FARRIS LAW FIRM, L.L.C.

CONTRACTORS' RIGHTS AND RESPONSIBILITIES

October 20, 2015

For Missouri Department of Transportation

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Phillips & Associates, Inc.

Program Overview

I. Federal, Missouri and Kansas Prompt Payment Act Overviews

Owners, contractors, subcontractors and suppliers in Missouri and Kansas are subject to five separate statutory schemes governing "prompt payment" requirements. These are summarized as:

1) Federal Government Projects, governed by 31. U.S.C. §3901 *et. Seq.,* also known as the Federal PPA (Prompt Payment Act);
2) Missouri Governmental Projects, governed by §34.057 *et. Seq.,* also known as the Missouri Public PPA (Prompt Payment Act);
3) Missouri Private Construction Projects, governed by two separate statutes including §431.180, Missouri Private Construction PPA (Prompt Payment Act) and §436.300 *et. Seq.* addressing retainage, trust fund status and substitute security for retainage release.
4) Kansas Public Projects, governed by §K.S.A. 16-1901 *et.seq.,* also known as the Kansas Public PPA (Prompt Payment Act), and finally,
5) Kansas Private Construction, governed by §K.S.A. 19-1801 *et. Seq.,* also known as the Kansas Private PPA (Prompt Payment Act).

Each statute contains somewhat differing provisions, timelines, penalties and triggers. These primary distinctions have been summarized in the attached spreadsheet handout. The primary features offered by each are as follows:

1. **Federal** 31. U.S.C. §3901 *et. Seq*
   a. Requires a valid contract for goods or services;
   b. Triggers Act's protections for "untimely payment" following proper invoice or documentation submittals;
   c. Defines Payment Due within 30 days after provision of goods/services from owner to general if not otherwise specified, or 14 days following receipt of proper invoice owner to general, and 7 days general to sub and so on downstream.
   d. Identifies what constitutes "proper invoice" or document submittals;
      a. Improper invoices or documentation do not trigger the Act's protections.
   e. Identifies legitimate grounds for withholding, but also requires:
      i. Documentation of same to upper tier and if requested, remand of monies paid by owner or upper tier
      ii. Documentation of same to lower tier and specific itemization justifying amounts withheld and reasons

iii. Provides automatic "penalty interest" at 18% per annum if payment not timely made

f. Does not provide reimbursement of attorneys fee's.

2. **<u>Missouri Public PPA:</u>** §34.057 *et. Seq*

a. Requires a valid contract for goods or services;

b. Triggers Act's protections for "untimely payment" following proper invoice or documentation submittals;

c. Defines Payment Due within 30 days after provision of goods/services from owner to general if not otherwise specified, or 15 days general to sub and so on downstream.

d. Identifies what constitutes "proper invoice" or document submittals;

i. Improper invoices or documentation do not trigger the Act's protections.

e. Identifies legitimate grounds for withholding, but also requires:

i. Documentation of same to upper tier and if requested, remand of monies paid by owner or upper tier

ii. Documentation of same to lower tier and specific itemization justifying amounts withheld and reasons

f. If withholding found to be in "bad faith"

i. In addition to statutory contract interest, provides additional "penalty interest" at 18% per annum if payment not timely made, and

ii. Reimbursement of reasonable attorney's fees and costs

3. **<u>Missouri Private PPA</u>** §431.180

a. Requires a valid contract for goods or services;

b. Defines Payment Due as set by the contract terms

c. Does not address "proper invoice" or basis for withholding

i. Does not require documentation of same to upper tier and if requested, remand of monies paid by owner or upper tier

ii. Does not require documentation of same to lower tier and specific itemization justifying amounts withheld and reasons

d. In addition to statutory contract interest, <u>permits</u> award of penalty interest "up to 1-1/2% per month" and award of attorneys fees to prevailing party <u>in "court's discretion"</u>

e. Does not require finding of "bad faith"

f. Cross references separate statute §436.300 *et. Seq.* which states that retainage held by upper tier is "held in trust" for lower tiers, thus creating fiduciary duties and potential tort and punitive damage exposure.

4. **<u>Kansas Public PPA</u>** §K.S.A. 16-1901 *et.seq*
   a. Requires a valid contract for goods or services;
   b. Triggers Act's protections for "untimely payment" following proper invoice or documentation submittals;
   c. Defines Payment Due within 30 days after provision of goods/services from owner to general if not otherwise specified, or 7 days general to sub and so on downstream.
   d. Identifies what constitutes "proper invoice" or document submittals;
      i. Improper invoices or documentation do not trigger the Act's protections.
   e. Identifies legitimate grounds for withholding, but also requires:
      i. Documentation of same to upper tier and if requested, remand of monies paid by owner or upper tier
      ii. Documentation of same to lower tier and specific itemization justifying amounts withheld and reasons
   f. If withholding found to be in "bad faith"
      i. In addition to statutory contract interest, provides additional "penalty interest" at 18% per annum if payment not timely made,
      iii. Reimbursement of reasonable attorney's fees and costs to prevailing party

5. **<u>Kansas Private PPA</u>** §16-1801 *et. Seq.*
   a. Requires a valid contract for goods or services;
   b. Triggers Act's protections for "untimely payment" following proper invoice or documentation submittals;
   c. Defines Payment Due within 30 days after provision of goods/services from owner to general if not otherwise specified, or 7 days general to sub and so on downstream.
   d. Identifies what constitutes "proper invoice" or document submittals;
      i. Improper invoices or documentation do not trigger the Act's protections.
   e. Identifies legitimate grounds for withholding, but also requires:
      i. Documentation of same to upper tier and if requested, remand of monies paid by owner or upper tier
      ii. Documentation of same to lower tier and specific itemization justifying amounts withheld and reasons

f. No bad faith withholding requirement necessary
g. If money withheld outside of justifiable grounds, mandates award of "penalty interest" at 18% per annum and reimbursement of attorney's fees to "prevailing party".

II. Mechanics Liens MO and KS

See Handout.

A. Mechanics Liens cannot be filed against government owned jobs

B. Exclusive remedy is actions against the project payment bond

C. BUT … many contractors still demand signed lien waivers to verify lower tier payments to subcontractors to ensure no payment bond claim exposure exists

D. Discuss different between Conditional Lien Waiver and Full Lien Waiver

III. Changes Orders

A. Constructive Change Order: Direction to change scope or time without backup paperwork

B. Written Change Order: Direction to change scope or time with backup paperwork

C. Discuss methods to create supporting paper trail.

IV. Handouts

A. Prompt Payment Chart MO & KS

B. Prompt Payment Act demand, MO Public Works

B. Lien Chart MO and KS

C. Conditional Lien Waiver

D. Full Lien Waiver

E. Letter re: Constructive Change Order

II. Interpretative Case Law - Missouri

A. Missouri

The preliminary cases addressing these statutes in Missouri began in 1997, with the Missouri Appellate Court first addressing the legislative intent and impact of the Missouri Public PPA. While the initial decision strongly supported both the statute and its penalty provisions, subsequent cases over the ensuing years created knicks and dents which negatively impact the original legislative intent. Of approximately twelve cases directly addressing the substantive issues within the Missouri Public or Private PPAs, the win/loss ratio is broken down as follows:

I.	Public Works PPA:	Of eight cases:	3 Wins	5 losses
II.	Private PPA:	Of five cases:	1 Win	3 Losses

B. Summary of Missouri PPA "Losers"

Those cases losing their PPA claims can be categorized as follows:

I. No Underlying Construction Contract

a. *Building Erection Services Co. v. Plastic Sales and Mfg. Co., Inc.*, 163 S.W. 3d 472 (Mo. App. 2005) (no underlying contract where parties disagreed on total number of skylights to be installed per contract; thus no "mutual assent" to create the underlying construction contract. Lacking a "contract", no ability to trigger PPA violation).

II. Disputed Change Orders or Improper Invoices or Final Documentation

a. *EPIC (Environmental Protection, Inspection and Consulting, Inc.) v. City of Kansas City*, 37 S.W. 3d 360 (Mo. App. W.D. 2000) (disputed change orders and failure to submit final documentation required under contract precluded triggering PPA penalties. Strict application of statute which required court to ignore evidentiary findings by jury of City's bad faith in refusing to address change order requests).
b. *Leo Journagan Construction Co., Inc. v. City Utilities of Springfield, MO*, 116 S.W.3d 711 (Mo. App. S.D. 2003) (no "bad faith" withholding where proper invoices and documentation not submitted by contractor. This case again deals with disputed change orders; lacking "approved change orders", an invoice submitted for same without authorization is not "properly submitted" for PPA purposes. Contractor additionally failed to produce evidence of prevailing wage compliance required under the contract for final payment.)
c. *Textor Construction, Inc. v. Forsyth R-III School District*, 60 S.W.3d 692 (Mo. App. S.D. 2001)(no PPA trigger where final invoice lacked architect certification.

Problematic where architect's refusal to certify was based on admitted error. However, court bound under *EPIC* precedent to strictly apply statutory triggers re: proper documentation, and A/E certificate required for final payment).

d. *Walton Construction, Inc. v. MGM Masonry, Inc.*, 199 S.W. 3d 799 (Mo. App. 2006) (under private act, even though penalties may apply for late payments, they are discretionary with the court. Court found there to be potentially justifying reasons for withholding, no evidence of bad faith, and declined to award penalty interest or attorney fees). *Accord*, *Glenstone Block Co. v. Vincent Pebworth,* 264 S.W. 3d 703 (Mo. App. 2008).

III. Legal or Technical Issues in Pleadings

a. *Mays-Maune & Associates v. Wrner Brothers, Inc.*, 139 S.W. 3d 201 (Mo. App. 2004) (claimant failed to name proper parties in interest, attempted to apply PPA violations against party not in direct contract line (i.e. privity of contract). Lacking the privity connection, no PPA trigger.

b. *Lucas Stucco v. Loren Landau,* (Mo. App. Lexis 111) (Mo. En banc 10/26/2010) (pleading alleged facts implying PPA claim but did not specifically allege violation per statutory reference; lacking a specific claim under the PPA statute, court may not award statutory penalties).

c. *Environmental Energy Partners, Inc. v. Siemens Building Technologies, Inc.*, 178 S.W. 3d 691 (Mo. App. 2005)(although evidence of PPA violations and bad faith found, no award of attorneys fees where bill submitted did not segregate legal fees incurred for PPA claims versus several other claims raised in the lawsuit).

C. Summary of Missouri PPA "Winners"

I. PPA award based on bad faith withholding

a. *City of Independence vs. Kerr Construction Co., Inc.,* 957 S.W. 2d 315 (Mo. App. W.D. 1997)(first reported decision analyzing legislative intent of act, awarding claimant Briggs $3430 breach of contract damages, $926 regular interest, $2066 penalty interest, and $20,000 in attorneys fees. Elements of bad faith included Kerr offsets from unrelated contracts, and a string of derogatory correspondence from Kerr to Briggs insulting Briggs' intelligence).

b. *Midwest Asbestos Abatement Corp. v. Sonya Rae Brooks,* 90 S.W. 3d 480 (Mo. App. E.D. 2002) (bad faith found where Midwest paid by owner for Brooks' work but withheld payment to Brooks without justification).

c. *Environmental Energy Partners, Inc. v. Siemens Building Technologies, Inc.*, *v. Siemens Building Technologies, Inc*178 S.W. 3d 691 (Mo. App. 2005)(case listed under both "Loser" and "Winner" status. Court found evidence of bad faith involving a skipover payment between parties not in privity, settlement of claims which interfered with pending claims, and a judicial finding against

Siemens of tortuous interference with contract. Penalty interest under PPA awarded, but not attorneys fees where same were not properly segregated and thus not proven to be "reasonable". However, punitive damages against Siemens for the tortuous interference upheld by appellate court).

II. Interpretative Case Law - Kansas

Unlike Missouri, the Kansas statutes are much younger and have little intrepetative reported case law to date. The limited cases are as follows:

a. *D-1 Constructors,Ltd. V. Unified School Dist. No. 229,* 14 Kan. App. 2d 245 (1990) (addressing old version of Kansas Public PPA. Noting that due to the unusual requirements of the statute and administrative procedures for handling, no substantive analysis of the PPA but addressing only procedural aspects of the case).

b. *Kansas Attorney General Opinion* #96-36 (April 9, 1996) (clarifying that when a public contract contains terms which conflict with the statutory requirements, the statutory requirements of the Kansas Public PPA prevail).

c. *Midwest Asphalt Coating, Inc. v. Chelsea Plaza Homes, Inc.,* 2010 WL 5185805 (Kan. App. 2010) (claim raised for withheld fees allegedly due to contractor's incomplete or defective performance. Court held contractor not entitled to PPA penalties when the amount due was disputed and where withholding based on justifiable grounds. Practice tip suggests at project completion, requesting architect certificate covering non-disputed completed items and separating out those remaining in dispute).

The remaining portion of this article provides the specific language of the Missouri and Kansas statutes as well as detailed information about the reported cases.

REPRESENTATIVE CASES:

MISSOURI

City of Independence v. Kerr Construction Co. Inc., 957 S.W.2d 315 (Mo. App. W.D. 1997)

The City of Independence contracted with Kerr Construction for paving, curbing, and sod work on the Vaile Mansion Project. Kerr subcontracted the sod work out to Briggs Sodding (Briggs). There was some confusion as to the scope of Briggs' work requirements. At trial Kerr claimed that Briggs would provide rolling, watering of the sod and maintenance for 15 days, and claimed that Briggs provided them with a contract saying they would do so, even though there was never a signature on any document. Briggs claimed that they explicitly told Kerr that they would not provide grading, maintenance or watering.

Briggs began to lay the sod and rolled out 2,050 yards of sod. As a result of the responsibilities confusion the grass was not watered and 800 yards had to be replaced. Briggs agreed to roll the extra 800 yards, Briggs also decided that they would bear some of the additional burden and only charge for 400 yards of sod. Briggs sent a bill to Kerr for 2,450 yards at $1.40 ($3,430). Kerr did not pay. Kerr then offered to pay two checks for $885.71, and $1,291.5 (totaling $2,177.21) if Briggs would sign a lien waiver. Briggs refused. Briggs attempted to get the surety to pay but the surety refused as well. Briggs then filed its initial action claiming breach of contract, breach of the surety bond and a violation of the Prompt Payment Act.

The Jury awarded Briggs damages of $3,430 and interest of $962 for the breach of contract; they awarded $2,066 in statutory interest and $20,000 in attorney's fees under the Prompt Payment Act. After the Jury verdict the judge vacated the Prompt Payment act interest and attorney fees. Briggs Appealed.

The Appellate Court looked to the language of the statute to decide if it was proper for the judge to vacate the Jury's award. The trial Court had said that their reason for vacating the Jury award was because the jury should not have been deciding the interest and the attorney fees. The Appellate court looked at the language of the statute. It said that the Public Prompt Payment Act requires a contractor to pay the subs within 15 days of being paid by the Public entity. Mo. Rev. Stat. § 34.057. if the contractor does not make payment within 15 days, and the payment is withheld in bad faith the contractor is liable for the amount due, and can also be liable also for a penalty of one-half of the amount owed per month that goes by as well as reasonable attorney's fees. *Id.* The Court went on to say that a finding of bad faith or good faith is one that is an issue of fact, and issues of fact are left up to the jury. The court then reasoned that it would be odd to leave the determination of bad faith up to the Jury but not allow the jury to make the decision on the remedy of interest and attorney fees.

The court held that the Prompt Payment Act does not prohibit submitting the issue to the jury. Because a jury can have issues regarding the Prompt Payment Act submitted to them, it was improper for the judge to set aside the verdict awarding interest and attorney fees to Briggs. The Court ordered that Jury verdict be re-instated

The Court also took up the issue of the Surety's liability for the attorney fees. The Court looked at the plain language of the Prompt Payment Act, and say that there is no mention of a surety being liable, only the contractor. *§* 34.057.1(7). The Court held that the Prompt Payment Act places responsibility on the contractor alone for their own violations of the Prompt Payment Act. In other words a Surety cannot be forced to pay interest or attorney fees under the Prompt Payment Act.

Environmental Protection, Inspection, and Consulting, Inc. v. City of Kansas City, 37 S.W.3d 360 (Mo. App. W.D. 2000)

Environmental Protection, Inspection, and Consulting, Inc. (EPIC) contracted with the City of Kansas City Missouri to replace a spillway at the Kansas City Zoo. After a series of complications, and changes involving a road the city did not disclose was underneath a lake, problems with city workers dumping dirt and clean up materials into a ditch meant to be a temporary drain, and all topped off by an unusually heavy rainy season. Kansas City only approved change orders amounting to $12, 466.00. In their last payment application EPIC requested a payment of an additional $11,080.07, which was denied by Kansas City. The City claimed that project was only 98% complete and did not pay. As a result of the non-payment by the City, EPIC was forced to close its business. EPIC then filed a suit against the City.

At the initial trial a jury awarded EPIC: $40,000 for the negligent maintenance of their property, $561,200.00 for breach of contract damages, and $454,572 in interest under the Prompt Payment Statute. After the jury made its award the Judge set aside part of the Jury's verdict and vacated the Jury's award of Interest under the Prompt Payment Act. EPIC appealed that decision.

On appeal the Court analyzed whether the trial judge properly set aside the award of interest, in doing so they looked at when a judge can set aside a verdict, and what specifically in the Prompt Payment Act allowed a judge to set aside a Jury verdict. A judge can only grant a JNOV (setting aside a jury decision) if the plaintiff failed to present a submissible case. *Sloan v. Bankers Life & Cas. Co., 1 S.W.3d,* 555, 564 (Mo. App. W.D. 1999). The Missouri Public Prompt Payment Act gives a public entity a defense if they withhold a payment in good faith for a reasonable cause. MO. Rev. Stat. §§ 34.057.5, & 34.057.6. Late payment in bad faith on the part of a public entity gives the court discretion to impose late payment interest of 1.5% per month and recovery of reasonable attorney fees. *Id.* There is also a statutory requirement that the payment be made within 30 days of the due date, the missing the payment due date is what triggers the remedy under the statute. *Id.* To have payment due date happen the contract work must be substantially complete and the public owner accepts. *Id.* The payment will occur within thirty days after the acceptance and the submission of the invoice and all other appropriate documentation and certifications in complete form as required by the contract. §34.057.1(8).

The Trial Court Judge set aside the verdict for interest because he saw no submissible case because EPIC failed to make all of the appropriate document submissions required by the contract to be entitled to trigger the interest remedy for late payment. The Appellate Court looked at the documents that were required by the contract: Certificates of completion, a contractor's affidavit, bills for labor equipment and materials, project construction records, a final lien waiver, and an affidavit of prevailing wage compliance. The Court then looked to the documents that were provided by EPIC to see if they

complied with the contract requirements. EPIC claimed that their change order requests, a certification of completion and a final payment request satisfied the contract documents. The Court said the change order requests had no bearing on the Prompt Payment act claim. The Certificate of Completion was not produced, and the only witness who saw it said it was not complete. In its final payment request Kansas City said that the letter was deficient and had too many errors. The Court then determined that there EPIC did not present a sufficient evidence showing its compliance with the contract required by the Prompt Payment Statue.

The Court held that because the Prompt Payment Statute did not require payment to be due until substantial completion (or just completion) of the project and upon submission of the proper documentation and certifications that EPIC failed to make a submissible case for relief under the Prompt Payment Act. Because EPIC did not make a submissible case there was no basis for submitting the issue of bad faith withholding under the Prompt Payment Act to the Jury. With no basis to send it to the Jury the Jury should not have been able to award an interest remedy under the Prompt Payment Act and the trial Judge was correct in setting aside the award of interest to EPIC.

Leo Journagan Construction Co. Inc., v. City Utilities of Springfield, MO., 116 S.W.3d 711 (Mo. App. S.D. 2003)

This case arose out of a dispute between Leo Journagan Construction Company and the City Utilities of Springfield. City Utilities contracted with Journagan to construct pipelines from Stockton Lake to the City of Springfield to provide the city with additional water. The conflict arose when Journagan was denied requests for additional claims. Journagan claimed that City Utilities interfered with the project and costs Journagan additional expenses, and filed a claim which City Utilities denied. Journagan filed suit. The issues presented in this case were: (1) Whether the Trial court should have granted a new trial, (2) Whether Judgment notwithstanding the verdict that City Utility breached of warranty *ex contractu* was appropriate (3) Whether the Contractor was entitled to an action under the prompt payment act.

(1) Whether the Trial court should have granted a new trial

The new trial order lacked specific grounds on which to base the order. Rule 78.03 states that "every order allowing a new trial shall specify of record the ground or grounds. Mo Court Rules. Under longstanding Missouri law if an order granting a new trial is ambiguous, it is appropriate for an appellate court to look to other places on the record to find explanation or other support for the order. *Land Clearance for Redevelopment Auth. Of City of Joplin v. Joplin Union Depot Co.*, 429 S.W.2d 806, 808-09 (Mo. App. 1968). In the case of no memorandum accompanying the trial oral statements can be made at a hearing post-trial. Hightower v. Hightower, 590 S.W.2d 99,103 (Mo. App. 1979). The Court then went to look at the Judge's comments in the post trial hearing. The trial Judge said that he had granted a new trial because counsel for Journagan (JCC) kept referring to the family of Journagan, after the judge had repeatedly sustained objections because it unfairly prejudiced the jury into looking at the company as a family, rather than a corporation. Because the judge felt that JCC's counsel prejudiced the jury, he granted the City Utility's (CU) motion for a new trial. The court held that this was sufficient reason to

call for a new trial, and that they would give deference to the trial Judge as he had better perspective on what occurred in the trial.

(2) Whether Judgment notwithstanding the verdict that City Utility breached of warranty ex contractu was appropriate

A JNOV will be affirmed only if the plaintiff failed to make a submissible case. *Faust v. Ryder Commercial Leasing & Svcs*, 954 S.W.2d 383, 387. To make a submissible case of breach of warranty *ex contractu* a party must establish (1) a positive representation by a government entity (2) of a material fact (3) that is false, (4) lack of knowledge by the contractor that the positive representation of a material face is false or incorrect (5) reliance by a contractor on the positive representation of the material fact made by the governmental entity and (6) damages sustained by the contractor as a direct result of the positive representation of a material fact made by the government entity. *Ideker v. Missouri State Highway Comm'n*, 654 S.W.2d 617 (MO. App. 1983). The court went on to analyze whether there had been any positive representations by CU to JCC. JCC claimed that CU represented to them that in excavating rock from the site, JCC would be able to measure the amount of rock by the white dust that appears when they start drilling. The Contract only stated that Limestone will be measured from the top as evidenced from drilling logs where white powder is noted during drilling 2.6 feet below the centerline of the pipeline as indicated in the contract drawings. The Court held that because the contract clearly states that the white dust only helps find where the top of the rock is, it was not a positive representation of how much rock would have to be excavated. Therefore a JNOV was appropriate because there was not a submissible case made for a breach of warranty ex contractu.

(3) Whether the Contractor was entitled to an action under the prompt payment act

Because the Trial Court ordered a directed verdict against JCC's claim of a violation of the prompt payment act, the court viewed all inferences in the light most favorable to the plaintiff, disregarding contrary evidence to see if there was a submissible case. *Schmidt v. Director of Revenue*, 48 S.W.3d 688, 690 (Mo. App. 2001). A directed verdict will be reversed unless that facts and reasonable inferences are so strong as to leave no room for reasonable minds to differ as to the result. *Id.* A claim under the prompt payment act should not be submitted to the jury unless there is evidence of a substantial nature indicating that the defendant acted in bad faith without reasonable cause. *City of Independence for Use of Bridges v. Kerr Constr. And Paving Co.*, 957 S.W.2d 315 321 (Mo. App. 1997) In the contract final payment for the project was contingent upon receipt of affidavits showing prevailing wage compliance, which JCC never provided. The court found that this shows there was not evidence of a substantial nature that CU acted in bad faith. Because CU did not act in bad faith in withholding the payment the directed verdict was upheld.

Vance Brothers Inc. v. Obermiller Construction Services, Inc., 181 S.W.3d 562 (Mo. App. 2006), *affd181 S.W. 3d 5623 (Mo. En banc 2006)*.

Obermiller involved a dispute on a Wal-Mart paving project between Obermiller, the general contractor, and Vance Brothers, the subcontractor providing the asphalt overlay services. Obermiller

withheld payment to Vance based on defective performance, and Vance filed against Obermiller for unpaid fees under a breach of contract basis. The court addressed 3 main issues in this case: (1) whether Obermiller could raise jurisdiction issues on appeal when it was not raised in the initial suit, (2) whether the action was an action for contract or an action on account where it was based on section 431.180, the private Prompt Payment Act within the Missouri Revised Statutes, and (3) was the award of attorney fees to Vance appropriate.

In addressing whether Obermiller could raise jurisdiction issues on appeal the court pointed out that generally a litigant must preserve a claim of error in the trial court in order for it to be afforded review. *Mo. R. Civ. P., Rule 78.07.(a)(1)*. An exception to this rule is made for jurisdictional motions, where jurisdictional issues can be raised at any stage in the proceedings. State tax Comm'n v. Admin Hearing Comm'n, 641 S.W.2d 69, 73 (Mo. Banc 1982). Because jurisdictional issues may be raised at any point the court held that the jurisdiction claim was preserved for appeal.

The Statute regarding payment for construction projects requires (1) the parties enter into a private construction contract and (2) payments be timely made pursuant to the contract. Mo. Rev. Stat. § 431.180. A contract must have an offer, acceptance and consideration. *Id*. There was some question as to whether there was a contract or not, but Vance stated, and Obermiller admitted, that they entered into an agreement for resurfacing of a parking lot. Thus by agreement the parties admissions established offer, acceptance and consideration, thus meeting the statutory requirements for an enforceable contract. The court held that Vance's stated "action on account" was brought solely because payments were not made pursuant to the contract; thereby making the action a "contract action" within the PPA statute's coverage.

The court finally addressed the issue of attorney fees. Obermiller claimed that the award of attorney fees was improper because the statute requires an award of penalty interest before awarding attorney fees. The statute provides that a court may, in addition to any other award for damages, award interest from the date payment was due pursuant to the terms of the contract, as well as reasonable attorney fees to the prevailing party. Mo. Rev. Stat. § 431.180. When there is clear language in a statute courts must give effect to the plain meaning. Home Builders Ass'n. of Greater St. Louis, Inc. v. City of Wildwood, 107 S.W.3d 235, 239 (Mo. Blanc 2003). The court said the statute clearly gives the trial court discretion to award attorney fees, without restriction. Because there was no restriction in the statute regarding the award of attorney fees the court affirmed the trial court's decision to award fees.

Textor Construction, Inc. v. Forsyth R-III School District, 60 S.W. 3d 692 (Mo. App. S.D. 2001)

Textor and Forsyth School District entered into a contract to have Textor build now ball fields for a school. The conflict in this case came as a dispute of whether the contractor should have brought in additional topsoil to meet a 4 inch grade requirement in one part of the contract, or whether another part of the contract, allowing Textor to simply to grade down instead. Textor interpreted the contract to mean that they could use the lower the ball fields instead of brining in additional dirt. The supervising architect of the School District did not. When Textor had completed the project they submitted their

request for final payment and it was denied because the architect said that they needed to fill using topsoil, not lower the ball fields to avoid having to bring in more dirt. After the school districts refusal to pay Textor filed a lawsuit claiming a breach of contract, and statutory damages from the Prompt Payment Act.

At trial Textor won on the both the breach of contract, and was awarded interest and attorney fees under the Prompt Payment Act. The School District appealed the award of statutory damages from the Prompt Payment Act, and the breach of Contract damages. The School District claimed that the trial court made an error when they awarded breach of contract damages to Textor. The School district's theory was that Textor had not substantially performed under the contract because the contract required that Textor bring the site to grade with four inches of topsoil. The Court looked at the language of the contract to address the conflict between Textor's and the School district's interpretations. The Court looked at addendum three to the contract. Addendum three clearly states that it supersedes all other portions of the contract. In the addendum it stated that the ball fields can be lowered as required to avoid bringing in fill dirt. Because the language of the contract eliminated the need to bring in top soil to fill in the ball fields the architect who would not sign off on the projects requirement misread the contract. Because the contract requirements were misread the trial court correctly awarded breach of contract because Textor had completed the contract.

On the issue of the Prompt Payment Act interest and attorney fees the court looked at the statues requirements. The Prompt Payment Act imposes a penalty for non-payment on a public owner once completion of the project and filing with the owner of all required documents and certification, in complete and acceptable form, in accordance with the terms and conditions of the contract. *Environmental Protection, Inspection, & Consulting, Inc. v City of Kansas City,* 37 S.W.3d 360, 369-72. The Appellate Court held that because the architect did not provide a final certificate for the payment, the contract conditions had not been satisfied. Here basically because the architect made a mistake interpreting the contract and withheld the payment and didn't issue a final certificate for payment, the contract was not complied with and the court could not award interest or attorney fees under the Payment Act. This gives government a loophole to avoid penalties under the Public Prompt Payment acts, so long as they withhold the final certificate of completion they can avoid penalties.

Midwest Asbestos Abatement Corp., v. Sonya Rae Brooks, 90 S.W.3d 480 (Mo. App. E.D. 2002)

This case involved a dispute between a subcontractor, Midwest Asbestos Abatement Corporation, and a general contractor, D&S Wrecking. D&S had been hired by the State of Missouri Highway and transportation Commission to demolish homes. D&S entered into a contract with Midwest to remove any friable asbestos, and category 2 non friable asbestos, but the contract did not explicitly call for D&S to remove any category 1 asbestos. The contract also stated that D&S would bear the responsibility for any additional compensation if removal called for anything other removal that what the contract had specified. It was discovered that the project would require removal of category 1 non-friable asbestos, and the two entered into an oral contract to have Midwest remove the category 1 asbestos. Midwest submitted invoices to D&S for the extra removal, and D&S in turn submitted their

invoices to the Commission. The problem arose in this case when the Commission denied the payments to D&S saying they had already paid D&S for the work under the general contract as D&S bore the responsibility for additional work, and D&S in turn refused to pay Midwest.

After D&S refused to pay Midwest, Midwest brought a suit against D&S for breach of contract, and for attorney fees and interest under the prompt payment act. The trial court awarded Midwest $29,301.52 in damages arising from the contract, plus $15,818.00 in pre-judgment interest and 14,805.00 in attorney's fees. D&S appealed the decision to award interest and attorney fees. D&S's claim on appeal was that the trial court used the Missouri Private Prompt Payment Act, which was wrong version of the Prompt Payment Act when they awarded the interest and attorney fees. *MO. Rev. Stat. § 431.180.* They claimed that the correct version was the Missouri Public Prompt Payment Act. *MO. Rev. Stat.§ 34.057*. The Public Prompt payment Act requires a showing by the person asserting the claim that the payment was withheld in bad faith by the general contractor. *Id.* If the payment is withheld in good faith for a reasonable cause then the court is not allowed to award interest fees and attorney. *Id.*

The Court agreed with D&S's interpretation that the Public Prompt Payment Act was the applicable law, and then analyzed whether the trial court could have properly awarded Attorney fees and interest. The court began by looking into whether the trial court could have found there was bad faith in awarding the attorney fees and interest. The Court held that the trial court could have found that D&S had been paid by the Commission. Because the Court could have found that the Commission had paid D&S for the removal of all asbestos, then the trial court could have found that withholding the payment simply because they had not received more money from the Commission, beyond what the general contract specified then not paying Midwest was in bad faith. After a finding of bad faith the Court is able to award interest and attorney fees under the Public Prompt Payment Act. *Id.* Therefore the Court held that the trial court's award of attorney's fees.

The Court then briefly addressed whether the surety could be held liable for attorney's fees and interest. The court held that a surety cannot be held responsible for penalties incurred by a principal as a result of the principal's violation of the Public Prompt Payment Act. *City of Independence for Use of Briggs v. Kerr Const. Paving, 957 S.W.2d 315.* Therefore the Court held that the surety was not liable for the attorney fees and interest penalties incurred by the D&S.

Gill Construction, Inc. v. 18th and Vine Authority, 157 S.W.3d 699 (Mo. App. 2004).

After a dispute arose from payment on the 18th and Vine restoration project, Gill Construction brought suit under the public Prompt Payment Act . Kansas City Missouri had created a not-for-profit corporation to manage the redevelopment efforts going on in the 18th and Vine district called the 18th and Vine Authority (the Authority). The Authority entered into three construction contract with Gill Construction. Gills was also asked to do work beyond the scope of what their contract asked for. The

parties agreed to change orders, which significantly increased Gill's costs, but the Authority did not pay for all of the additional work. Gill Filed suit under the Prompt Payment Act.

In trying to resolve the dispute over whether the Prompt Payment Act had been violated, the court looked into (1) whether City of Kansas City MO should have been dismissed from the case, (2) whether the trial court abused its discretion in refusing to grant Gill's motion to amend the judgment on a theory of an agency relationship between the City and the 18th and Vine Authority (the Authority), and (3) whether the trial court erred in refusing to grant a motion for directed verdict for the Authority.

(1) Whether City of Kansas City MO should have been dismissed from the original suit.

The court was asked to address the following facts. The city had authorized the Authority to take control of the 18th and Vine Redevelopment Project, an action which was argued to create an agency relationship between the City and the Authority. At trial, the court found that besides this fact, the agreement was not sufficient to constitute a contract between Gill and the City. Because no contract existed between Gill and the City, the trial court did not err in releasing the City from the suit. In making this finding, the court analyzed the following legal concepts. (By statute, no county, city, town, village, school district or other municipal corporation shall make any contract unless the contract is allowed by law. Mo. Rev. Stat § 432.070. No contract shall be binding on the City unless it is in writing. Kansas City Charter § 82. The fact that a municipality received the benefit of performance by the other party does not make the municipality liable either on the theory of estoppel or implied contract. *Mo Int'l investigators v. City of Pacific*, 545 S.W.2d 684, 685 (Mo. App. 1976). An ordinance that is not a contract in itself cannot constitute a writing under Section 432.070. *Allen v. Fredericktown*, 591 S.W.2d 723, 725 (Mo. App. E.D. 1979).

(2) Whether the trial court abused its discretion in refusing to grant Gill's motion to amend the judgment on a theory of an agency relationship between the city and the Authority.

Gill appealed the trial court's decision not to re-instate the City on the theory that the City and the Authority are jointly liable because the Authority acts as an agent for the City. Rule 75.01 gives the circuit court inherent power to amend a judgment upon a finding of good cause during the thirty day period after entry of a judgment. *Stroup v. Leipard*, 981 S.W.2d 600, 603 (Mo. App. W.D. 1998). The court will not reverse the order unless there is an abuse of discretion. The trial court found that the mandatory provisions of what a contract with the city must have from section 432.070 of the RSMO were not complied with, so even if the Authority could be held responsible as an agent, a contract with the city would not be valid. The court held that there was no abuse of discretion.

(3) Whether the trial court erred in refusing to grant a motion for directed verdict for the 18th and Vine Authority.

The Standard of review for denial of a motion for directed verdict is whether the non-moving party submitted substantial evidence that tended to prove the facts essential to its claim. *Lasky v. Union Electric Co.,* 936 S.W.2d 797, 801 (Mo. Banc 1997). The evidence is viewed in light most favorable to the non-moving party affording all reasonable inferences and disregarding evidence favorable to the moving

party. *Id.* A jury verdict will be reversed for insufficient evidence only is there is a complete absence of probative facts. *Id.* The Authority preserved 3 issues, of which the circuit court denied directed verdict, for appeal (I) Gill failed to prove the claims were made in a timely manner according to the contracts, (II) Gill did not present evidence on their claim of loss of productivity, and (III) Gill's claims for additional compensation are barred by the doctrine of estoppel and the doctrine of accord and satisfaction.

(I) Gill failed to prove the claims were made in a timely manner according to the contracts

In the contracts section 4.7.3 stated that a claim by either party must be made within 21 days of each event that gives rise to the claim. The Authority argues that Gill did not meet that contractual time period after execution of the additional work authorizations (AWA). Gill presented evidence at trial that the 21 day requirement had been waived. The work schedule was very hectic and in the process, when the AWA cam about there was no new contract, and the Authority verbally asked for more work to be done and verbally guaranteed payment, which made other procedures no longer valid. This was evidence that a jury could have believed showed the 21 days had been waived. After construing evidence most favorably to the non-moving party there is sufficient evidence that shows probative facts of a waiver of the 21 day provision for the additional work.

(II) Gill did not present evidence on their claim of loss of productivity

The Authority argues that Gill did not make a submissible case because Gill did not produce evidence of a cardinal change, merely evidence of work it agreed to. The cardinal change doctrine says that breach occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for. *Allied materials & Equip. Co. v. United States*, 569 F.2d 562, 563-64 (Ct. Cl. 1978). The foreman of Gill construction testified that the work performed was beyond the work the contracts called for, and was not part of a bid package that any other contractor had been given. The court found that this was sufficient evidence to allow a jury to conclude there was a cardinal change and Gill had met its burden of production.

(III) Gill's claims for additional compensation are barred by the doctrine of estoppel and the doctrine of accord and satisfaction.

The Authority claimed that Gill's is barred by the doctrine of estoppel because Gill's accepted the AWA payment without reservation and the Authority relied on their acceptance as an agreed to amount, and that Gill's should not be allowed to change the original agreement. Estoppel is an affirmative defense under rule 55.10, and the burden of proof is upon the party asserting it. *Peerless Supply Co. v. Industrial Plumbing and Heating Co.*, 460 S.W.2d 651,666 (Mo. App. 1997). In the case the court reasoned that because Gill made a submissible breach of contract claim, even if the authority established a prima facie case of estoppel, there was no burden on Gill to prove the contrary. With no burden to prove the contrary the Jury could have disbelieved the evidence the Authority put forward. The Court held that because the evidence could be disbelieved the trial court did not error in not allowing directed verdict.

Spiritas Co. v. Division of Design and Construction, 131 S.W.3d 411 (Mo. App. 2004)

The issue in this case was whether the trial court erred in granting summary judgment in favor of Spiritas holding that as a matter of law Spiritas was entitled by contract to remove asbestos at a set per unit price rate when there was a potential ambiguity in the language of the contract itself. Summary judgment is reviewed de novo, and viewed in the light most favorable to the non-movant. *ITT Commercial Fin Corp. v. Mid.-Am. Marine Supplies*, 854 S.W.2d 371, 376. The movant is only entitled to summary judgment if the facts establish that the movant is entitled to judgment as a matter of law. *Id.* Where a contract dispute is based on the construction of the contract rather than a factual dispute, the court must construe the contract. If it is clear and unambiguous as a matter of law construction is limited to the four corners of the contract. *Eisenberg v. Redd*, 279 S.W.3d. 409, 411. A contract is only ambiguous if its meaning is subject to fair and honest differences. *Dunn Indust. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421,428 (Mo. Banc 2003).

In the case at hand there were two competing contract clauses that the Court analyzed. First was a clause for removal of asbestos. The contract provided that Spiritas was obligated to remove all asbestos from the building for a demolition project. The contract had contemplated that the level of asbestos may be higher or lower than was initially estimated and had provisions for how much should be paid and standards for removal at either an agreed upon or a per unit price. Secondly the contract also stipulated that when materially differing circumstances are discovered the parties were required to reach an agreement regarding the price to be paid to the Division for work. The contract was silent on what materially different circumstances would be. The Court went on to say that there could have been a genuine disagreement over whether the amount of asbestos to be removed was a material change in the contract. The court found that there were two reasonable interpretations, one stating that Spiritas was entitled to the work because the contract had anticipated the extra work, and secondly that the extra work was above and beyond the scope of the contract and Spiritas should have negotiated for a new price. Because there were multiple interpretations that were reasonable the issue was not a matter of law but a matter of fact and summary judgment was inappropriate. They remanded for a trial on the merits.

Mays-Maune & Associates v. Werner Brothers Inc., 139 S.W.3d 201 (Mo. App. 2004)

The court addressed 3 issues arising out of the failure of the subcontractor to get paid in construction of a school, (1) whether the pleadings, although not clearly distinguished as such, could reasonably be seen as in pleading in the alternative, (2) whether there was a claim of unjust enrichment/implied contract against the school district, and (3) whether there needs to be privity of contract to assert claims under the Prompt Payment Act.

(1) whether the pleadings, although not clearly distinguished as such, could reasonably be seen as in pleading in the alternative

Missouri procedure allows a pleading to posses the traits of alternatively. *Mueller v. Pittard*, 590 S.W.2d 111, 112 (Mo. App. 1979). Although it is better practice to explicitly and carefully allege what facts are being alternatively hypothesized it is enough that the alternative character of the

allegation be reasonably inferable. *Bratton v. Sharp Enterprises, Inc*, 552 S.W.2d 306, 312. The plaintiff in the trial court plead both an unjust enrichment claim against the school district and the general contractor claiming that the school district had failed to pay the general contractor, and that the general contractor had failed to pay them. The lower court dismissed the unjust enrichment claim against the general contractor because if the school had not paid the contractor as the pleadings stated, then they could not have been unjustly enriched. The Court went on to hold that if looked at in the alternative, had the school paid the general contractor then there would indeed be a claim against the general contractor, and said it was an error to dismiss the unjust enrichment claim.

(2) Whether there was a claim of unjust enrichment/implied contract against the school district

No school district shall make any contract unless the same including the consideration shall be in writing, and shall be subscribed to the parties thereto. Mo. Rev. Stat § 432.070. The fact that the school district has received a benefit of the plaintiff's performance does not make it liable on the theory of implied contract. *Duckett Creek Water Sewer District v. Golden Triangle Development*, 32 S.W.3d 178,183 (Mo. App. 200). The court went on to say that the action that Subcontractor was seeking was one of implied contract, and because there was no direct contractual relationship between the District and the subcontractor there could be no action in implied contract against the school district.

(3) Whether there needs to be privity of contract to assert claims under the Prompt Payment Act.

All public works contracts made and awarded for construction, reconstruction or alteration of any public works project shall provide for prompt payment by the public owner to the contractor and prompt payment by the contractor to the subcontractor and material supplier. Mo. Rev. Stat § 34.057. The court went on to hold that there was no claim against the school district because the act provides for an action by the contractor against the public owner, and for the subcontractor against the general contractor. The court held that there needed to be privity of contract between the school and the subcontractor and that relationship was not present. It also held that there needed to be a contract at all for an action to be valid under the prompt payment act, and there was no contract between the general contractor and subcontractor. The court held generally that if no privity relationship exists then there can be no PPA action.

Environmental Energy Partners, Inc. v. Siemens Building Technologies, Inc., 178 S.W.3d 691 (Mo. App. 2005)

This case involved a nonpayment dispute between Siemens and Environmental Energy Partners (EEP), arising out of contract clauses and flow-down payment issues. The contract between Siemens and Environmental Energy Partners (EEP) stated the general contractor, EEP, would be paid by the client (St. John's hospital) before the subcontractor, Siemens, would be paid. EEP had not fully paid Siemen's compensation because EEP had yet to be paid because of delay in project completion as well as their failure to provide a certificate of completion. Siemens liened the project where they had not received

final payment. The day before trial on the lien enforcement action, Siemens and St. Johns settled. Pursuant to the settlement agreement, St. Johns bypassed EEP and paid Siemens the rest of the payment withheld from EEP as consideration for releasing St. Johns from the lien suit, said by-pass comprising EEP's claim against Siemens for tortuous interference with contract. The court addressed two issues in this case: (1) the trial court's finding of tortuous interference and award of damages to EEP, and (2) the awarding of attorney fees pursuant to the Prompt Payment Act.

(1) Punitive Damages

Siemens appealed the judgment awarding punitive damages to Environmental Energy Partners and claimed error in the court's finding against Siemens of tortuous interference with contract. To prove tortuous interference with a contract the plaintiff must prove (1) a contract or valid business expectancy (2) defendant's knowledge of the contract or relationship, (3) an intentional interference by the defendant inducing or causing a breach of the contract or relationship, (4) absence of justification, and (5) damages. *Acetylene Gas Co. v. Oliver*, 939 S.W.2d 404, 408 (Mo. App. 1996). However, justification for interfering with another's business expectancy exists when one undertakes to protect a valid economic interest, but the justification must come from a definite legal right to take without qualification. *Community Title v. Roosevelt Federal S&L*, 796 S.W.2d 396, 372 (Mo. Banc 1990). Protecting one's economic interest constitutes justification for interference unless one employs improper means*. Beelman River Terminals inc. v. Mercantile Bank*, 887 S.W.2d 903, 908 (Mo. App. S.D. 1994) Improper means are those which are independently wrongful notwithstanding injury caused by the interference. *Id.*

Siemens claimed that they were justified in their interference with the contract because they had not been paid for the work they had done. After reviewing major factors in the case, such as Siemens' failure to comply with many of the conditions of the contract, failing to provide a certificate of completion, lack of communication with EEP, and significant delay in completion of the project, the court held that there was sufficient evidence to show Siemens' interference with the contract was independently wrongful and therefore not justified. The court upheld the trial court's finding of tortuous interference and punitive damage award against Siemens.

The court next addressed whether the trial court erred in denying Siemens' request to remit punitive damages because they were too excessive and denied their due process of law. The Due process clause of the fourteenth amendment prohibits the imposition of grossly excessive or arbitrary punishments. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* The test for whether a punitive damage award is grossly excessive is threefold: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive damages to compensatory damages; and (3) comparison of the punitive damages assessed that might otherwise be imposed for comparable misconduct. *BMW of North America v. Gore*, 517 U.S. 599, (1996). The court analyzed the three prongs of this test. First they looked at the degree of reprehensibility and determined that Siemens' actions during the course of work and in interfering with the contract were egregious, unwarranted, overbearing, reprehensible and without justification. It then noted there was a four to one ratio of the punitive damages to the compensatory damages, which by the court's judgment did not constitute an amount that equaled a

violation of the due process of law. Based on this review, the court held that the punitive damages were not grossly excessive or arbitrary.

EEP cross-appealed a judgment notwithstanding the verdict ruling at trial (ie where the court overrules a jury finding). In this instance the trial court held that other punitive damages the jury had awarded were inappropriate where the actions had no actual damages associated. There can be no punitive damages absent an award of actual damages, even if that amount is only $1.00. *Forbes v. Forbes*, 987 S.W.2d 468, 469 (Mo. App. 1999). Granting a judgment notwithstanding the verdict was appropriate where the jury verdict awards no actual damages but punitive damages. *Id.*

(2) Attorney Fees

St. John's Hospital was assessed attorney fees for EEP's claim of breach of contract against them in the initial suit. At issue here was whether the attorney fees awarded by the trial court were the reasonable value of recoverable fees incurred because of the breach of contract claim. Any person who has not been paid who has entered into a contract for private construction work can bring an action against those who fail to pay, and the court may award reasonable attorney fees. MO. Rev. Stat. § 431.180. The court looked at the legal fees charged to St. Johns and found that in the attorneys bills for same, the legal counsel did not segregate fees and costs incurred for the tortuous interference claims and those associated with the breach of contract claims. Because there was no separation the court remanded the issue to the trial court to determine which attorney fees EEP was entitled to.

Building Erection Services Co. v. Plastic Sales and Mfg. Co., Inc. 163 S.W.3d 472 (Mo. App. 2005)

This Case involved a dispute between Sunglo and a Subcontractor, Building Erection Service Company (BESCO), to install skylights in the Kansas City International Airport. Sunglo had been contracted by J.E. Dunn to take care of the skylights openings for the project. The conflict arose on the understanding of how many skylights were to be put in. The contract remained silent on the issue of how many were to be installed. BESCO's representative agreed made a verbal bid of 7,000 to a representative of Sunglo, and the two reached a verbal agreement to install the skylights for 7,000. BESCO thought that their original bid was only for two skylights to be installed. Sunglo thought it was for 3. After the first two were completed they would have a third. BESCO after finishing installing the windows submitted a bill to Sunglo for $7,000, plus 1,530 in additional work. Sunglo objected to the $1,350 additional costs. Sometime there after Sunglo contacted BESCO and told them that a third skylight whole had been finished and was ready for installation. BESCO installed, and notified Sunglo that the third would be an additional $4,904. Sunglo paid only for the first two at $6,300 which represented the initial deal minus the retainage.

The court analyzed three issues in this case (1) whether or not a contract existed between the parties (2) whether the request for attorney fees under the PPA was appropriate, and (3) whether in the absence of a contract there was a quantum meruit claim.

(1) Whether a contract existed between the parties

The issue of a contract's existence focused on whether there was mutual assent or a meeting of the minds on essential terms of the contract (basically did they have a good understanding of what was to be done at the time of the contract). Courts can determine whether there was a meeting of the minds by looking to the intention of the parties as expressed in their words of acts. *Smith v. Hammons*, 63 S.W.3d 320, 325 (Mo. App. 2003). The essential terms of the agreement must be certain or capable of certain interpretation, and must be sufficiently definite to enable the court to give it exact meaning. *Ketcherside v. McLane*, 118 S.W.3d 631, 636 (Mo. App. 2003). The purpose of the agreement between the two parties was to subcontract for the installation of skylights at the Kansas City International Airport. When looking at the words and acts of the parties, it became obvious there was no mutual understanding on how many skylights were ordered or thus needed to be installed by the subcontractor. There were multiple understandings regarding number of skylights to be installed. Because there was no meeting of the minds on the number of skylights to be provided, the contract was deemed void as a matter of law.

As a side issue, this case also addressed parol or extrinsic (outside the contract) evidence. The parol evidence rule bars evidence of prior or contemporaneous oral agreements that contradict terms of an unambiguous final and complete writing. *MO DOT v. SAFECO Ins. Co.*, 97 S.W.3d 21,32 (Mo. App. 2002). If a writing omits an essential term, it is considered incomplete and in some cases parol or extrinsic evidence may be introduced to establish the parties' intent. The parties did not agree in their writing how many windows should be installed. As the number of windows was an essential term to the contract, where the dispute wholly focused on the number of windows, the court held it applied to an essential term and permitted introduction of parol evidence in interpreting the contract. Even with extrinsic evidence, the number of skylights ordered could not be determined with specificity.

(2) Whether Attorney Fees were appropriate

BESCO appealed the trial court's denial of attorney fees under the PPA. Attorney fees are generally allowed when authorized by contract or statute, and the court has discretion to award them. *McDonalds Corp., v. Sandbone*, 814 S.W.2d 665, 671 (Mo. App. 1991). Under the prompt payment act statute, a prevailing party in a construction contract may recover attorney fees in breach of contract cases. Mo. Rev. Stat. § 431.180(2). However, where the court found no contract to exist in this case, there was no contract upon which to base a Prompt Payment Act claim. Thus, because the legal requirements for requesting attorney fees were not met the trial court properly denied awarding attorney fees to BESCO.

(3) Whether in the absence of a contract there was a quantum meruit claim.

BESCO's pleading sought, in the alternative, to recover additional costs on a quantum meruit claim. To prevail on a quantum meruit claim a plaintiff must prove (1) it provided the services or products at the request or acquiescence of the defendant, (2) the services or products were of a certain and reasonable value, and (3) the defendant refused to pay for the services or products upon demand. *Mills Realty, Inc. v. Wolff*, 910 S.W.2d 320, 322 (Mo. App. 1995). The testimony describing the additional costs only showed what the costs were, but did not prove the reasonableness of those

charges. Because the additional costs were not proven to be reasonable, BESCO failed to meet their necessary burden of production and the Court upheld the denial of the quantum meruit claim.

Walton Construction v. MGM Masonry Inc., 199 S.W.3d 799 (Mo. App. 2006)

This case involved a building contract between Walton Construction and MGM Masonry. MGM was to provide masonry work for a large store that Walton was constructing. In the contract Walton had several completion dates. Walton claimed that MGM had missed these completion dates and withheld $242,384. MGM Filed suit. At the trial court awarded MGM the remaining portion of the contract, but did not award attorney fees under the prompt Payment Act. MGM and Walton both appealed.

At issue in this appeal was whether it is a reversible error for the trial court to refuse a jury poll in a civil case on a party's respective claim, as well as the issue of attorney fees and interest denial to MGM by the trial court.

(1) Whether it is a reversible error not to poll a jury

> *A bit of procedural and factual history is necessary before rules, analysis and interpretation can be applied. In this case there was a claim and a counter claim both for breach of contract. At the end of the trial the judge refused to allow the loser, Walton, to poll the jury assuming it was not an absolute right to allow polling of a jury in civil cases. Afterward it was discovered that not all of the same jurors signed the verdict sheet, and it would have been a logical impossibility if the same jurors had not all signed.*

Each Party in a civil case has a right to poll a jury. *Poulson v. Collier*, 18 Mo. App. 583, 603 (1885). Even if an error occurs when a trial judge refuses to poll a jury reversal is not required absent evidence of substantial prejudice. *St. Louis County v. Pennington*, 830 S.W.2d 553,555 (Mo. App. 1992). It is the duty of the trial judge to resolve doubt when an inconsistency occurs in a jury verdict. *State v. Thompson*, 85 S.W.2d 635,639 (Mo Banc 2002). In this case there could have been an inconsistency in the jury verdict that would be a reversible error, a juror cannot believe that Walton did and did not breach their contract. MGM offered an affidavit saying the juror in question simply did not put his name down because they had met the 9 juror threshold. Because there could be a simple resolution to the doubt the court remanded the case to allow for a hearing on whether the juror made a mistake or not.

(2) Attorney Fees and Interest

A court may in addition to other damages award interest and reasonable attorney fees. Mo. Rev. Stat. § 431.180. The parties stipulated that the court, not the jury would decide the interest and attorney fees. Walton was not unreasonable in withholding the payment, and MGM was not cooperative or conciliatory, and the trial court exercised its discretion not to award the fees. Because the language of the statute gives discretion to the trial court of when to award interest and fees the decision of the court was upheld.

Jerry Bennett Masonry Contractor Inc., v. Crossland Construction Co., Inc., 213 S.W.3d 733, (Mo. App. 2007)

This case addresses when interest begins to accrue and ends on a breach of contract action. In actions for breach of contract, interest ordinarily runs from the date the breach occurs or was or should have been discovered, or the time when payment is due under the contract. *Wulfing v. Kansas City Southern Industries, Inc.*, 842 S.W.2d 235,242 (Mo. Blanc 1997). Pre-judgment interest runs to the date of the judgment. *Bolivar Insulation Co. v. R. Logsdon Builders, Inc.,* 929 S.W.2d 232 (Mo. App. 1992). The court analyzed the appropriate dates and reversed the trial court's decision, remanding the case to determine the appropriate dates to use starting from the time the payment was due to the date of the judgment.

This approach was distinguished in a later case, *Payroll Advance, Inc. v. Yates***,** 270 S.W.3d 428 . In *Jerry Bennett Masonry,* the contractor did not expressly request the statutory interest that could be applied (ie prejudgment, postjudgment or statutory under the Prompt Payment Act). In *Payroll,* the case involved a request for modification of the interest rate applied, did not discuss the start date, and involved details where the claimant had expressly requested the penalty statutory interest rate.

Glenstone Block Co. v. Vincent Pebworth, 264 S.W.3d 703 (Mo. App. 2008)

This dispute arose out of the construction of when a subcontractor, Glenstone Block was not paid by the General Contractor, Vincent Pebworth, after constructing a block wall for a subdivision. Pebworth eventually ran out of money, and did not pay Glenstone. The Trial Court awarded $18,629 to Glenstone. Pebworth appealed. At issue in this case is (1) whether the judgment creating a special lien was supported by substantial evidence, (2) whether the lien had a just and true account of the of the amounts due, (3) Whether the interest rate applied was done in error under the Prompt Payment Acts. .

(1) Whether the judgment creating a special lien was supported by substantial evidence.

The court will sustain a judgment of the trial court unless there is no substantial evidence to support it or the law is erroneously applied. *Murphy v. Carron*, 365 S.W.2d 30,32 (Mo. Banc 1976). When determining sufficiency of evidence the appellate court will accept true the evidence and inferences that are favorable to the trial court's interpretation. *Propes v. Griffth*, 25 S.W.3d 544, 547 (Mo. App. 2000). To be able to overturn the evidence there would need to be no substantial evidence that the blocks were not actually delivered or used at the jobsite. The jobsite coordinator testified they received the blocks and there was an invoice for the blocks. The court viewed this as sufficient evidence showing that the blocks were delivered to the jobsite.

(2) Whether the lien had a just and true account of the of the amounts due

The mechanics lien statute requires that a lien claimant file a just and true account of the amounts due. *American Prop. Maint. V. Monia*, S.W.3d 640, 643 (Mo. App. 2001); *quoting* Mo. Rev. Stat. § 429.080. A lien statement may be regarded as just and true if the inclusion of a non-lienable item

is the result of an honest mistake or inadvertence without intent to defraud. *Id.,* at 643. There was a small discrepancy in the lien amount twice with both totaling under $100, which the plaintiff admitted at trial was a mistake. There was no evidence that the minor amount was in an attempt to defraud, and the non-lienable items could be taken out and was removed when pointed out. As there is nothing in the record that established an attempt to defraud the lien amount was a just and true amount.

(3) Whether the interest rate applied was done in error

Section 431.180 places discretion in the court to award interest fees. *Vance Bros Inc. v. Obermiller Construction Servs. Inc.*, 181 S.W.3d 562 564. To show that the trial court abused its discretion the complaining party must show the decision to be arbitrary and unreasonable. *Id.* The trial court lowered the request amount of interest by the plaintiff, and did not grant any attorney fees. Because there is no evidence the trial court's actions were unreasonable the interest rate as applied was not an error.

(4) Whether the deed of trust issued by the bank was a construction loan and inferior to the mechanics lien.

The Judgment of the circuit court will be affirmed on appeal unless there is no substantial evidence to support it, or it erroneously applies the law. *Butler Supply inc. v. Coon's Creek inc.*, 999 S.W.2d 748 (Mo. App. 1999). Mechanics liens do not take precedence over a purchase money deed of trust which secures repayment of funds used to purchase land upon which improvements giving rise to claims are erected. *Westinghouse Elec. Co. v. Vann Realty Co.*, 568 S.W.2d 777,781 (Mo. Banc 1978). A promissory note for a deed of trust was executed by the bank for the property. There is no reference in the document that says it is a construction loan. The only evidence that supports it is a construction loan was a witness who walked by and saw people building on the property. The Court reasoned that this did not pass the test of having substantial evidence to support that it was indeed a construction loan and reversed the decision stating the deed of trust was a construction loan, making the holders of the deed of trust superior to the mechanic lien holder.

Lucas Stucco v. Loren Landau, (Mo. App. Lexis 111) (MO *En Banc 10*/26/2010)

Note: this case is not final until expiration of the re-hearing period

This case addressed whether the court erred in *sua sponte* (i.e. on its own motion) awarding attorney fees to the Plaintiff where Plaintiff had not pled for attorney fees specifically under the Statute but only under a general claim for attorneys fees. The court noted that Missouri follows the American rule on attorney fees, providing that lacking contract or statutory entitlement, each party pays its own legal costs. *Washington Univ. v. Royal Crown Bottling Co.*, 801 S.W.2d 458, 469 (Mo. App. E.D. 1990). The relief awarded in a judgment is limited to that sought by the specific pleadings. *Norman v. Wright*, 100 S.W.3d 768 (Mo. Banc. 2003). The court analyzed prompt payment act legal precedent cases and

concluded that all cases requesting attorneys' fees had specifically pled entitlement under the statute ***Based on this, the court held that to receive attorney fees the pleadings must specifically reference the prompt payment act. In this case, because the pleadings only generally requested attorney fees, the court's sua sponte award of attorney fees was improper.***

REPRESENTATIVE

KANSAS CASES

D-1 Constructors, Ltd. V. Unified School Dist. No. 229, 14 Kan. App. 2d 245 (1990). Due to the definiteness of the statute, technical requirements for compliance, and administrative procedures for handling, only one reported case to date is the above and even in this, the Public Works Prompt Payment Act is only referred to in passing.

Kansas Attorney General Opinion #96-36 (April 9, 1996). Responding to a request for clarification, the Kansas Attorney General's office responded to a school district's inquiry about authority to enter into contracts containing one or more of the following provisions:

1. a provision requiring the school district to release the other contracting party from any and all claims, liability, damages, or other obligations arising out of certain construction;
2. a provision requiring the school district to hold harmless and indemnify the other contracting party from and against all costs, expenses, claims, and damages asserted by any person as the result of certain construction; and
3. a provision requiring the school district to provide an irrevocable letter of credit in the amount of $10,000 as security for the school district's obligations under the contract.

Addressing the school district's obligation to make payments in accordance with the Public Prompt Payment Act Statute in light of the above clauses, the Attorney General stated that the KPPA operate as a limitation on the authority of a unified school district to contract. The district may not enter into an agreement which requires the district to provide an irrevocable letter of credit as security for the district's obligations under the contract.

Midwest Asphalt Coating, Inc. v. Chelsea Plaza Homes, Inc., 2010 WL 5185805 (Kan.App.)

In this decision the Kansas Court of Appeals ruled a contractor was not entitled to an award of attorneys' fees under the Kansas Fairness In Private Construction Act ("Kansas Prompt Pay Act") despite a jury finding in the contractor's favor on either a breach of contract claim or a quantum meruit claim. In this case, a contractor entered into a contract with an owner for the repair of a parking lot. Before the work was complete, the owner terminated the contract alleging the work was not completed per the contract. Contractor demanded payment for the balance of the contract and subsequently filed suit on the theories of breach of contract, quantum meruit and violation of the Kansas Prompt Pay Act. A jury found in favor of the contractor and awarded the contractor a portion of the total amount due under the contract.

The contractor subsequently filed a motion for award of attorneys' fees and the district court denied the motion. Contractor appealed and the Court of Appeals ruled that the contractor was not entitled to attorneys' fees under the Kansas Prompt Pay Act because the amount due under the contract was in dispute. No prejudgment interest was awarded or available under the Kansas Prompt Pay Act when the amount is disputed.

A practice tip for contractors and subcontractors hoping to preserve the possibility of an attorneys' fees award and prejudgment interest in a Kansas Prompt Pay Act claim is to request certification from the architect (if using AIA documents) for those items where they are certain there is no dispute as to conformance with the contract. Those certified costs could then potentially become the basis for a Kansas Prompt Pay Act claim.

The author acknowledges the contribution of Bradley Farris in the research and preparation of this handout. Bradley is currently a 2nd year law student at the University of Missouri – Kansas City School of Law.

Farris Law Firm LLC, 1600 Genessee, Suite 433 Kansas City, MO 64102
Telephone: 816 842 0800 Cell: 913-220-6203 Fax: 816-842-0877
Email: dfarris@farrislawfirm.com Web page: www.farrislawfirm.com.

APPENDIX A

KANSAS STATUTES

PUBLIC CONSTRUCTION

PRIVATE CONSTRUCTION

KANSAS FAIRNESS IN PUBLIC CONSTRUCTION PROMPT PAYMENT ACT

ARTICLE 19

16-1901. Title; rights and duties not waivable or varied under terms of contract. (a) K.S.A. 16-1901 through 16-1908, and amendments thereto, shall be known and may be cited as the Kansas fairness in public construction contract act.

(b) The rights and duties prescribed by this act shall not be waivable or varied under the terms of a contract. The terms of any contract waiving the rights and duties prescribed by this act shall be unenforceable

16-1902. Definitions. As used in this act:

(a) "Alternate security" means an irrevocable bank letter of credit, certificate of deposit, cash bond or other type of asset or security of value equal to or exceeding the amount of retained funds. "Alternate security" shall not include a performance bond or a payment bond.

(b) "Construction" means furnishing labor, equipment, material or supplies used or consumed for the design, construction, alteration, renovation, repair or maintenance of a building, water or waste water treatment facility, oil line, gas line, appurtenance or other improvement to real property, including any moving, demolition or excavation of a building. "Construction" shall not mean the design, construction, alteration, renovation, repair or maintenance of a road, highway or bridge.

(c) "Contract" means a contract or agreement concerning construction made and entered into by and between an owner and a contractor, a contractor and a subcontractor or a subcontractor and another subcontractor.

(d) "Contractor" means a person performing construction and having a contract with an owner of the real property or with a trustee or agent of an owner.

(e) "Owner" means a public entity that holds an ownership interest in real property.

(f) "Public entity" means the state of Kansas, political subdivisions, cities, counties, state universities or colleges, school districts, all special districts, joint agreement entities, public authorities, public trusts, nonprofit corporations and other organizations which are operated with public money for the public good.

(g) "Retainage" or "retention" means money earned by a contractor or subcontractor but withheld to ensure timely performance by the contractor or subcontractor.

(h) "Subcontractor" means any person performing construction covered by a contract between an owner and a contractor but not having a contract with the owner.

(i) "Substantial completion" means the stage of a construction project where the project, or a designated portion thereof, is sufficiently complete in accordance with the contract, so that the owner can occupy or utilize the constructed project for its intended use.

(j) "Undisputed payment" means payments which all parties to the contract agree are owed to the contractor

16-1903. Public construction contracts; payment provisions; provisions against public policy, void, unenforceable; failure to pay. (a) Subject to the provisions of subsections (b), (c), (d), (e), (f), (g), (h) and K.S.A. 16-1904 and 16-1905, and amendments thereto, all owners, contractors and subcontractors, who enter into a contract for public construction after the effective date of this act, shall make all payments pursuant to the terms of the contract.

(b) The following provisions in a contract for public construction shall be against public policy and shall be void and unenforceable:

(1) A provision that purports to waive, release or extinguish the right to resolve disputes through litigation in court or substantive or procedural rights in connection with such litigation except that a contract may require nonbinding alternative dispute resolution as a prerequisite to litigation;

(2) a provision that purports to waive, release or extinguish rights to file a claim against a payment or performance bond, except that a contract may require a contractor or subcontractor to provide a waiver or release of such rights as a condition for payment, but only to the extent of the amount of payment received; and

(3) a provision that purports to waive, release or extinguish rights of subrogation for losses or claims covered or paid by liability or workers compensation insurance except that a contract may require waiver of subrogation for losses or claims paid by a consolidated or wrap-up insurance program, owners and contractors protective liability insurance, or project management protective liability insurance or a builder's risk policy.

(c) All contracts for public construction shall provide that payment of amounts due a contractor from an owner, except retainage, shall be made within 30 days after the owner receives a timely, properly completed, undisputed request for payment according to terms of the contract, unless extenuating circumstances exist which would preclude approval of payment within 30 days. If such extenuating circumstances exist, then payment shall be made within 45 days after the owner receives such payment request.

(d) The architect or engineer of record or agent of the owner shall review, approve and forward undisputed requests for payment to the owner within seven business days of receipt from the contractor.

(e) If the owner fails to pay a contractor within the time period set forth in subsection (c), the owner shall pay interest computed at the rate of 18% per annum on the undisputed amount to the contractor beginning on the day following the end of the time period set forth in subsection (d).

(f) A contractor shall pay its subcontractors any amounts due within seven business days of receipt of payment from the owner, including payment of retainage, if retainage is released by the owner, if the subcontractor has provided a timely, properly completed and undisputed request for payment to the contractor.

(g) If the contractor fails to pay a subcontractor within seven business days, the contractor shall pay interest to the subcontractor beginning on the eighth business day after receipt of payment by the contractor, computed at the rate of 18% per annum on the undisputed amount.

(h) The provisions of subsection (g) shall also apply to all payments from subcontractors to their subcontractors.

16-1904. Retainage; release and withholding thereof; alternate security; failure to pay. (a) Retainage shall not exceed 5% of the value of the contract or subcontract unless the owner or contractor determines that a higher rate of retainage is required to ensure performance of the contract. Retainage, however, shall not exceed 10% of the value of the contract or subcontract.

(b) If the contractor or subcontractor has failed to meet the terms of the contract, is not performing according to schedule, shows poor workmanship or other issues, the owner may increase retainage up to 10%.

(c) An owner may withhold not more than 150% of the value of incomplete work, provided that the incomplete work is due to the fault of a contractor. Any amounts retained for incomplete work shall be paid within 45 days after completion of the work as a part of the regular payment cycle.

(d) A contractor may withhold not more than 150% of the value of incomplete work, provided that the incomplete work is due to the fault of a subcontractor. Any amounts retained for incomplete work shall be paid within 45 days after completion of the work as part of the regular payment cycle.

(e) A subcontractor may withhold not more than 150% of the value of incomplete work that is the responsibility of another subcontractor, provided that the incomplete work is due to the fault of such other subcontractor. Any amounts retained for incomplete work shall be paid within 45 days after completion of the work as a part of the regular payment cycle.

(f) Prior to commencement of work, a contractor or subcontractor may request an alternate security in lieu of retainage.

(g) If a contractor or subcontractor requests the use of an alternate security, as defined in subsection (a) of K.S.A. 16-1902, and amendments thereto, in lieu of retainage, the owner or contractor who would otherwise withhold the retainage shall have the right to determine which type of alternate security, as defined in subsection (a) of K.S.A. 16-1902, and amendments thereto, shall be accepted.

(h) An owner, contractor or subcontractor must release all remaining retainage on any undisputed payment due on a construction project within 30 days after substantial completion of the project as part of the regular payment cycle; however, if any contractor or subcontractor is still performing work on the project, an owner may withhold that portion of the retainage attributable to such work until 30 days after such work is completed.

(i) If an owner, contractor or subcontractor fails to pay retainage, if any, pursuant to the terms of a contract for public construction or as required by this act, the owner, contractor or subcontractor shall pay interest to the contractor or subcontractor to whom payment was due, beginning on the first business day after the payment was due, at a rate of 18% per annum.

(j) Nothing in this section shall prevent early release of retainage if it is determined by the owner, the contractor and the project architect or engineer, that a subcontractor has completed performance satisfactorily and that the subcontractor can be released prior to substantial completion of the entire project without risk or additional cost to the owner or contractor. Once so determined, the contractor shall request such adjustment in retainage, if any, from the owner as necessary to enable the contractor to pay the subcontractor in full, and the owner shall, as part of the next contractual payment cycle, release the subcontractor's retainage to the contractor, who shall, as part of the next contractual payment cycle, release such retainage as is due to the subcontractor.

16-1905. Suspension of performance, when. If any undisputed payment is not made within seven business days after the payment date established in a contract for public construction or in this act, the contractor and any subcontractors, regardless of tier, upon seven additional business days' written notice to the owner and, in the case of a subcontractor, written notice to the contractor, shall, without prejudice to any other available remedy, be entitled to suspend further performance until payment, including applicable interest, is made. The contract time for each contract affected by the suspension shall be extended appropriately and the contract sum for each affected contract shall be increased by the suspending party's reasonable costs of demobilization, delay and remobilization

16-1906. Action or arbitration to enforce act; costs; venue. In any action to enforce K.S.A. 16-1903, 16-1904 or 16-1905, and amendments thereto, including arbitration, between a contractor and subcontractors or subcontractors and subcontractors, the court or arbitrator shall award costs and reasonable attorney fees to the prevailing party. Venue of such an action shall be in the county where the real property is located and under Kansas law. The hearing in such an arbitration shall be held in the county where the real property is located

16-1907. Provisions waiving right to collect damages for delays, void, unenforceable. Any provision in a contract that purports to waive the rights of a party to the contract to collect damages for delays caused by another party to the contract shall be void, unenforceable and against public policy. This provision is not intended to create a contract between parties where a contract did not otherwise exist.

16-1908. Scope. The provisions of the Kansas fairness in public construction contract act shall not apply to construction projects which are required to comply with section 109 of the Kansas department of transportation special provisions to the standard specifications, 1990 edition (90P-205-R6) or any subsequent amendments.

KANSAS FAIRNESS IN PRIVATE CONSTRUCTION ACT

ARTICLE 18

16-1801. Title; rights and duties not waivable or varied under terms of contract. (a) K.S.A. 16-1801 through 16-1807, and amendments thereto, shall be known and may be cited as the Kansas fairness in private construction contract act.

(b) The rights and duties prescribed by this act shall not be waivable or varied under the terms of a contract. The terms of any contract waiving the rights and duties prescribed by this act shall be unenforceable

16-1802. Definitions. As used in this act:

(a) "Alternate security" means an irrevocable bank letter of credit, certificate of deposit, cash bond or other type of asset or security of value equal to or exceeding the amount of retained funds. "Alternate security" shall not include a performance bond or a payment bond.

(b) "Construction" means furnishing labor, equipment, material or supplies used or consumed for the design, construction, alteration, renovation, repair or maintenance of a building, structure, road, bridge, water line, sewer line, oil line, gas line, appurtenance or other improvement to real property, including any moving, demolition or excavation.

(c) "Contract" means a contract or agreement concerning construction made and entered into by and between an owner and a contractor, a contractor and a subcontractor or a subcontractor and another subcontractor.

(d) "Contractor" means a person performing construction and having a contract with an owner of the real property or with a trustee, agent or spouse of an owner.

(e) "Owner" means a person who holds an ownership interest in real property.

(f) "Person" means an individual, corporation, estate, trust, partnership, limited liability company, association, joint venture or any other legal entity.

(g) "Retainage" or "retention" means money earned by a contractor or subcontractor but withheld to ensure proper performance by the contractor or subcontractor.

(h) "Subcontractor" means any person performing construction covered by a contract between an owner and a contractor but not having a contract with the owner.

(i) "Substantial completion" means the stage of a construction project where the project, or a designated portion thereof, is sufficiently complete in accordance with the contract, so that portion thereof can be used for its intended purpose.

16-1803. Private construction contracts; payment provisions; provisions against public policy, void, unenforceable; failure to pay. (a) Subject to the provisions of subsections (b), (c), (d), (e), (f), (g) and (h) and K.S.A. 16-1804 and 16-1805, and amendments thereto, all persons

who enter into a contract for private construction after the effective date of this act, shall make all payments pursuant to the terms of the contract.

(b) The following provisions in a contract for private construction shall be against public policy and shall be void and unenforceable:

(1) A provision that purports to waive, release or extinguish the right to resolve disputes through litigation in court or substantive or procedural rights in connection with such litigation except that a contract may require binding arbitration as a substitute for litigation or require non-binding alternative dispute resolution as a prerequisite to litigation;

(2) a provision that purports to waive, release or extinguish rights provided by article 11 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto, except that a contract may require a contractor or subcontractor to provide a waiver or release of such rights as a condition for payment, but only to the extent of the amount of payment received; and

(3) a provision that purports to waive, release or extinguish rights of subrogation for losses or claims covered or paid by liability or workers compensation insurance except that a contract may require waiver of subrogation for losses or claims paid by a consolidated or wrap-up insurance program, owners and contractors protective liability insurance, or project management protective liability insurance, unless otherwise prohibited under subsection (b)(5) of K.S.A. 2010 Supp. 40-5403, and amendments thereto.

(c) Any provision in a contract for private construction providing that a payment from a contractor or subcontractor to a subcontractor is contingent or conditioned upon receipt of a payment from any other private party, including a private owner, is no defense to a claim to enforce a mechanic's lien or bond to secure payment of claims pursuant to the provisions of article 11 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto.

(d) All contracts for private construction shall provide that payment of amounts due a contractor from an owner, except retainage, shall be made within 30 days after the owner receives a timely, properly completed, undisputed request for payment.

(e) If the owner fails to pay a contractor within 30 days following receipt of a timely, properly completed, undisputed request for payment, the owner shall pay interest to the contractor beginning on the thirty-first day after receipt of the request for payment, computed at the rate of 18% per annum on the undisputed amount.

(f) A contractor shall pay its subcontractors any amounts due within seven business days of receipt of payment from the owner, including payment of retainage, if retainage is released by the owner, if the subcontractor has provided a timely, properly completed and undisputed request for payment to the contractor.

(g) If the contractor fails to pay a subcontractor within seven business days, the contractor shall pay interest to the subcontractor beginning on the eighth business day after receipt of payment by the contractor, computed at the rate of 18% per annum on the undisputed amount.

(h) The provisions of subsections (f) and (g) shall apply to all payments from subcontractors to their subcontractors.

16-1804. Retainage; release of retainage; incomplete work; alternate security; failure to pay. (a) Retainage shall not exceed 5% of the value of the contract or subcontract unless the owner or contractor determines that a higher rate of retainage is required to ensure performance of the contract. Retainage, however, shall not exceed 10% of the value of the contract or subcontract.

(b) If the contractor or subcontractor has failed to meet the terms of the contract, is not performing according to schedule or there is a problem with workmanship or other issues, the owner may increase retainage up to 10%.

(c) An owner shall release all remaining retainage on any undisputed payment due to a contractor on a construction project within 30 days after substantial completion of the project; however, if any contractor or subcontractor is still performing work on the project, an owner may withhold that portion of the retainage attributable to such work until 30 days after such work is completed.

(d) An owner may withhold not more than 150% of the value of incomplete work, provided that the incomplete work is due to the fault of a contractor. Any amounts retained for incomplete work shall be paid within 45 days after completion of the work as a part of the regular payment cycle.

(e) A contractor may withhold not more than 150% of the value of incomplete work, provided that the incomplete work is due to the fault of a subcontractor. Any amounts retained for incomplete work shall be paid within 45 days after completion of the work as part of the regular payment cycle.

(f) A subcontractor may withhold not more than 150% of the value of incomplete work that is the responsibility of another subcontractor, provided that the incomplete work is due to the fault of such other subcontractor. Any amounts retained for incomplete work shall be paid within 45 days after completion of the work as a part of the regular payment cycle.

(g) Prior to commencement of work, a general contractor or subcontractor may request an alternate security in lieu of retainage.

(h) If a contractor or subcontractor requests the use of an alternate security, as defined in subsection (a) of K.S.A. 16-1802, and amendments thereto, in lieu of retainage, the owner or contractor who would otherwise withhold the retainage shall have the right to determine which type of alternate security, as defined in subsection (a) of K.S.A. 16-1802, and amendments thereto, shall be accepted.

(i) An owner, contractor or subcontractor may withhold no more than 10% retainage from the amount of any undisputed payment due.

(j) If an owner, contractor or subcontractor fails to pay retainage, if any, pursuant to the terms of a contract for private construction or as required by this act, the owner, contractor or subcontractor shall pay interest to the contractor or subcontractor to whom payment was due, beginning on the first business day after the payment was due, at a rate of 18% per annum.

(k) Nothing in this section shall prevent early release of retainage if it is determined by the owner, the contractor and the project architect or engineer, that a subcontractor has completed performance satisfactorily and that the subcontractor can be released prior to substantial completion of the entire project without risk or additional cost to the owner or contractor. Once so determined, the contractor shall request such early release of retainage from the owner as necessary to enable the contractor to pay the subcontractor in full. The

owner shall, as part of the next contractual payment cycle, release the subcontractor's retainage to the contractor, who shall, as part of the next contractual payment cycle, release such retainage as is due to the subcontractor

16-1805. Suspension of performance, when. If any undisputed payment is not made within seven business days after the payment date established in a contract for private construction or in this act, the contractor and any subcontractors, regardless of tier, upon seven additional business days' written notice to the owner and, in the case of a subcontractor, written notice to the contractor, shall, without prejudice to any other available remedy, be entitled to suspend further performance until payment, including applicable interest, is made. The contract time for each contract affected by the suspension shall be extended appropriately and the contract sum for each affected contract shall be increased by the suspending party's reasonable costs of demobilization, delay and remobilization

16-1806. Action or arbitration to enforce act; costs; venue. In any action to enforce K.S.A. 16-1803, 16-1804 or 16-1805, and amendments thereto, including arbitration, the court or arbitrator shall award costs and reasonable attorney fees to the prevailing party. Venue of such an action shall be in the county where the real property is located. The hearing in such an arbitration shall be held in the county where the real property is located

16-1807. Scope. The provisions of this act shall not apply to single family residential housing and multifamily residential housing of four units or less. The provisions of this act shall not apply to public works projects. The provisions of this act shall not apply to contracts entered into prior to the effective date of this act

APPENDIX B:

MISSOURI STATUTES

PUBLIC CONSTRUCTION

PRIVATE CONSTRUCTION

MISSOURI

PUBLIC CONSTRUCTION PROMPT PAYMENT ACT

Public works contracts--prompt payment by public owner to contractor--prompt payment by contractor to subcontractor--progress payments--retainage--late payment charges--withholding of payments.

34.057. 1. Unless contrary to any federal funding requirements or unless funds from a state grant are not timely received by the contracting public municipality but notwithstanding any other law to the contrary, all public works contracts made and awarded by the appropriate officer, board or agency of the state or of a political subdivision of the state or of any district therein, including any municipality, county and any board referred to as the public owner, for construction, reconstruction or alteration of any public works project, shall provide for prompt payment by the public owner to the contractor and prompt payment by the contractor to the subcontractor and material supplier in accordance with the following:

(1) A public owner shall make progress payments to the contractor on at least a monthly basis as the work progresses, or, on a lump sum basis according to the terms of the lump sum contract. Except in the case of lump sum contracts, payments shall be based upon estimates prepared at least monthly of work performed and material delivered, as determined by the project architect or engineer. Retainage withheld on public works projects shall not exceed five percent of the value of the contract or subcontract unless the public owner and the architect or engineer determine that a higher rate of retainage is required to ensure performance of the contract. Retainage, however, shall not exceed ten percent of the value of the contract or subcontract. Except as provided in subsection 4 of this section, the public owner shall pay the contractor the amount due, less a retainage not to exceed ten percent, within thirty days following the latter of the following:

(a) The date of delivery of materials or construction services purchased;

(b) The date, as designated by the public owner, upon which the invoice is duly delivered to the person or place designated by the public owner; or

(c) In those instances in which the contractor approves the public owner's estimate, the date upon which such notice of approval is duly delivered to the person or place designated by the public owner;

(2) Payments shall be considered received within the context of this section when they are duly posted with the United States Postal Service or other agreed upon delivery service or when they are hand-delivered to an authorized person or place as agreed to by the contracting parties;

(3) If, in the discretion of the owner and the project architect or engineer and the contractor, it is determined that a subcontractor's performance has been completed and the subcontractor can be

released prior to substantial completion of the public works contract without risk to the public owner, the contractor shall request such adjustment in retainage, if any, from the public owner as necessary to enable the contractor to pay the subcontractor in full. The public owner may reduce or eliminate retainage on any contract payment if, in the public owner's opinion, the work is proceeding satisfactorily. If retainage is released and there are any remaining minor items to be completed, an amount equal to two hundred percent of the value of each item as determined by the public owner's duly authorized representative shall be withheld until such item or items are completed;

(4) The public owner shall pay the retainage, less any offsets or deductions authorized in the contract or otherwise authorized by law, to the contractor after substantial completion of the contract work and acceptance by the public owner's authorized contract representative, or as may otherwise be provided by the contract specifications for state highway, road or bridge projects administered by the state highways and transportation commission. Such payment shall be made within thirty days after acceptance, and the invoice and all other appropriate documentation and certifications in complete and acceptable form are provided, as may be required by the contract documents. If at that time there are any remaining minor items to be completed, an amount equal to two hundred percent of the value of each item as determined by the public owner's representative shall be withheld until such items are completed;

(5) All estimates or invoices for supplies and services purchased, approved and processed, or final payments, shall be paid promptly and shall be subject to late payment charges provided in this section. Except as provided in subsection 4 of this section, if the contractor has not been paid within thirty days as set forth in subdivision (1) of subsection 1 of this section, the contracting agency shall pay the contractor, in addition to the payment due him, interest at the rate of one and one-half percent per month calculated from the expiration of the thirty-day period until fully paid;

(6) When a contractor receives any payment, the contractor shall pay each subcontractor and material supplier in proportion to the work completed by each subcontractor and material supplier his application less any retention not to exceed ten percent. If the contractor receives less than the full payment due under the public construction contract, the contractor shall be obligated to disburse on a pro rata basis those funds received, with the contractor, subcontractors and material suppliers each receiving a prorated portion based on the amount of payment. When, however, the public owner does not release the full payment due under the contract because there are specific areas of work or materials he is rejecting or because he has otherwise determined such areas are not suitable for payment then those specific subcontractors or suppliers involved shall not be paid for that portion of the work rejected or deemed not suitable for payment and all other subcontractors and suppliers shall be paid in full;

(7) If the contractor, without reasonable cause, fails to make any payment to his subcontractors and material suppliers within fifteen days after receipt of payment under the public construction contract, the contractor shall pay to his subcontractors and material suppliers, in addition to the payment due them, interest in the amount of one and one-half percent per month, calculated from the expiration of the fifteen-day period until fully paid. This subdivision shall also apply to any payments made by subcontractors and material suppliers to their subcontractors and material

suppliers and to all payments made to lower tier subcontractors and material suppliers throughout the contracting chain;

(8) The public owner shall make final payment of all moneys owed to the contractor, less any offsets or deductions authorized in the contract or otherwise authorized by law, within thirty days of the due date. Final payment shall be considered due upon the earliest of the following events:

(a) Completion of the project and filing with the owner of all required documentation and certifications, in complete and acceptable form, in accordance with the terms and conditions of the contract;

(b) The project is certified by the architect or engineer authorized to make such certification on behalf of the owner as having been completed, including the filing of all documentation and certifications required by the contract, in complete and acceptable form; or

(c) The project is certified by the contracting authority as having been completed, including the filing of all documentation and certifications required by the contract, in complete and acceptable form.

2. Nothing in this section shall prevent the contractor or subcontractor, at the time of application or certification to the public owner or contractor, from withholding such applications or certifications to the owner or contractor for payment to the subcontractor or material supplier. Amounts intended to be withheld shall not be included in such applications or certifications to the public owner or contractor. Reasons for withholding such applications or certifications shall include, but not be limited to, the following: unsatisfactory job progress; defective construction work or material not remedied; disputed work; failure to comply with other material provisions of the contract; third party claims filed or reasonable evidence that a claim will be filed; failure of the subcontractor to make timely payments for labor, equipment and materials; damage to a contractor or another subcontractor or material supplier; reasonable evidence that the contract can not be completed for the unpaid balance of the subcontract sum or a reasonable amount for retention, not to exceed the initial percentage retained by the owner.

3. Should the contractor determine, after application or certification has been made and after payment has been received from the public owner, or after payment has been received by a contractor based upon the public owner's estimate of materials in place and work performed as provided by contract, that all or a portion of the moneys needs to be withheld from a specific subcontractor or material supplier for any of the reasons enumerated in this section, and such moneys are withheld from such subcontractor or material supplier, then such undistributed amounts shall be specifically identified in writing and deducted from the next application or certification made to the public owner or from the next estimate by the public owner of payment due the contractor, until a resolution of the matter has been achieved. Disputes shall be resolved in accordance with the terms of the contract documents. Upon such resolution the amounts withheld by the contractor from the subcontractor or material supplier shall be included in the next application or certification made to the public owner or the next estimate by the public owner and shall be paid promptly in accordance with the provisions of this section. This

subsection shall also apply to applications or certifications made by subcontractors or material suppliers to the contractor and throughout the various tiers of the contracting chain.

4. The contracts which provide for payments to the contractor based upon the public owner's estimate of materials in place and work performed rather than applications or certifications submitted by the contractor, the public owner shall pay the contractor within thirty days following the date upon which the estimate is required by contract to be completed by the public owner, the amount due less a retainage not to exceed five percent. All such estimates by the public owner shall be paid promptly and shall be subject to late payment charges as provided in this subsection. After the thirtieth day following the date upon which the estimate is required by contract to be completed by the public owner, the contracting agency shall pay the contractor, in addition to the payment due him, interest at a rate of one and one-half percent per month calculated from the expiration of the thirty-day period until fully paid.

5. Nothing in this section shall prevent the owner from withholding payment or final payment from the contractor, or a subcontractor or material supplier. Reasons for withholding payment or final payment shall include, but not be limited to, the following: liquidated damages; unsatisfactory job progress; 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 contract 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.

6. Notwithstanding any other provisions in this section to the contrary, no late payment interest shall be due and owing for payments which are withheld in good faith for reasonable cause pursuant to subsections 2 and 5 of this section. If it is determined by a court of competent jurisdiction that a payment which was withheld pursuant to subsections 2 and 5 of this section was not withheld in good faith for reasonable cause, the court may impose interest at the rate of one and one-half percent per month calculated from the date of the invoice and may, in its discretion, award reasonable attorney fees to the prevailing party. In any civil action or part of a civil action brought pursuant to this section, if a court determines after a hearing for such purpose that the cause was initiated, or a defense was asserted, or a motion was filed, or any proceeding therein was done frivolously and in bad faith, the court shall require the party who initiated such cause, asserted such defense, filed such motion, or caused such proceeding to be had to pay the other party named in such action the amount of the costs attributable thereto and reasonable expenses incurred by such party, including reasonable attorney fees.

(L. 1990 S.B. 808 & 672 § 1)

MISSOURI

PRIVATE CONSTRUCTION PROMPT PAYMENT ACT

PROMPT PAYMENT ACT STATUTE:

431.180. 1. All persons who enter into a contract for private design or construction work after August 28, 1995, shall make all scheduled payments pursuant to the terms of the contract.

2. Any person who has not been paid in accordance with subsection 1 of this section may bring an action in a court of competent jurisdiction against a person who has failed to pay. The court may in addition to any other award for damages, award interest at the rate of up to one and one-half percent per month from the date payment was due pursuant to the terms of the contract, and reasonable attorney fees, to the prevailing party. If the parties elect to resolve the dispute by arbitration pursuant to section 435.350, the arbitrator may award any remedy that a court is authorized to award hereunder.

3. The provisions of this section shall not apply to contracts for private construction work for the building, improvement, repair or remodeling of owner-occupied residential property of four units or less.

4. For purposes of this section, design or construction work shall include design, construction, alteration, repair or maintenance of any building, roadway or other structure or improvement to real property, or demolition or* excavation connected therewith, and shall include the furnishing of surveying, architectural, engineering or landscape design, planning or management services, labor or materials, in connection with such work.

(L. 1995 S.B. 93, A.L. 1999 H.B. 343)

Payment contingent upon payment from third party, not a defense to enforcement of lien.

431.183. Any provision in a contract, agreement or understanding that provides that a payment from a contractor to a subcontractor, trade contractor, specialty contractor or supplier is contingent or conditioned upon receipt of a payment from any other private party, including a

private owner, is no defense to a claim to enforce a mechanic's lien pursuant to the provisions of chapter 429.

Private construction work contract payment requirements.

436.300. Notwithstanding any other law to the contrary, all parties to any contract or agreement for private construction work that is between any owner and any contractor, or between any contractor and any subcontractor, or between any subcontractor and any sub-subcontractor, or any supplier at whatever tier for construction, reconstruction, maintenance, alteration, or repair for a private owner of any building, improvement, structure, private road, appurtenance, or appliance, including moving, demolition, or any excavating connected therewith, shall make payment in accordance with the terms of such contract or agreement, provided such terms are not inconsistent with the provisions of sections 436.300 to 436.336.

PRIVATE CONSTRUCTION PAYMENTS: RELATED STATUTE

Private construction work contract payment requirements.

436.300. Notwithstanding any other law to the contrary, all parties to any contract or agreement for private construction work that is between any owner and any contractor, or between any contractor and any subcontractor, or between any subcontractor and any sub-subcontractor, or any supplier at whatever tier for construction, reconstruction, maintenance, alteration, or repair for a private owner of any building, improvement, structure, private road, appurtenance, or appliance, including moving, demolition, or any excavating connected therewith, shall make payment in accordance with the terms of such contract or agreement, provided such terms are not inconsistent with the provisions of sections 436.300 to 436.336.

Contract provisions--retainage.

436.303. A contract or agreement may include a provision for the retainage of a portion of any payment due from the owner to the contractor, not to exceed ten percent of the amount of such payment due pursuant to the contract or agreement, to ensure the proper performance of the contract or agreement, provided that the contract may provide that if the contractor's performance is not in accordance with the terms of the contract or agreement, the owner may retain additional sums to protect the owner's interest in satisfactory performance of the contract or agreement. The amount or amounts so retained by the owner shall be referred to in sections 436.300 to 436.336 as "retainage", and shall be held by the owner in trust for the benefit of the contractor and contractor's subcontractors, sub- subcontractors, and suppliers at whatever tier who are not in default, in proportion to their respective interests. Such retainage shall be subject to the conditions and limitations listed in sections 436.300 to 436.336.

Security tendered, when.

436.306. 1. The contractor may tender to the owner acceptable substitute security as set forth in section 436.312 with a written request for release of retainage in the amount of the substitute security. The contractor shall thereupon either:

(1) Be entitled to receive cash payment of retainage pursuant to this section; or

(2) Not be subject to the withholding of retainage, in either case, to the extent of the security tendered, provided that the contractor is not in default of its agreement with the owner.

2. If the tender described in subsection 1 of this section is made after retainage has been withheld, the owner shall, within five working days after receipt of the tender, pay to the contractor the withheld retainage to the extent of the substitute security. If the tender described in subsection 1 of this section is made before retainage has been withheld, the owner shall, to the extent of the substitute security, refrain from withholding any retainage from the future payments.

Subcontractor may tender substitute security, when.

436.309. A subcontractor of the contractor may tender to the contractor acceptable substitute security as set forth in section 436.312 with a written request for release of retainage in the amount of the substitute security. The contractor shall tender the subcontractor's substitute security to the owner with a like request, pursuant to the provisions of section 436.306. Provided that the subcontractor is not in default of its agreement with the contractor, the contractor shall pay over to the subcontractor, within five working days after receipt, any accumulated retainage paid by the owner to the contractor on account of substitute security tendered by the subcontractor, except that the contractor shall not be required to pay over retainage in excess of the amount properly attributable to work completed by the subcontractor at the time of payment. Provided that the subcontractor is not in default of its agreement with the contractor, the contractor shall refrain from withholding retainage from payments to the subcontractor to the extent the owner has refrained from withholding retainage from payments to the contractor on account of the subcontractor's substituted security. The subcontractor shall be entitled to receive, upon receipt by the contractor, all income received by the contractor from the owner on account of income-producing securities deposited by the subcontractor as substitute security. Except as otherwise provided in this section, the contractor shall have no obligation to collect or pay to a subcontractor retainage on account of substitute security tendered by the subcontractor.

Substitute security requirements.

436.312. 1. The following shall constitute acceptable substitute security for purposes of sections 436.306 and 436.309:

(1) Certificates of deposit drawn and issued by a national banking association located in this state or by any banking corporation incorporated pursuant to the laws of this state, and mutually agreeable to the project owner and the contractor or subcontractor, in the amount of the retainage released. If the letter of credit is not renewed at least sixty days before the expiration of the letter of credit, the owner may draw upon the letter of credit regardless of the contractor's or subcontractor's performance for an amount equal to or no greater than the value of the amount of work remaining to be performed by the contractor or subcontractor;

(2) A retainage bond naming the owner as obligee issued by any surety company authorized to issue surety bonds in this state in the amount of the retainage released; or

(3) An irrevocable and unconditional letter of credit in favor of the owner, issued by a national banking association located in this state or by any banking corporation incorporated pursuant to the laws of this state, in the amount of the retainage released.

2. The contractor shall be entitled to receive, in all events, all interest and income earned on any securities deposited by the contractor in substitution for retainage.

Withholding of retainage prohibited, when.

436.315. A contractor shall not withhold from any subcontractor any retainage in excess of the retainage withheld from the contractor by the owner for the subcontractor's work, unless the subcontractor's performance is not in accordance with the terms of the subcontract, in which case, subject to the terms of the subcontract, the contractor may retain additional sums to ensure the subcontractor's satisfactory performance of the subcontract.

Release of retainage, payment made.

436.318. Upon the release of retainage by the owner to the contractor, other than for substituted security pursuant to sections 436.306 and 436.312, the contractor shall pay to each subcontractor the subcontractor's ratable share of the retainage released, provided that all conditions of the subcontract for release of retainage to the subcontractor have been satisfied.

Adjustment in retainage, when.

436.321. If it is determined that a subcontractor's performance has been satisfactorily completed and the subcontractor can be released prior to substantial completion of the entire project without risk to the owner involving the subcontractor's work, the contractor shall request such adjustment in retainage, if any, from the owner as necessary to enable the contractor to pay the subcontractor in full, and the owner shall as part of the next contractual payment cycle release the

subcontractor's retainage to the contractor, who shall in turn as part of the next contractual payment cycle release such retainage as is due the subcontractor.

Release of retainage, when.

436.324. Within thirty days of the project reaching substantial completion, as defined in section 436.327, all retainage or substitute security shall be released by the owner to the contractor less an amount equal to one hundred fifty percent of the costs to complete any remaining items. Upon receipt of such retainage from the owner, the contractor shall within seven days release to each subcontractor that subcontractor's share of the retainage.

Substantial completion defined.

436.327. The project shall be deemed to have reached substantial completion upon the occurrence of the earlier of the architect or engineer issuing a certificate of substantial completion in accordance with the terms of the contract documents or the owner accepting the performance of the full contract.

(L. 2002 H.B. 1403)

APPENDIX C

SUMMARY CHART

Federal, Missouri and Kansas Prompt Payment Acts