

Appellate Court Overturns Contractor Award
For Nonpayment, Interest and Attorney Fees

by

James R. Keller

This article appeared in St. Louis Construction News and Review, p. 18-19, 2014, July-August, 2014.

The Missouri Court of Appeals for the Eastern District recently reversed a trial court's decision to award summary judgment to Systemaire, a contractor for St. Charles County, in Systemaire's claim for an unpaid contract balance, interest and attorney fees. The case now goes back to St. Charles County Circuit Court to be set for trial.

The case is Systemaire, Inc. v. St. Charles County, 2014 WL 2108953, decided May 20.

Systemaire had contracted with St. Charles County to install two 500 ton fiberglass cooling towers at the St. Charles County Family Arena for \$265,000.00. St. Charles County and Systemaire agreed during an installation to increase the contract to include installation of a base heater for \$10,000.00 and electric water level control for \$23,000.00.

The contract further expanded to include Systemaire painting structural steel for \$2,500.00 and to provide and install a heat trace for \$24,735.00. Systemaire installed the cooling towers, basin heater, electric water level control and heat trace and painted the structural steel.

Systemaire demanded that St. Charles County pay the remaining balance of \$60,225.00 for the work plus the release of \$26,500.00 in retainage. When St. Charles County did not pay, Systemaire filed its law suit in St. Charles County Circuit Court for breach of contract, alleging damages of \$86,725.00 plus interest and attorney's fees.

Systemaire filed a Motion for Summary Judgment stating that there were no facts in dispute. St. Charles County filed a response, contending otherwise.

The court entered judgment on the motion in favor of Systemaire for \$60,225.00 for the unpaid balance on the contract, \$8,583.30 for interest, and \$32,376.70 for attorney's fees, for a total of \$101,185.00.

At the heart of this dispute is Missouri's Public Prompt Act. This statute promotes timely payment to contractors, subcontractors, and suppliers on contracts with public owners for public works construction projects.

The Act provides that the public entity must pay the final contract balance due less offsets or deductions authorized by the contractor law, within thirty days of the due date. It also provides that the public entity must pay the retention less offsets after substantial completion of the work and acceptance by the public owner's authorized contract representative.

If timely payments are not made, the Act requires the public entity to pay, in addition to the amount due, interest of 1½ percent per month unless the public entity has a valid reason for withholding payment.

Valid reasons can include liquidated damages; unsatisfactory job program; 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 contractor 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.

The Act further allows the public entity to withhold payments without penalty of interest if they are withheld "in good faith for reasonable cause." If the payments were not withheld in good faith, the court may in its discretion also award reasonable attorney fees.

In this case, St. Charles County argued on appeal that it could properly withhold these payments under the contract until Systemaire provided as-built pump piping schematics and material warranties which Systemaire had not done.

The contract's payment schedule provided that the disputed payments were due upon "receipt of all appropriate project closeout documents." St. Charles County pointed to a subsection in the contract entitled "Project Documentation" wherein Systemaire was to provide copies of all

manufacturer's literature and to provide an as-built isometric piping schematic.

The problem, however, was that the "project closeout documents" were never defined in the contract. The Appellate Court concluded that there was substantial uncertainty regarding what documents constitute the project closeout documents.

With the contract being unclear, the Eastern District decided that there were facts in dispute. Therefore, it was inappropriate for the trial court to grant summary judgment based on a determination that there were no facts in dispute.

Given the ambiguity in the contract, the Eastern District sent the case back to the trial court for further proceedings which certainly could include a full trial.

James R. Keller is a partner at Herzog Crebs LLP where he concentrates his practice on construction law, complex business litigation, real estate and ADR. He also is an arbitrator and a mediator.