

Another Subcontractor Denied Bond Claim
for a Public Works Construction Project

by

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The Western District Missouri Court of Appeals recently denied a subcontractor from recovering against the City of Moberly. The court concluded the subcontractor could not sue the City for its failure to secure bonds to cover the subcontractor's work.

This decision follows a Missouri Supreme Court opinion in 2016 where Brentwood Glass Company could not sue St. Louis County for its failure to require payment bonds.

The cases are *Septagon Construction Company, Inc. – Columbia and Stockman Construction Corp. v. Industrial Development Authority of the City of Moberly*, 2017 WL 892550 (W.D. Mo. March 7, 2017) and *Brentwood Glass Company, Inc. v. Pal's Glass Service, Inc.*, 499 S.W.3d 296 (Mo. 2016).

In both projects, the subcontractors were not paid for their work.

The Brentwood Glass case was the subject of my column in the November-December 2016 edition of the *St. Louis Construction News & Review*. The headline was: "Subcontractor Denied Bond Claim against St. Louis County."

This column focuses on the Septagon Construction/Stockman Construction case.

In 2010, Mamtek US, Inc. sought financing to construct a sucralose manufacturing facility in Moberly. The project was built on property blighted by the City of Moberly.

Pursuant to several agreements, Mamtek agreed with the City to construct, manage and operate the project consistent with various bonds. The City agreed to timely make the bond proceeds available to reimburse Mamtek for construction. In turn, Mamtek agreed to make timely payments to the City to cover principal and interest on the bonds.

The City owned the project during the term of the bonds. Mamtek was obligated to purchase the project at the expiration of the bonds.

Mamtek then entered into a construction contract with Septagon Construction for design and construction. The contract identified Mamtek as the owner and Septagon as the contractor. Stockman Construction had a separate contract with Mamtek to perform some of the work.

Stockman Construction began work and billed Mamtek. The City authorized its bond agent UMB Bank to make payments of \$331,470.05 to Stockman.

Mamtek did not complete the project and defaulted on its obligations to make the required bond payments. UMB Bank took possession and control of the subject property.

Stockman Construction filed suit against the City of Moberly and other related entities for non-payment of \$349,000.00. Septagon Construction also sued. Although the opinion does not make clear, it appears that Stockman Construction was initially paid on the invoice of \$331,470.05. It was seeking through the lawsuit additional payment for additional work.

Stockman and Septagon sued the City of Moberly for violation of Section 107.170(2) of the Revised Statutes of Missouri. This statute makes it the duty of all public entities like the City of Moberly when making contracts for public works that exceed \$50,000.00 to require each contractor to furnish to the city a bond covering payment for such work. The statute also protects subcontractors for their work.

Mamtek had not maintained the bond to cover the work. Septagon and Stockman also filed mechanic's lien lawsuits as an alternative claim to the alleged violation of Section 107.170(2).

The Western District discussed the recent Missouri Supreme Court case involving Brentwood Glass. In this case, St. Louis County issued industrial revenue bonds to develop property for the headquarters of Smurfit-Stone Container Enterprises. The County contracted with Cornerstone VI to construct the project.

Clayco was the general contractor. Brentwood Glass was a sub-subcontractor. The Supreme Court held that Cornerstone did not provide construction services under its contract with the County. This meant Cornerstone was not a contractor covered by the bond statute. Thus, no bond was required.

Relying on Brentwood Glass, the Western District similarly determined that Mamtek did not provide construction services under its contract with the City of Moberly. Mamtek, therefore, was not a contractor under Section 107.170 and thus did not have to furnish a construction bond.

Stockman argued on appeal that the City breached a provision in an operating agreement that required Mamtek to obtain a construction surety bond. Stockman contended that it was a third-party beneficiary to this contract. The appellate court found that the operating agreement expressly excluded third-party beneficiaries from having any contractual rights.

The Western District also rejected Stockman's argument that the City unjustly benefited from the work without payment. This claim was based on the concept of an implied contract. The court relied on Section 432.070 of the Revised Statutes of Missouri.

This section provides that all contracts with a municipal corporation must be in writing. The court noted that this requirement shields municipalities from lawsuits based on implied contracts.

Lastly, Stockman could not recover on its mechanic's lien claim because the lien related to public property. Mechanic's liens cannot attach to public property.

This left Stockman with no means to recover additional money for its work.

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