

Subcontractor Needed Mechanic's Lien
for Work on Public Right-of-Way

by

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The Missouri Court of Appeals for the Eastern District recently denied the claim of a subcontractor for work it performed on a public right-of-way because the subcontractor did not file a mechanic's lien. The Court determined that work in a public right-of-way was not work that was subject to Missouri's public bond requirement, but rather was work on private property which was subject to the filing of a mechanic's lien.

The case is *Missouri Department of Transportation, ex rel. On Point Contractors, LLC v. Aura Contracting, LLC*, 391 S.W.3d 11 (Mo. App. E.D. 2013).

Pace-Creve Coeur Associates, LLC is the owner of a private commercial development project adjacent to Olive Boulevard. The project required some work to be performed on a public right-of-way. This meant that Pace had to obtain a permit for work on the right-of-way from the Missouri Highways and Transportation Commission.

Pace had a construction contract with Aura for this work and Aura had a subcontract with On Point Contractors, LLC to install a storm pipe and structures along Olive Boulevard.

The subcontract specifically provided that On Point Contractors was providing services pursuant to the prime contract. The subcontract did not mention that any of the services were for a public entity including the Missouri Highways and Transportation Commission.

The right-of-way permit required that Aura obtain a surety bond which was issued by Western Surety on behalf of Aura and in favor of the Missouri Highways and Transportation Commission.

After the work was completed, several subcontractors filed mechanic's liens. On Point Contractors, LLC elected not to file a mechanic's lien but rather filed a lawsuit against the Missouri Highways and Transportation Commission and Western Surety based upon the permit surety bond and a Missouri statute

(Section 107.170) that requires a payment bond be put in place for work on public property in Missouri.

Western Surety did not issue a statutory payment bond under Missouri §107.170. Section 107.170 requires the issuance of a bond by any public entity that makes a contract for public works where the project exceeds \$25,000.00.

This bond assures payment of wages to workers employed by subcontractors. If the project involves public property, the subcontractor cannot file a mechanic's lien and bond serves as a substitute means for payment.

The Eastern District emphasized that the long-established purpose of the public-works bond statute has been to afford those furnishing labor or material on public works the same measure of protection as is afforded by Missouri's mechanic's lien statute for work performed on private property. The bond statute is broadly construed to carry out its purpose to protect those who improve and enhance public properties and ensure they are paid for their work.

Section 522.300 of Missouri's Statutes provides that where a public bond has been issued a person may sue on such bond for payment for work or material provided.

The Eastern District agreed with the trial court that the subcontractor could not maintain its lawsuit. The Eastern District noted that the public policy in Missouri is that subcontractors and suppliers are entitled to the protection of either a mechanic's lien or a payment bond depending on the nature of the property they improve.

In this case the work was actually performed on private property even though some of the work involved a public right-of-way. The Court determined that the public works statute clearly applies only to public land and does not apply to projects owned by companies.

On Point Contractors' remedy was not a lawsuit on a public works bond but rather it should have filed a mechanic's lien.

The Court decided that the only role of the Missouri Highways and Transportation Commission was to grant the right-of-way permit to Aura so that Aura and its subcontractors could complete the contract. While the right-of-way permit required a permit surety bond, this bond was issued on behalf of Aura and in favor of the Missouri Highways and Transportation Commission, not in favor of Aura's subcontractors and suppliers.

Since On Point Contractors chose the wrong remedy, the trial court properly denied its claims under Missouri's public works bond statute and properly dismissed the counts against Western Surety and the Missouri Highways and Transportation Commission.

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