

IN THE SUPREME COURT OF IOWA

No. 22-2098

**CHARLES L. SMITH, TRUSTEE IN THE BANKRUPTCY OF
METRO CONCRETE, INC.,**

Plaintiff,

v.

IOWA ASSOCIATION OF COMMUNITY COLLEGE TRUSTEES;

Defendant,

DES MOINES AREA COMMUNITY COLLEGE,

Defendant-Appellee,

**ROCHON CORPORATION OF IOWA, INC., and GRAPHITE
CONSTRUCTION GROUP, INC.,**

Defendants-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE ROBERT B. HANSON, DISTRICT COURT JUDGE

**CONDITIONAL BRIEF OF AMICI CURIAE COMMUNITY
COLLEGES OF IOWA, IOWA ASSOCIATION OF SCHOOL
BOARDS, IOWA STATE ASSOCIATION OF COUNTIES, and
IOWA LEAGUE OF CITIES IN SUPPORT OF APPELLEE**

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STATEMENT OF IDENTITY AND INTEREST

This amicus brief is submitted on behalf of four groups: the Community Colleges of Iowa (with the exception of DMACC), the Iowa Association of School Boards, the Iowa State Association of Counties, and the Iowa League of Cities (“Amici”). Amici are all voluntary membership organizations that represent the common interests of their members in matters such as training, advocacy, and information sharing. The Amici represent public entities across the state who are subject to the requirements of Iowa Code chapters 26 and 573 with respect to their public improvement projects.

This case addresses an issue of broad public importance: the appropriate handling of retainage funds for public improvement projects. This issue impacts hundreds of projects constructed by cities, counties, school districts, and community colleges across the state of Iowa each year. Amici and their taxpayers have an interest in ensuring such projects are completed correctly, on time and on budget, to the greatest extent possible. Iowa Code chapter 573, and the retainage requirements within it, grant public owners the ability to hold back limited funds from construction projects to ensure subcontractors and material suppliers are paid what they are owed by the principal contractor, and to keep them on the job to a project’s completion. If principal contractors are allowed to deplete the retainage fund prior to final completion, public owners will lose the ability to protect subcontractors and material

suppliers from nonpayment and keep them working. Amici impress upon this Court the broader implications of the issues raised by the parties that impact all cities, counties, school districts, and community colleges in Iowa.

STATEMENT REQUIRED BY IOWA R. APP. P. 6.906(4)(d)

Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), the undersigned counsel certifies that no party's counsel authored this brief in whole or in part, and no party or party's counsel, or any other person other than Amici, contributed money that was intended to fund the preparation or submission of this brief.

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ARGUMENT

The Iowa Court of Appeals erred when it reversed the decision of the district court. As a result, Amici respectfully request the Court vacate the ruling of the Court of Appeals and affirm the district court's ruling. Iowa Code section 573.16(1) expressly limits the timeframe in which an equity action can be brought to adjudicate rights related to the retainage fund for a public improvement project to between thirty-one days and sixty days following the completion and final acceptance of the improvement. Because the 573.16 action was brought before completion and final acceptance of the project, it was premature, and Graphite was not entitled to any retainage on the project.

I. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT GRAPHITE WAS NOT ENTITLED TO RETAINAGE BECAUSE THE 573.16 ACTION WAS PREMATURE

The district court denied Graphite's motion to compel release of retainage because "[t]he plain language of Iowa Code section 573.16 demands that there be final completion and acceptance of the project for Graphite to receive twice the amount of Metro Concrete's claim." App. 278. In other words, "the district court ruled DMACC was not yet required to release any of the retainage related to Metro Concrete's claim because section 573.16(1) provided that the appropriate time for the action to be brought 'to adjudicate all rights to [the retainage] fund' was 'at any time after the expiration of thirty days, and not later than sixty days, following the

completion and final acceptance of said improvement.’ ” Court of Appeals Opinion at 7 (quoting Iowa Code § 573.16(1)).

Although neither DMACC nor Graphite argued in support of the district court’s reasoning, *see* Court of Appeals Opinion at 2, the Supreme Court is obliged to affirm on this basis if possible. *In re Det. of Anderson*, 895 N.W.2d 131, 138 (Iowa 2017) (“we first examine the basis upon which the trial court rendered its decision, affirming on that ground if possible.”). In this case, the district court got it right. As will be shown below, the district court’s interpretation of section 573.16 best aligns with the overall purpose of chapter 573 and is most consistent with the statute as a whole.

A. Overview of Iowa Code chapter 573

“Because mechanic’s liens do not attach to government-owned facilities, chapter 573 was enacted to provide other protections to secure payment for those working on public improvements.” *Star Equipment, Ltd. v. State, Iowa Dept. of Transp.*, 843 N.W.2d 446, 452 (Iowa 2014). The two specific forms of protection provided by chapter 573 are the performance and payment bond, and “a retained percentage fund.” *Id.* at 452-453.

“Bonds on public projects serve as a substitute for the protection of mechanic’s liens.” *Id.* at 452. When the cost of a project exceeds \$25,000, “chapter 573 requires the general contractor to execute and deliver a bond running to the

public corporation sufficient to insure the fulfillment of the conditions of the contract.” *Id.* (citing Iowa Code § 573.2). In most cases, the bond cannot be less than 75% of the contract price for the work to be performed. Iowa Code § 573.5. The bond is conditioned upon the faithful performance of the contract and requires the principal contractor and surety to pay “all just claims due them for labor performed or materials furnished ... *when the same are not satisfied out of the portion of the contract price which the public corporation is required to retain until completion of the public improvement....*” Iowa Code § 573.6 (emphasis added). Thus, the bond is secondary to the retainage fund.

The retainage fund is the other protection afforded subcontractors. *Star Equipment*, 843 N.W.2d at 453. Chapter 573 requires public owners to “retain from each monthly payment [to the principal contractor] not more than five percent of that amount which is determined to be due according to the estimate of the architect or engineer.” Iowa Code § 573.12(1)(a). This retainage fund “constitutes a fund for the payment of claims for materials furnished and labor performed on the improvement and shall be held and disposed of by the public corporation as provided in” chapter 573. Iowa Code § 573.13. The public owner is required to retain the fund until “thirty days after the completion and final acceptance of the improvement.” Iowa Code § 573.14(1).

“Subcontractors owed money on public construction projects may submit their claims to the responsible public corporation.” *Star Equipment*, 843 N.W.2d at 453 (citing Iowa Code § 573.16). Generally, the claim must be filed with the public owner “before the expiration of thirty days immediately following the completion and final acceptance of the improvement.” Iowa Code § 573.10(1). This timeline coincides with the owner’s obligation to retain the fund “for a period of thirty days after the completion and final acceptance of the improvement.” Iowa Code § 573.14(1). If there are claims on file at the end of this time period, the owner must “continue to retain from the unpaid funds a sum equal to double the total amount of all claims on file.” *Id.* This ensures there are sufficient contract funds available to resolve any outstanding claims.

The public owner, principal contractor, surety or a claimant who has filed a claim may bring an action in equity in the county where the project is located to “adjudicate all rights to” the retainage fund. Iowa Code § 573.16(1). Such action must be filed between 31 and 60 days after the completion and final acceptance of the project. *Id.* This provision has been held to be “a special statute of limitations,” barring action against the retainage fund if the action is not brought within the stated time period. *Northwest Limestone Co., Inc. v. State Dept. of Transp.*, 499 N.W.2d 8, 11 (Iowa 1993).

Alternatively, a principal contractor may serve a written demand on a claimant “to commence action in court to enforce the claim ... within thirty days, otherwise the retained and unpaid funds due the contractor shall be released.” Iowa Code § 573.16(2). If an action is commenced by a claimant in response to such a demand, the principal contractor may file with the public corporation “a surety bond in double the amount of the claim in controversy, conditioned to pay any final judgment rendered for the claims so filed....” *Id.* If such a bond is filed, “the public corporation ... shall pay to the contractor the amount of funds withheld.” *Id.*

B. The district court correctly held that actions brought pursuant to subsection 573.16(2) are subject to the requirements of subsection 573.16(1).

In this case, Graphite, the principal contractor, argued that Iowa Code section 573.16(2) allows a principal contractor to serve a demand on a claimant, at any time after a claim is filed, and require the claimant to commence an action against the retainage fund within thirty days of the date of the demand, regardless of whether the project has been completed and finally accepted. The Court of Appeals agreed with Graphite and interpreted subsection 573.16(2) as operating independently of the statute of limitations set forth in subsection 573.16(1). Amici urge the Court to reverse that erroneous interpretation.

“[T]he goal in construing statutes is to ascertain legislative intent.” *Emmetsburg Ready Mix Co. v. Norris*, 362 N.W.2d 498, 499 (Iowa 1985) (quoting

Hansen v. State, 298 N.W.2d 263, 265-66 (Iowa 1980)). “The spirit of the statute must be considered as well as the words.” *Id.* “A sensible, workable, practical, and logical construction should be given,” and “[i]nconvenience or absurdity should be avoided.” *Id.* The Court should “assess the statute in its entirety rather than isolated words or phrases to ensure our interpretation is harmonious with the statute as a whole.” *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 770 (Iowa 2016). The Court should “avoid construing a statutory provision in a manner that would make any portion thereof redundant or irrelevant.” *Id.*

The language and intent of chapter 573, as a whole, does not support the Court of Appeals’ interpretation. Chapter 573 clearly contemplates one action be brought to address all claims to the retainage fund. Subsection 573.16(1) authorizes the filing of an action in equity “to adjudicate *all rights* to said fund.” Iowa Code § 573.16(1) (emphasis added). The district court “shall adjudicate *all claims* for which *an action* is filed under 573.16.” Iowa Code § 573.18(1) (emphasis added). Payments from the retainage fund are paid out by the public corporation in a statutorily prescribed order: first to satisfy the “[c]osts of *the action*,” followed by “claims” for labor, “claims” for materials, and finally “claims” of the public corporation. *Id.* (emphasis added). Section 573.11 authorizes the district court to permit untimely claims to be filed “during the pendency of *the action* ... if it be made to appear that such belated filing will not materially delay *the action*.” Iowa Code § 573.11 (emphasis added);

see also Iowa Supply Co. v. Grooms & Co. Const., Inc., 428 N.W.2d 662, 667 (Iowa 1988) (stating “Iowa law recognizes that if one claim against a general contractor results in an action against the retainage under Iowa Code chapter 573, other claimants who have dealt directly with the general contractor may participate in a suit to recover against the retainage, even though the claimants did not properly file their claims.”).

Thus, chapter 573 clearly contemplates one action to resolve all claims to the retainage. However, a single action would only be possible if it is brought upon conclusion of the project, once all potential claimants have had an opportunity to submit a claim, and once the final retainage fund balance is known. Reading 573.16(1) and (2) as complementary, rather than as independent, is consistent with the clear intent of chapter 573 to resolve claims related to retainage in one action. When read in a complementary manner, section 573.16(2) allows the principal contractor to shorten the time for filing an action related to the retainage from 60 days, after final completion and acceptance, to 31 days. Once the owner finally accepts a project, the principal contractor can, the very next day, serve written demand on any subcontractors who filed claims to bring suit within 30 days of such demand. This would mean the claimants would need to bring suit by the 31st day following final acceptance and they would no longer have up to 60 days in which to file suit, thereby shortening the statute of limitations that otherwise applies.

The district court’s interpretation that the timing requirements of subsection 573.16(1) apply to actions brought under subsection 573.16(2) is also consistent with section 573.14(1), which mandates that the retainage fund “shall be retained by the public corporation for a period of thirty days after the completion and final acceptance of the improvement....” Iowa Code § 573.14(1). Nothing in subsection 573.16(2) purports to override that requirement. In contrast, other sections of chapter 573 that allow for earlier payment of retainage contain such overriding language. *See, e.g.*, Iowa Code § 573.28(2) (“Payments made by a governmental entity ... shall be made in accordance with the provisions of this chapter, *except as provided in this section....*”) (emphasis added); Iowa Code § 573.15A (“*Notwithstanding section 573.14*, a public corporation may release retained funds upon completion of ninety-five percent of the contract in accordance with the following....”) (emphasis added). These distinctions cannot be ignored. “Legislative intent is expressed by omission as well as by inclusion of statutory terms,” and it is presumed that the legislature acts “intentionally and purposely in the disparate inclusion or exclusion” of particular language in a statute. *Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 193 (Iowa 2011).

The district court’s interpretation also avoids the apparent conflict that was grappled with by the Court of Appeals: how to reconcile the requirement in subsection 573.16(2) that the public corporation release “the amount of funds

withheld” in response to the principal contractor’s posting of a bond, with the provision in subsection 573.28(2)(c) allowing the public corporation to withhold 200% of the value of labor or materials yet to be provided. Under the district court’s interpretation, this conflict would never arise because the commencement of the action, posting of bond, and release of retainage contemplated by subsection 573.16(2) would only occur *after* the completion and final acceptance of the project, thereby never implicating section 573.28. The Court should “favor interpretations that avoid conflicts....” *Sanon v. City of Pella*, 865 N.W.2d 506, 520 (Iowa 2015) (Waterman, J., dissenting).

The district court’s interpretation is also most consistent with the purpose of chapter 573, which is to protect subcontractors and the governmental entity. *Farmers Co-op. Co. v. DeCoster*, 528 N.W.2d 536, 537-38 (Iowa 1995). The Court of Appeals’ interpretation is contrary to that purpose. It would allow a principal contractor to submit multiple demands to multiple claimants throughout the project and force multiple lawsuits prior to final acceptance. This would cripple the progress of work and make it difficult for owners to complete public improvement projects on time and on budget. It would also allow the principal contractor to bond out such claims and thereby prematurely empty the project of retainage without notice to the subcontractors for whose benefit the retainage fund is held. Unlike the owner, there are no statutory restrictions on what the principal contractor does with the retainage

funds. The principal contractor could hold on to the money and make the subcontractors chase after it for years.

The purpose and overall structure of chapter 573 does not support Graphite's position that the principal contractor can force a subcontractor to judicially enforce a claim at any point in the progress of the project. Rather, they support the opposite—that the retainage fund remains in place until the project is complete, or nearly complete, and all claims are known.

The Court of Appeals made two significant errors in rejecting the district court's interpretation. First, it concluded that subsection 573.16(2) "operates separately" from subsection 573.16(1), citing to *Dobbs v. Knudson, Inc.*, 292 N.W.2d 692, 694 (Iowa 1980). Court of Appeals Opinion at 16. However, *Dobbs* did not address the interplay between subsection 573.16(1) and (2), and nothing in that opinion suggests that the action in that case was commenced and the bond posted *prior* to final acceptance. Moreover, contrary to the Court of Appeals' conclusion, it is clear that subsections 573.16(1) and (2) do *not* operate separately. Subsection 573.16(1) sets forth when the action can be brought, what type of action can be brought, and where the action can be brought. Subsection 573.16(2) does not contain any similar provisions. Thus, the action contemplated by subsection (2) must be subject to the requirements of subsection (1).

Second, the Court of Appeals reasoned that because subsection 573.14(2) states that it “does not abridge any of the rights set forth in section 573.16,” this means that “[s]ection 573.16(2) removes the restrictions required under 573.14 if the process provided in section 573.16 is followed.” Court of Appeals Opinion at 14. However, the language relied upon by the Court of Appeals is found in subsection 573.14(2) and states that “*this subsection* does not abridge any of the rights set forth in section 573.16,” referring to subsection 573.14(2). Iowa Code § 573.14(2) (emphasis added). The requirement that the public corporation hold on to the retainage fund for a period of thirty days after completion and final acceptance is found in subsection 573.14(1), not subsection 573.14(2). See Iowa Code § 573.14(1). Thus, the language relied upon by the Court of Appeals does not override the requirement in subsection 573.14(1) to hold retainage until thirty days after completion and final acceptance.

Because the district court’s interpretation is most consistent with the purpose of chapter 573 and the overall statutory scheme, the Court should vacate the Court of Appeals’ opinion and affirm the district court’s decision.

II. IN THE ALTERNATIVE, IF 573.16(1) IS NOT CONTROLLING, THEN 573.16(2) SHOULD NOT BE INTERPRETED AS NEGATING THE OWNER’S RIGHTS UNDER 573.28

Iowa Code chapter 26 requires public owners to engage the lowest responsive, responsible bidder on public improvement projects, when those projects exceed the

competitive bidding threshold. Iowa Code § 26.9. The Supreme Court has stated the purpose of the public bidding law is “to secure by competition among bidders, the best results at the lowest price, and to forestall fraud, favoritism and corruption in the making of contracts,” for the benefit of taxpayers. *Elview Const. Co., Inc. v. North Scott Community School Dist.*, 373 N.W.2d 138, 141 (Iowa 1985) (quoting *Istari Construction, Inc. v. City of Muscatine*, 330 N.W.2d 798, 800 (Iowa 1983)).

Under chapter 26, public owners such as Amici have no ability to evaluate the qualifications of a particular contractor when making a contract award, other than to determine whether that contractor is “responsible.” Chapter 26 does not include a definition of a “responsible” bidder. It does, however, specifically allow the owner to request information from the bidder to inform its decision, such as information about the bidder’s “experience, number of employees, and ability to finance the cost of the public improvement.” Iowa Code § 26.9(2). In many cases, the public owner is forced to engage a principal contractor on a project who the owner knows is not the most qualified, simply because they have submitted the lowest bid to complete the work. *Bruner and O’Connor on Construction Law* § 2:110, Evaluation of bidder responsibility—Generally (Aug. 2023 Update) (stating “[t]he sole question before the agency is whether the low bidder is or is not ‘responsible’—not whether the bidder is most responsible among all bidders.”).

In addition to being prohibited from engaging the most qualified principal contractor on public improvement projects, Iowa Code chapter 573 and its retainage provisions place public owners squarely in the middle of disputes between the principal contractor and subcontractors or material suppliers related to payment. “The American Subcontractors Association has called the issue of prompt payment one of the most important issues for construction specialty trade contractors and suppliers.” Deborah F. Buckman, 83 A.L.R. 7th Art. 6, State Prompt Payment Statutes – Construction Cases (2023) (internal quotations omitted).

While the primary purpose of chapter 573 may be to protect subcontractors and material suppliers on public projects, it is also intended to protect the owner. *Farmers Co-op.*, 528 N.W.2d at 537-38. Thus, if a principal contractor is entitled to deplete the retainage from a project before substantial completion by submitting a bond under subsection 573.16(2), the owner must still be entitled to enforce the protections afforded to it pursuant to section 573.28.

Section 573.28 allows the principal contractor to request retainage early, once the project, or a portion of the project, is substantially completed. Iowa Code § 573.28(2)(a). This statute is intended, in part, to address portions of the work that are completed early in the construction process, so that subcontractors on that portion of the project do not have to wait until the project is finally complete to receive their full payment. *See Bruner and O’Connor on Construction Law* § 8:19

Retainage (Aug. 2023 Update) (“Excavation contractors, for example, may completely perform their work in the first few months of a construction project but may not be in a position to recover 100% of their contract price until many months later when the project is substantially complete.”). However, section 573.28 also includes protections for the owner and subcontractors who have not yet completed their work, allowing the public owner to continue to withhold retainage funds equal to 200% of the value of the labor or materials yet to be provided. Iowa Code § 573.28(2)(c).

Graphite argued that section 573.28 does not apply when a principal contractor provides a bond to cover a claim pursuant to subsection 573.16(2). The Court of Appeals agreed and concluded “there is no interplay between [573.28(2)(c)] and 573.16(2).” Court of Appeals Opinion at 22. The Court of Appeals appears to base this conclusion on the fact that Graphite did not follow the procedures required by section 573.28. Court of Appeals Opinion at 21 (stating that the procedure provided for in section 573.28 “was not pursued here.”). However, the fact that Graphite did not comply with the procedures required by section 573.28 does not mean that such procedures are inapplicable. The Court of Appeals acknowledged that “Graphite Construction made an early request for retainage funds....” Court of Appeals Opinion at 11. If, as held by the Court of Appeals, subsection 573.16(2)

authorizes a principal contractor to obtain retainage early, then the statute should be read harmoniously and the requirements of section 573.28 should be followed.

Thus, when a request for retainage is made before 95% completion of the project¹, whether by submitting a bond pursuant to 573.16(2) or otherwise, section 573.28 should be triggered. The section 573.28 process must be followed in addition to the principal contractor providing the bond. This ensures that subcontractors and material suppliers are aware of the request for retainage, by providing them with ten days' notice, and allows the owner to withhold funds from the retainage to address uncompleted work on the project. Iowa Code §§ 573.28(2)(a) and (c). Skipping the section 573.28 procedures would allow the principal contractor to surreptitiously deplete the retainage fund outside of the knowledge of subcontractors and material suppliers. It would also permit the principal contractor to capture funds that are required to be withheld to protect subcontractors and material suppliers on portions of the project that have not been completed yet.

Because the bond under subsection 573.16(2) is “conditioned to pay any final judgment rendered for the claims so filed,” it is not intended to address future claims related to yet-to-be-performed work. The bond submitted by the principal contractor is, therefore, not an equivalent substitute for the retention of project funds by the

¹ Iowa Code section 573.15A sets forth separate procedures for early release of retainage when a project is 95% complete.

owner. The bond should not be used to put the owner in a worse position than section 573.28 would allow.

The Court of Appeals suggested that the owner's withholding of retainage for work not yet performed is unnecessary because the owner "is still protected by the performance bond posted at the beginning of the project under section 573.2...." Court of Appeals Opinion at 22. However, this is not consistent with the realities of public improvement projects. The principal contractor and surety—who are often represented by the same attorney—take the position that a "default" that triggers a surety's obligation to perform under its performance bond must rise to the level of a "material breach," meaning "[o]rdinary items of uncompleted or non-conforming work ... rarely constitute material breaches." Philip L. Bruner et al., *The Surety's Response to the Obligee's Declaration of Default and Termination. "To Perform or Not to Perform—That is the Question,"* 17 Construction Lawyer 3 (Jan. 1997). "Failure of the contractor to complete all work under a substantially performed contract allows the owner merely to utilize any retained contract funds to complete the remaining work if the contractor fails to do so," and "the owner is not permitted to pursue the surety under the performance bond." *Id.* Thus, the public corporation's withholding of money provides a much greater incentive for the principal contractor to complete the work rather than the threat of a claim on its performance bond.

III. THE DISTRICT COURT AND COURT OF APPEALS WERE CORRECT IN RULING A PRINCIPAL CONTRACTOR IS NOT ENTITLED TO ATTORNEY FEES PURSUANT TO 573.21

Iowa Code section 573.21 provides “[t]he court may tax, as costs, a reasonable attorney fee in favor of any claimant for labor or materials who has, in whole or in part, established a claim.” Graphite argued they are entitled to attorney fees pursuant to section 573.21 because they prevailed in a claim against the retainage fund. The district court and Court of Appeals correctly concluded that Graphite is not entitled to attorney fees in this matter. The district court came to this conclusion because Graphite was not the prevailing party in the retainage dispute due to the untimeliness of their demand for retainage. The Court of Appeals concluded that principal contractors are not entitled to attorney fees pursuant to section 573.21 because chapter 573 distinguishes a principal contractor from a claimant for labor or materials. Amici agree with both holdings.

CONCLUSION

For the forgoing reasons, Amici respectfully requests the Court uphold the decision of the Court of Appeals regarding attorney fees, but reverse the remaining ruling of the Iowa Court of Appeals and reinstate the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

The undersigned hereby certifies that on May 3, 2024, the foregoing Conditional Brief of Amici Curiae was electronically filed with the Iowa Supreme Court by using the EDMS system. I further certify that all parties or their counsel of record are registered as EDMS filers and will be served by the EDMS system.

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