

Builder Must Pay Lost Profits on Cancelled Purchase Order

by

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A builder of pre-engineered steel buildings must pay for the seller's lost profits when the builder terminated the purchase orders, according to a recent decision from the Missouri Court of Appeals for the Southern District. The case is *Williams Construction, Inc. v. Wehr Construction, LLC*, 2012 WL 5451725, decided November 8, 2012.

The appellate court struck down an additional award of \$5,000.00, however, for overhead, finding that the builder could not recover both lost profits and overhead expenses where the expenses were merely tied to the production of that profit.

Williams Construction sells metal building packages. Wehr Construction puts these buildings together. In 2004, Wehr executed a purchase order requesting that Williams provide four pre-engineered steel buildings for a total cost of \$299,435.00.

The four buildings included a warehouse, retail strip center, convenience store and a car wash. The buildings were to comprise what was known as the "Kansas Plaza" and were to be located at the corner of the Kansas Expressway and Sunset Boulevard in Springfield, Missouri.

Williams submitted an invoice to Wehr to cover the mobilization fee of \$14,972.00, which was five percent of the anticipated projected total project cost. Wehr paid this invoice in full.

A month later by letter Wehr cancelled the purchase order. Wehr stated that it had been "forced to reassess costs" and forced to cancel the order because the cost of construction materials had increased tremendously. Williams then stopped work on the project, but by that point, Williams owed its supplier, American Buildings Company (ABC), \$25,986.25 for engineering services. The drawings and specifications provided by ABC were specific to this project and could not be used elsewhere.

The purchase order provided that all submittals including shop drawings were to be in Wehr's office no later than three weeks after the date of the purchase

order. The purchase order also provided that the builder could terminate the purchase order if the supplier did not deliver the drawings within three weeks.

After receiving the notice of cancellation, Williams told Wehr that a higher than expected project cost was not a just reason for termination. Williams took the position that the purchase order allowed Williams to terminate for convenience and this was the applicable provision. This provision entitled Williams to receive payment for work executed and costs incurred along with reasonable overhead and profit on work not yet completed.

The dispute ended in a court-tried case. Williams sued Wehr for breach of contract. Williams contended that Wehr owed \$60,986.25 consisting of \$35,000.00 for lost profit and overhead and \$25,986.25 owed to Williams' supplier, ABC, for engineering services including drawings. After crediting for the \$14,972.00 paid for mobilization, Williams demanded payment of \$46,014.25.

Wehr countersued for the return of its payment of \$14,972.00. The trial court found that Williams had sustained damages in the amount of \$35,000.00 for lost overhead and profit. The trial court denied Williams' request for \$25,986.25 to pay ABC. The appellate opinion does not explain why the trial court denied the \$25,986.25. The court also denied Wehr's counterclaim.

On appeal, Wehr argued that Williams had actually breached the contract first by not supplying the drawings within the required three-week period. The evidence showed that not all of the required drawings were submitted on time.

Missouri has a rule that the party who first breaches a contract cannot then benefit from the contract by recovering damages. The trial and appellate courts agreed that this rule did not apply. Wehr cancelled the purchase order due to cost issues, which was not a valid reason under the purchase order, and not because the design materials were late, which presumably might have been a valid reason.

Wehr also argued on appeal that Williams was not entitled to \$35,000.00 because \$5,000.00 of that related to overhead which was included in the work covered by the lost profits. Mr. Williams, testifying for Williams Construction, stated at trial that the overhead consisted of labor and rent for his construction business. He testified that it takes knowledge and man hours to order a building.

The Southern District concluded that Williams' general references to rent, knowledge and man hours were insufficient to support the award of overhead expenses.

Mr. Williams also testified that given his 35 years of experience in the construction industry, he guessed the profit would have been about ten percent which rounded off was about \$30,000.00. The appellate court found this testimony was enough to provide a “rational basis for estimating” lost profits and the award of \$30,000.00.

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