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**Contractor Ordered to Pay Subcontractor
9% (not 18%) Interest on Withheld Money**

Missouri's appellate court recently decided that a subcontractor should have been awarded 9 percent interest on money withheld by its contractor but agreed that the trial court correctly rejected the 18 percent interest that the subcontractor sought under Missouri's Public Works Prompt Payment Act, § 34.057 R.S.Mo. The case is *Jerry Bennett Masonry, Inc. v. Crossland Construction Co., Inc.*, 2005 WL 1791591 (Mo. App. S.D.), decided July 28, 2005.

In reaching this decision, the court provided helpful insights into how a Missouri appellate court interprets the circumstances when a contractor can safely withhold payments from its subcontractor and avoid Missouri's law that allows a trial court to assess 18 percent interest per year against those who do not timely pay what is owed. The Act, created in 1990, provides the same 18 percent interest penalty for money that an owner withholds from its contractor.

While the payment of interest as allowed by this Act continues to be a pervasive consideration in the resolution of disputes over nonpayment by an owner to its contractor or the contractor to its subcontractor, most cases involving interest are resolved before the appellate court level.

Missouri's Prompt Payment Act requires in public contracts that if a contractor fails within 15 days of receipt of payment from the owner to make any payment to its subcontractor without reasonable cause, the contractor shall pay interest to the subcontractor at 18 percent until paid in full. The trial court can also award attorney fees in its discretion if and after it assesses the 18 percent interest penalty. The question always becomes what is reasonable cause to withhold payment.

In this case, the contractor Crossland Construction had entered into a contract to build a school building for the Webb City R-7 School District in Jasper County. The job called for extensive masonry work to be performed by the subcontractor Jerry Bennett Masonry Contractor.

Crossland withheld \$67,057.50, or 10 percent of the contract's price, as retainage from what otherwise was due to the subcontractor. The subcontractor sued to recover this amount plus interest at 18 percent and attorney fees under the Act.

The contractor defended in part on the basis that the subcontractor did not provide sufficient manpower on the site to keep the project on time and this caused contractor delays in the completion date. The trial court found both the contractor and the subcontractor to be at fault in “poor management decisions” and inadequate planning. The appellate court agreed there was sufficient evidence for the trial court to find that the contractor had reasonable cause to withhold payment and not be subject to the 18 percent interest rate.

The court emphasized that while the subcontract did not have an express completion deadline, it did require that the subcontractor increase its work force if its progress was inadequate at no additional cost to the contractor. And, the subcontractor had to perform this work in accordance with the contractor’s “crashed-work” schedule, necessitated by the subcontractor’s slow performance.

The appellate court did apply Missouri’s standard provision of 9 percent interest on withheld money, however, under § 408.020 R.S.Mo. This provision allows for a 9 percent interest rate on unpaid sums that are otherwise fixed and readily determinable to be due.

The contractor successfully argued that it could offset the \$67,057.50 that was otherwise owed by \$33,496.00 to cover the additional cost to the contractor due to the subcontractor’s failure to provide adequate manpower. Thus, the contractor only owed \$33,561.50, but as to this amount, the trial court should have awarded interest at 9 percent, the appellate court held.

The appellate court also noted its disapproval with the contractor certifying to the owner that all its subcontractors had been paid when the contractor in fact had retained the \$67,057.50 from the subcontractor. “We do not approve of the practice of a contractor withholding funds from a subcontractor without noting the withholding in its application or certification to the public owner as the statute requires.”

The court concluded, none the less, that Missouri’s Prompt Payment Act, despite this conduct, did not preclude the contractor from asserting a right of set-off for \$33,496.00 from money otherwise owed. The fact there was a genuine dispute over payment, according to the court, was of overriding consideration in how to resolve this matter and whether the contractor should be penalized for technical non-compliance with the certification requirement in the Act.

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