

MISSOURI PROMPT PAY ACT FOR PUBLIC PROJECTS

34.057. Public works contracts—prompt payment by public owner to contractor—prompt payment by contractor to subcontractor—progress payments—retainage—late payment charges—withholding of payments

1. Unless contrary to any federal funding requirements or unless funds from a state grant are not timely received by the contracting public municipality but notwithstanding any other law to the contrary, all public works contracts made and awarded by the appropriate officer, board or agency of the state or of a political subdivision of the state or of any district therein, including any municipality, county and any board referred to as the public owner, for construction, reconstruction or alteration of any public work project, shall provide for prompt payment by the public owner to the contractor and prompt payment by the contractor to the subcontractor and material supplier in accordance with the following:

(1) A public owner shall make progress payments to the contractor on at least a monthly basis as the work progresses, or, on a lump sum basis according to the terms of the lump sum contract. Except in the case of lump sum contracts, payments shall be based upon estimates prepared at least monthly of work performed and material delivered, as determined by the

project architect or engineer. Retainage withheld on public works projects shall not exceed five percent of the value of the contract or subcontract unless the public owner and the architect or engineer determine that a higher rate of retainage is required to ensure performance of the contract. Retainage, however, shall not exceed ten percent of the value of the contract or subcontract. Except as provided in subsection 4 of this section, the public owner shall pay the contractor the amount due, less a retainage not to exceed ten percent, within thirty days following the latter of the following:

- (a) The date of delivery of materials or construction services purchased;
- (b) The date, as designated by the public owner, upon which the invoice is duly delivered to the person or place designated by the public owner; or
- (c) In those instances in which the contractor approves the public owner's estimate, the date upon which such notice of approval is duly delivered to the person or place designated by the public owner;

(2) Payments shall be considered received within the context of this section when they are duly posted with the United States Postal Service or other agreed upon delivery service or when they are hand-delivered to an authorized person or place as agreed to by the contracting parties;

(3) If, in the discretion of the owner and the project architect or engineer and the contractor, it is determined that a subcontractor's performance has been completed and the subcontractor can be released prior to substantial completion of the public works contract without risk to the public owner, the contractor shall request such adjustment in retainage, if any, from the public owner as necessary to enable the contractor to pay the subcontractor in full. The public owner may reduce or eliminate retainage on any contract payment if, in the public owner's opinion, the work is proceeding satisfactorily. If retainage is released and there are any remaining minor items to be completed, an amount equal to two hundred percent of the value of each item as determined by the public owner's duly authorized representative shall be withheld until such item or items are completed;

(4) The public owner shall pay the retainage, less any offsets or deductions authorized in the contract or otherwise authorized by law, to the contractor after substantial completion of the contract work and acceptance by the public owner's authorized contract representative, or as may otherwise be provided by the contract specifications for state highway, road or bridge projects administered by the state highways and transportation commission. Such payment shall be made within thirty days after acceptance, and the invoice and all other appropriate documentation and certifications in complete and acceptable form are provided, as may be required by the contract documents. If at that time there are any remaining minor items to be completed, an amount equal to two hundred percent of the value of each item as determined by the public owner's representative shall be withheld until such items are completed;

(5) All estimates or invoices for supplies and services purchased, approved and processed, or final payments, shall be paid promptly and shall be subject to late payment charges provided in this section. Except as provided in subsec-

tion 4 of this section, if the contractor has not been paid within thirty days as set forth in subdivision (1) of subsection 1 of this section, the contracting agency shall pay the contractor, in addition to the payment due him, interest at the rate of one and one-half percent per month calculated from the expiration of the thirty-day period until fully paid;

(6) When a contractor receives any payment, the contractor shall pay each subcontractor and material supplier in proportion to the work completed by each subcontractor and material supplier his application less any retention not to exceed ten percent. If the contractor receives less than the full payment due under the public construction contract, the contractor shall be obligated to disburse on a pro rata basis those funds received, with the contractor, subcontractors and material suppliers each receiving a prorated portion based on the amount of payment. When, however, the public owner does not release the full payment due under the contract because there are specific areas of work or materials he is rejecting or because he has otherwise determined such areas are not suitable for payment then those specific subcontractors or suppliers involved shall not be paid for that portion of the work rejected or deemed not suitable for payment and all other subcontractors and suppliers shall be paid in full;

(7) If the contractor, without reasonable cause, fails to make any payment to his subcontractors and material suppliers within fifteen days after receipt of payment under the public construction contract, the contractor shall pay to his subcontractors and material suppliers, in addition to the payment due them, interest in the amount of one and one-half percent per month, calculated from the expiration of the fifteen-day period until fully paid. This subdivision shall also apply to any payments made by subcontractors and material suppliers to their subcontractors and material suppliers and to all payments made to lower tier subcontractors and material suppliers throughout the contracting chain;

(8) The public owner shall make final payment of all moneys owed to the contractor, less any offsets or deductions authorized in the contract or otherwise authorized by law, within thirty days of the due date. Final payment shall be considered due upon the earliest of the following events:

(a) Completion of the project and filing with the owner of all required documentation and certifications, in complete and acceptable form, in accordance with the terms and conditions of the contract;

(b) The project is certified by the architect or engineer authorized to make such certification on behalf of the owner as having been completed, including the filing of all documentation and certifications required by the contract, in complete and acceptable form; or

(c) The project is certified by the contracting authority as having been completed, including the filing of all documentation and certifications required by the contract, in complete and acceptable form.

2. Nothing in this section shall prevent the contractor or subcontractor, at the time of application or certification to the public owner or contractor, from withholding such applications or certifications to the owner or contractor for

payment to the subcontractor or material supplier. Amounts intended to be withheld shall not be included in such applications or certifications to the public owner or contractor. Reasons for withholding such applications or certifications shall include, but not be limited to, the following: unsatisfactory job progress; defective construction work or material not remedied; disputed work; failure to comply with other material provisions of the contract; third party claims filed or reasonable evidence that a claim will be filed; failure of the subcontractor to make timely payments for labor, equipment and materials; damage to a contractor or another subcontractor or material supplier; reasonable evidence that the contract can not be completed for the unpaid balance of the subcontract sum or a reasonable amount for retention, not to exceed the initial percentage retained by the owner.

3. Should the contractor determine, after application or certification has been made and after payment has been received from the public owner, or after payment has been received by a contractor based upon the public owner's estimate of materials in place and work performed as provided by contract, that all or a portion of the moneys need to be withheld from a specific subcontractor or material supplier for any of the reasons enumerated in this section, and such moneys are withheld from such subcontractor or material supplier, then such undistributed amounts shall be specifically identified in writing and deducted from the next application or certification made to the public owner or from the next estimate by the public owner of payment due the contractor, until a resolution of the matter has been achieved. Disputes shall be resolved in accordance with the terms of the contract documents. Upon such resolution the amounts withheld by the contractor from the subcontractor or material supplier shall be included in the next application or certification made to the public owner or the next estimate by the public owner and shall be paid promptly in accordance with the provisions of this section. This subsection shall also apply to applications or certifications made by subcontractors or material suppliers to the contractor and throughout the various tiers of the contracting chain.

4. The contracts which provide for payments to the contractor based upon the public owner's estimate of materials in place and work performed rather than applications or certifications submitted by the contractor, the public owner shall pay the contractor within thirty days following the date upon which the estimate is required by contract to be completed by the public owner, the amount due less a retainage not to exceed five percent. All such estimates by the public owner shall be paid promptly and shall be subject to late payment charges as provided in this subsection. After the thirtieth day following the date upon which the estimate is required by contract to be completed by the public owner, the contracting agency shall pay the contractor, in addition to the payment due him, interest at a rate of one and one-half percent per month calculated from the expiration of the thirty-day period until fully paid.

5. Nothing in this section shall prevent the owner from withholding payment or final payment from the contractor, or a subcontractor or material supplier. Reasons for withholding payment or final payment shall include, but

not be limited to, the following: liquidated damages; unsatisfactory job progress; defective construction work or material not remedied; disputed work; failure to comply with any material provision of the contract; third party claims filed or reasonable evidence that a claim will be filed; failure to make timely payments for labor, equipment or materials; damage to a contractor, subcontractor or material supplier; reasonable evidence that a subcontractor or material supplier cannot be fully compensated under its contract with the contractor for the unpaid balance of the contract sum; or citation by the enforcing authority for acts of the contractor or subcontractor which do not comply with any material provision of the contract and which result in a violation of any federal, state or local law, regulation or ordinance applicable to that project causing additional costs or damages to the owner.

6. Notwithstanding any other provisions in this section to the contrary, no late payment interest shall be due and owing for payments which are withheld in good faith for reasonable cause pursuant to subsections 2 and 5 of this section. If it is determined by a court of competent jurisdiction that a payment which was withheld pursuant to subsections 2 and 5 of this section was not withheld in good faith for reasonable cause, the court may impose interest at the rate of one and one-half percent per month calculated from the date of the invoice and may, in its discretion, award reasonable attorney fees to the prevailing party. In any civil action or part of a civil action brought pursuant to this section, if a court determines after a hearing for such purpose that the cause was initiated, or a defense was asserted, or a motion was filed, or any proceeding therein was done frivolously and in bad faith, the court shall require the party who initiated such cause, asserted such defense, filed such motion, or caused such proceeding to be had to pay the other party named in such action the amount of the costs attributable thereto and reasonable expenses incurred by such party, including reasonable attorney fees.

(L.1990, S.B. Nos. 808 & 672, § A(§ 1).)

Law Review and Journal Commentaries

Prompt pay for government construction work in Missouri. Richard A. Stockenberg, 48 J.Mo.B. 11 (1992).

Public works projects. John W. Maupin and W. Dudley McCarter, 52 J.Mo.B. 94 (March-April 1996).

Library References

States ⇨104.
WESTLAW Topic No. 360.
C.J.S. States §§ 168, 172 to 173.

Notes of Decisions

In general 1
Costs 3
Housing authorities 2

1. In general

Surety's liability on payment and performance bond issued in connection with public

works project was coextensive with principal's liability, making it unnecessary for surety's name to appear on form of verdict in subcontractor's action against principal. City of Independence for Use of Briggs v. Kerr Const. Paving Co., Inc. (App. W.D. 1997) 957 S.W.2d 315, rehearing and/or transfer denied.

Verdicts finding principal of public works project liable on breach of contract claim but surety not liable on breach of bond claim were not inconsistent, where jury was never told that if it found it against principal, it was also required to find surety liable, and jury considered no issues relating to validity or applicability of payment and performance bond. City of Independence for Use of Briggs v. Kerr Const. Paving Co., Inc. (App. W.D. 1997) 957 S.W.2d 315, rehearing and/or transfer denied.

Like claim of vexatious refusal to pay, issue of contractor's violation of Public Works Prompt Pay Statute should not be submitted unless there is something of substantial nature in case indicating that contractor acted in bad faith and without reasonable cause. City of Independence for Use of Briggs v. Kerr Const. Paving Co., Inc. (App. W.D. 1997) 957 S.W.2d 315, rehearing and/or transfer denied.

Evidence that contractor refused to pay subcontractor for sodding work performed on public works contract, unilaterally attempted to offset alleged claims for other job, and communicated to subcontractor in condescending and insulting way established submissible case for late payment interest penalty under Public Works Prompt Pay Statute. City of Independence for Use of Briggs v. Kerr Const. Paving Co., Inc. (App. W.D. 1997) 957 S.W.2d 315, rehearing and/or transfer denied.

Public Works Prompt Pay Statute was intended to allow courts to impose interest penalty whenever bad faith is found. City of Independence for Use of Briggs v. Kerr Const. Paving Co., Inc. (App. W.D. 1997) 957 S.W.2d 315, rehearing and/or transfer denied.

Whether general contractor and public works contractor acted in good faith in withholding payment from subcontractor could be determined by jury in action under Public Works Prompt Pay Statute. City of Independence for Use of Briggs v. Kerr Const. Paving Co., Inc. (App. W.D. 1997) 957 S.W.2d 315, rehearing and/or transfer denied.

Trial court was not entitled to set aside penalty interest ruling of jury in action under Public Works Prompt Pay Statute; only option available to judge, if he disagreed with jury's verdict on penalty interest provision, was to set aside verdict and order new trial on grounds that verdict was against weight of the evidence. City of Independence for Use of Briggs v. Kerr Const. Paving Co., Inc. (App. W.D. 1997) 957 S.W.2d 315, rehearing and/or transfer denied.

Under Public Works Prompt Pay Statute, extent of attorney fee award is to be decided by judge; this is to be done after fact finder has resolved "good faith" issue and accordingly imposed any penalty interest. City of Independence for Use of Briggs v. Kerr Const. Paving

Co., Inc. (App. W.D. 1997) 957 S.W.2d 315, rehearing and/or transfer denied.

Judge may award attorney fees only to party prevailing on penalty interest issue in action under Public Works Prompt Pay Statute. City of Independence for Use of Briggs v. Kerr Const. Paving Co., Inc. (App. W.D. 1997) 957 S.W.2d 315, rehearing and/or transfer denied.

Issue of prevailing party attorney fees in action under Public Works Prompt Pay Statute was tacitly submitted to jury, where neither party objected to the submission of either penalty issue or attorney fee issue to jury instead of judge, and contractor only alleged that subcontractor had not made submissible case. City of Independence for Use of Briggs v. Kerr Const. Paving Co., Inc. (App. W.D. 1997) 957 S.W.2d 315, rehearing and/or transfer denied.

Jury's determination that general contractor's dispute with sodding subcontractor was not in good faith and that general contractor had no reasonable cause to refuse payment entitled subcontractor to award of penalty interest and attorney fees under Public Works Prompt Pay Statute. City of Independence for Use of Briggs v. Kerr Const. Paving Co., Inc. (App. W.D. 1997) 957 S.W.2d 315, rehearing and/or transfer denied.

Under Public Works Prompt Pay Statute, any contractor withholding payment from subcontractor, beyond time specified, on claim of defective work will be liable for late payment penalty interest if it is determined in court that withholding of payment was not in good faith for reasonable cause; if it is determined that withholding was in good faith for reasonable cause, contractor will not have any liability under statute. City of Independence for Use of Briggs v. Kerr Const. Paving Co., Inc. (App. W.D. 1997) 957 S.W.2d 315, rehearing and/or transfer denied.

Party in whose favor court rules as to penalty interest provision under Public Works Prompt Pay Statute may be awarded attorney fees in discretion of trial judge. City of Independence for Use of Briggs v. Kerr Const. Paving Co., Inc. (App. W.D. 1997) 957 S.W.2d 315, rehearing and/or transfer denied.

Surety under bond posted pursuant to public work statute was not liable for penalties incurred by principal as result of principal's violation of Public Works Prompt Pay Statute. City of Independence for Use of Briggs v. Kerr Const. Paving Co., Inc. (App. W.D. 1997) 957 S.W.2d 315, rehearing and/or transfer denied.

2. Housing authorities

Chapter 34, RSMo, the Missouri Purchasing Law, does not as a whole apply to the St. Louis Housing Authority; however, certain sections

within the chapter do apply. Op.Atty.Gen. Letter No. 128-90, Bass, 12-11-90.

3. Costs

Absent specific determination by trial court that withholding of funds by Department of Natural Resources for alleged failure of contrac-

tor to comply with prevailing wages on public works law was in good faith, and without hearing on matter of costs, trial court order imposing interest and costs could not be affirmed on appeal. *Essex Contracting, Inc. v. City of DeSoto* (App. E.D. 1991) 815 S.W.2d 135.

34.058. Public works contract, defined—certain contract clauses against public policy—exceptions

1. As used in this section, the term “**public works contract**” means a contract of the state, county, city and other political subdivisions of the state, except the Missouri transportation department, for the construction, alteration, repair, or maintenance of any building, structure, highway, bridge, viaduct, pipeline, public works, or any other works dealing with construction, which shall include, but need not be limited to, moving, demolition, or excavation performed in conjunction with such work.

2. Any clause in a public works contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages, or obtain an equitable adjustment, for delays in performing such contract, if such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void and unenforceable.

3. Subsection 2 of this section is not intended to render void any contract provision of a public works contract that:

(1) Precludes a contractor from recovering that portion of delay costs caused by the acts or omissions of the contractor or its agents;

(2) Requires notice of any delay by the party responsible for such delay;

(3) Provides for reasonable liquidated damages; or

(4) Provides for arbitration or any other procedure designed to settle contract disputes.

(L.1990, S.B. Nos. 808 & 672, § A(§ 2).)

Law Review and Journal Commentaries

Prompt pay for government construction work in Missouri. Richard A. Stockenberg, 48 *J.Mo.B.* 11 (1992).

Library References

States ⇨104.
WESTLAW Topic No. 360.
C.J.S. States §§ 168, 172 to 173.

Notes of Decisions

Public works contract 1

1. Public works contract

Statute prohibiting inclusion in public works contracts of clauses purporting to waive, release or extinguish rights of contractor to recover costs or damages for delays caused in whole or in part by acts or omissions within control of

contracting public entity did not apply to contract between two private entities, and enforcement of clause in subcontract providing that subcontractor was not entitled to seek damages from general contractor for delay unless owner was obligated to general contractor for such damages was thus not against public policy. Roy A. Elam Masonry, Inc. v. Fru-Con Const. Corp. (App. E.D. 1996) 922 S.W.2d 783, rehearing and/or transfer denied.