

Surety and Contractor Must Pay Subcontractor's Attorneys' Fees and Interest

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This article appeared in *St. Louis Construction News and Review*, p. 16-17, January-February, 2012.

A subcontractor will recover more in attorneys' fees and interest than in a contract balance under a recent ruling from a state appeals court. The Missouri Court of Appeals for the Western District upheld a trial court's award in favor of a subcontractor and against a contractor and a bond surety for \$200,000 in attorneys' fees and \$138,400.68 in interest.

This is in addition to an agreed settlement between the parties to pay the subcontractor \$300,000 for work performed. The case is *Brooke Drywall of Columbia, Inc. v. Building Construction Enterprises, Inc.*, 2011 WL 5335410 (Mo. App. W.D.), which was decided on November 8.

The case involves two construction projects at the Missouri University of Science and Technology in Rolla, MO. The curators of the University of Missouri are the owners of the projects. Building Construction Enterprises, Inc. (BCE) was the general contractor. Brooke Drywall was a subcontractor to BCE. Hartford Fire Insurance Company issued payment bonds with BCE as the principal.

The Western District took the unusual step of "assuming" that the prime contract between the University and BCE provided that the contractor was required to make all payments due to its subcontractors. The prime contract was not part of the record for the appellate court to review.

Brooke Drywall filed a lawsuit against BCE and Hartford alleging that it was owed the contract balance under its subcontract plus interest and attorneys' fees. BCE in turn filed a third-party lawsuit against the University seeking the remaining amounts due from the University including amounts due to Brooke Drywall.

Most of the disputes ultimately were settled prior to the introduction of evidence at trial, including an agreement by BCE and Hartford to pay Brooke Drywall \$300,000 as the principal due under the subcontract. This left open for resolution at trial Brooke Drywall's claims for attorneys' fees and interest.

The subcontract provided that unpaid payments shall bear interest from the date payment was due. Final payment was due to the subcontractor upon demand even if the contractor had not received payment from the owner. The subcontract required that the losing party to the dispute pay to the prevailing

party all attorneys' fees, costs and expenses. This is a common provision in many construction contracts. The circuit court found that the contractor and surety were both liable for interest and attorneys' fees and entered judgment against them.

The surety and contractor conceded at trial that the subcontractor had fully performed its work, that any delay in completion caused by a steel shortage was not the subcontractor's fault and that the subcontractor made demand for payment. Accordingly, the appellate court held that money was due the subcontractor and that interest ran from that date.

The surety and contractor contended that the trial court erred in awarding attorneys' fees because the subcontractor was not the "prevailing" party. They argued that in order for a party to "prevail," the issue had to be litigated and resolved in court, not settled as occurred in this case.

The Western District noted that a prevailing party is someone who obtains a judgment regardless of the amount of damages. A prevailing party need only obtain "some relief" from the court.

In this case, the parties agreed in settlement on the principal due to the subcontractor, but they litigated the issue of interest. The subcontractor ultimately prevailed on that issue and obtained relief from the court in the form of a judgment of \$136,400.68.

The appellate court concluded that this was sufficient to render the subcontractor the "prevailing party" and thus triggered the subcontractor's contractual right to attorneys' fees.

The surety had argued that the payment bond only covered contractor payments for materials and labor performed by the subcontractor. It did not expressly include attorneys' fees and thus the surety contended that it was not liable for payment of attorneys' fees.

In rejecting this argument, the Western District concluded that the bond also provided that if the contractor was in default and failed to comply with any provision in the prime contract with the University, then the obligation becomes binding upon the surety.

The Western District then expressly "assumed" that the prime contract between the University and BCE required the contractor to make all payments due under its subcontracts. The Western District stated this assumption was necessary because the prime contract was not part of the record and thus not available for review by the appellate court.

The court concluded that the contractor failed to make payment for labor performed, interest and attorneys' fees. Thus, the contractor failed to comply with the prime contract. This meant that the bond was still in effect and subject to the lawsuit brought by Brook Drywall.

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