services.

Cosmopolitan filed a complaint against Miller and Ondeo, as well as National Fire Insurance Company to the extent of Ondeo's surety bond. Cosmopolitan prevailed on the breach of contract and bond claims at trial, then moved for attorney fees against Ondeo and the surety bond pursuant to RCW 18.27.040(6). The trial court disallowed attorney fees against the contractor but allowed them in the action against the bond, and the Court of Appeals reversed.

The Supreme Court held that RCW 18.27 authorized fees only on an action against the bond, not on the breach of contract and equitable actions against the contractor. The Court first examined the plain language of the statute: "The prevailing party *in an action filed under this section against the contractor and contractor's bond or deposit, for breach of contract* by a party to a construction contract, is entitled to costs, interest, and reasonable attorneys' fees." (Court's emphasis). The Court noted that the quoted language refers to actions filed against both the contractor and the contractor's bond, but limits the application of the provision to actions "*filed under this [actions against the bond] section*" (Court's emphasis). Thus, the Court concluded, a review of the statute in its entirety demonstrates actions "filed under this section" refers only to actions for recovery against the bond, rejecting an argument that such an interpretation renders the language "against the contractor and contractor's bond" superfluous. The Court further cited to other subsections of the statute, which expressly refer or relate to suits against the bond rather than suits against the contractor.

In making its ruling, the Court rejected a number of arguments proposed by Cosmopolitan. The first related to vicarious liability inherent in surety law, where one entity is responsible for the actions of another by virtue of their relationship as surety and contractor. The Court explained that such an argument relies on actions against a contractor and the bond being filed together; yet such joint filing is not required. Next, the Court rejected the argument that the purpose of the statute is to protect the public, including other contractors, "from unreliable, fraudulent, financially irresponsible, or incompetent contractors." Although the Court recognized that interpreting the statute to provide for fees against the contractor would serve the protective purposes of the statute, the purposes should not be used to extend the protections beyond mechanisms expressly provided for in the statute. The Court recognized that its interpretation provided only limited protection, as the bond would rarely be sufficient to cover both the

contractor's liability and attorney fees; furthermore, the prevailing plaintiff's fees would always be limited by the bond amount, whereas the prevailing contractor's fees would not. However, the Court explained that, had the legislature intended to provide attorney fees for an action against the contractor, it would have expressly provided for one.

This decision has important ramifications for the construction industry; first and foremost, it highlights the necessity of expressly providing for attorney fees by contract where parties expect to receive fees in the event of any litigation, regardless of whether that litigation implicates the contractor's bond. Consult legal counsel to determine whether such a provision is appropriate in a particular situation, as well as to determine the ramifications of the *Cosmopolitan* case on any current actions.