# Payment Bonds for Public Works Contract

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## Introduction

Public works projects are subject to statutory requirements that are not applicable to private sector construction.[3] These statutes must be considered when contemplating a public works project because they can affect cost and their violation can carry criminal liability.[4] Moreover, contractors, subcontractors and material suppliers are presumed to know they apply.[5] To provide sound advice, construction attorneys must be familiar with these statutes.

This article examines the statutory requirements for payment bonds for public works contractors. Other requirements are considered to the extent they interrelate with payment bonds.

## Payment Bonds Versus Performance Bonds

The two primary bonds utilized on construction projects are payment bonds and performance bonds.[6] "Most often, contractor's bonds are issued on behalf of the general contractor, as principal, and in favor of the public or private owner, as the obligee."[7]

Performance bonds are provided to "protect[] the obligee … by obligating the surety to cover any extra costs the obligee may incur to complete the project if the principal … defaults."[8] Thus, a performance bond protects the obligee's interest, not the parties performing work or furnishing materials.[9] In the event that the work is incomplete or performed in an unsatisfactory or unworkmanlike manner, the project owner may make a claim against the performance bond. "[T]he surety [then] has the option of completing performance or of assuming the liability for the obligee's costs" to complete performance.[10]

Payment bonds, on the other hand, are provided to ensure payment to parties furnishing labor or materials.[11] In the event of non-payment, a covered subcontractor or supplier can assert a claim against the surety on the payment bond and the surety is responsible for paying certain unsatisfied debts of its principal and has no responsibility related to the completion of the project.[12]

## Federal Miller Act and § 107.170

The federal Miller Act,[13] originally enacted as the Heard Act in 1893, requires prime contractors on some government construction contracts to post bonds guarantying both the performance of their contractual duties and the payment of their subcontractors and material suppliers. Section 107.170, RSMo, which has been called the "Little Miller Act," likewise requires general contractors to obtain payment bonds for certain public projects.[14] Their similarity of purpose has led Missouri courts in some contexts to find federal treatment of the Miller Act persuasive in construing § 107.170.[15] But federal cases are not binding in interpreting § 107.170 and sometimes are not followed.[16] Moreover, the Miller Act provides narrower protections than § 107.170.[17]

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## Payment Bond Statute

Section 107.170.2,[18] RSMo imposes a duty on "public entities … in making contracts for public works … exceed[ing] twenty-five thousand dollars, … to require every contractor … to furnish the public entity, a bond with good and sufficient sureties … conditioned for the payment of … materials, incorporated, consumed or used in … such work … and for all labor performed in such work whether by subcontractor or otherwise."

## History and Purpose

Missouri's longstanding policy protects those "who expend labor or" furnish supplies "in making improvements for the benefit of private persons" by allowing a lien upon the improvements.[19] These are known as "mechanics' and materialmen's liens."[20] Public policy considerations, however, prohibit liens on public improvements.[21] In recognition of the moral obligation to protect material suppliers and laborers, and to enable public entities to secure cheaper labor and materials, Missouri courts recognized a public entity's right to require contractors to provide a surety bond for payment of suppliers and laborers.[22] This right to require a bond was eventually made a statutory duty.[23]

The policy underlying payment bonds is to afford the same protections to those furnishing labor or materials to public entities as mechanic's liens do for private projects.[24] Missouri courts have treated mechanic's liens and public works bond statutes, including the act, as *in pari material*, meaning that: "All consistent statutes relating to the same subject matter are … construed together as though constituting one act."[25] Section 107.170 is intended to protect everyone who would have had a mechanic's lien.[26] It has been held that, to achieve its purpose, the statute must be broadly construed.[27]

Notwithstanding the identity of their underlying policy goals, the protections afforded under § 107.170 are not identical to mechanic's liens. For instance, under § 107.170, employees can recover under the bond double the unpaid wages available under § 290.300 of the Prevailing Wage Act (PWA).[28] Similarly, while mechanic's liens cover all materialmen and laborers no matter how far removed from the general contractor, under § 107.170 bonds need only extend to those who furnish labor or materials to the general contractor or to a subcontractor.[29]

## Public Entities

"Public entity" is defined in § 107.170.1(2) as "any official, board, commission or agency of this state or any county, city, town, township, school, road district or other political subdivision of this state."[30]

Numerous cases apply the requirements of § 107.170 to various departments of the state,[31] counties,[32] cities and towns,[33] and school districts.[34] The statutory payment bond requirements have also been applied to municipal utilities,[35] port authorities,[36] public water supply districts,[37] and housing authorities.[38] While there is no discussion of the term "public entity" in these cases, the foregoing entities would seem to be included under the phrase "political subdivision[s] of the state" found in § 107.170.[39]

The term "agency of this state," which is *not* defined within § 107.170, has been examined and applied in several Missouri cases. In *Redbird Engineering Sales, Inc. v. Bi-State Development Agency,*[40] a material supplier brought a mechanic's lien action against property owned by Bi-State, "a nonprofit corporation [that operates] in the public interest,"[41] relating to the construction of a public transportation facility. After its mechanic's lien claim was dismissed, the material supplier sought damages against Bi-State for its failure to require the contractor to furnish a payment bond pursuant to § 107.170.[42]

The court acknowledged the general rule that "a public building, lot or other public property owned by a traditional governmental body such as a state, county, city or school district and devoted to public use is not subject to a mechanics' lien"[43] and that "the general rule is that the property of a quasi-public corporation which is affected with a public use is not subject to a mechanics' lien."[44] However, the court went on to determine that "[o]nly such property held by a quasi-public corporation for the benefit of the public which can be determined to be reasonably necessary for public use is exempt [from mechanics' liens]."[45]

Because the public transportation facility was determined by the court to be "reasonably necessary for the public use," the court found that the material supplier could not file a mechanic's lien against the property.[46] It next examined the issue of whether Bi-State should have required the contractor to furnish a payment bond.

Since Bi-State did not fit within any of the other categories listed in § 107.170,[47] the court sought to determine whether the term "agency of the state" applied to Bi-State. The court, in applying the "normal and usual" definition of "agent,"[48] found that the term as used in § 107.170 "refers to one who consents with another, the *principal*, for the agent to act on the principal's behalf."[49]

Utilizing this definition, the court determined that Bi-State was an agency of the states of Missouri and Illinois. It reasoned that the authority to contract for the work was granted to Bi-State by a "compact between the states."[50] Additionally, the states identified Bi-State in the compact as an "agency." According to the court, "[t]he legislature knew full well the meaning of the word 'agent' and used it deliberately not just once, but twice in order to further its intent to close every loophole and ensure that Section 107.170 applied to contracts made by agents of the state."[51]

The term "agency of the state" was also examined in *Johnson Controls, Inc. v. Citizens Memorial Hospital District.*[52] In *Johnson Controls*, a subcontractor who had not been paid for certain labor and materials on a public hospital district[53] project filed suit against the district and its directors for failing to require a payment bond. The subcontractor claimed that the hospital district was an "agent of the state."[54]

According to the court, "[w]hen a statute directs performance to an enumerated class it implies that those not enumerated are not included."[55] The court determined that a public hospital district did *not* fit within one of the enumerated classes set forth in § 107.170. In examining the court's decision in *Redbird*, the court noted the statutes relating to public hospital districts do not refer to the districts as agents, as was the case with Bi-State.[56]

The court "conclude[ed] that the public hospital district [was] not an agent of the State," stating

> [w]e find no indication that a hospital district acts on the State's behalf. It is not controlled by the State except to the limited degree in the statute in enacting and allowing such districts … Although … the State did not create it and there is no indication that it acts for the State. It works for the benefit of those in the area who need hospital and medical care.[57]

Thus, because a public hospital district is not an agent of the state, the requirements of § 107.170 do not apply to it.

In *Collins & Hermann, Inc. v. TM2 Construction Company,*[58] the court applied the requirements of § 107.170 to AmerenUE, which is a Missouri corporation "in the business of supplying electric and gas utility service to residents in large portions of the State of Missouri."[59] The plaintiffs, who had furnished labor and materials, brought mechanic's lien claims against AmerenUE, which were dismissed. The plaintiffs then brought claims alleging that AmerenUE should have required its contractor to furnish a payment bond in accordance with § 107.170.

Before determining whether AmerenUE was required to comply with § 107.170, it stated, "[t]he public policy of Missouri, as expressed in Section 429.010 and Section 107.170, is that subcontractors and suppliers are entitled to the protection of either mechanic's liens or payment bonds depending on the nature of the property they improve."[60]

The court next sought to determine whether the phrase "agency of the state" referred to AmerenUE using § 536.010(8), RSMo, which defines "state agency" as "each board, commission, department, officer of other administrative office or unit of the state … existing under the constitution or statute, and authorized by the constitution or statute to make rules or to adjudicate contested cases."[61]

Applying this definition, the court determined that AmerenUE is an "agency of the state" because "AmerenUE is a 'public utility' operated in the public interest and its [power] substations," on which plaintiffs worked, "are reasonably necessary for public use."[62] The court went on to state:

> [w]hile AmerenUE, unlike Bi-State, is an investor-owned utility company, this difference is not an important one in terms of the public policy behind Section 107.170. AmerenUE is subject to heavy regulation by the PSC and its authority to provide essential utility services to the residents of the State of Missouri derives solely from its regulation by the PSC.[63]

The court also indicated that *Johnson Controls* was distinguishable because public hospital districts are not regulated by the State and "AmerenUE is pervasively regulated by the PSC and its authority to provide electrical services to Missouri residents derives solely from its regulation by the PSC."[64]

## Public Works

Courts have determined that the following qualify as public works:

- improvements to utility company substations;[65]
- asbestos removal from a port authority warehouse;[66]
- construction of water test wells; [67]
- street repairs resulting from work on a natural gas pipeline;[68]
- construction of a shelter and repair garage for public buses;[69]
- "raising streets over railroad tracks with bridges[;]"[70]

- "sewers and grading, curbing, guttering and macadamizing of streets[;]"[71]
- "removal and disposal of garbage[;]"[72]
- "install[ing] and serv[ing] the computer network equipment" in a public entity;[73] and
- demolishing buildings condemned by a governmental body.[74]

In 1995, an amendment to § 107.170 defined "public works" as "the erection, construction, alteration, repair or improvement of any building, road, street, public utility or other public facility owned by the public entity." Before that, no definition was provided.

Although one court has held that the 1995 definition narrows the statute's application to projects "owned" by a public entity rather than to "fixed works constructed for public use or benefit paid for wholly or in part out of public funds," it did not apply the narrower definition because the project at issue pre-dated the amendment.[75] Notwithstanding the narrower definition, courts continue to analyze the meaning of "public works" in the context of the statute's purpose of providing laborers and material suppliers protection of either a mechanic's lien or payment bond.[76] Accordingly, any interpretation urged upon the court that deprives laborers or material suppliers the protection of either a mechanic's lien or a payment bond will likely be rejected.

It has also been held that the Missouri Highways and Transportation Commission's requirement of a permit surety bond in conjunction with issuance of a right of way permit for "incidental work upon … a public right of way" does not make a public work out of a project paid for and owned by a private company, and the permit surety bond does not fall within the provisions of § 107.170.[77]

## Covered Laborers and Material Suppliers

Section 107.170 requires that the payment bond be "conditioned for the payment of any and all materials, incorporated, consumed or used in connection with the construction of such work … and for all labor performed in such work whether *by subcontractor or otherwise.*"[78]

Several "Missouri cases have … recognized that one of the purposes of the Little Miller Act [§ 107.170] 'has … been to afford to those who furnish labor or material on public work the same measure of protection as is afforded by the mechanic's lien law where the building or improvement is not of a public character."[79] In spite of this purpose, the protection of payment bonds required by § 107.170 has *not* been extended by Missouri courts to cover *all* those that would otherwise have a right to file a mechanic's lien were the project not a public project.[80] The phrase "by subcontractor or otherwise" has been interpreted more narrowly to cover only those parties that have a contract to furnish labor or materials to a subcontractor or the general contractor.[81]

According to the court in *City of St. Louis ex. rel. Stone Creek Brick Co. v. Kaplan-McGowan Co.,*[82] the test to determine whether a party was covered under the statutory bond was one of privity of contract:

> When the principal contractor and his surety execute their bond they know that certain portions of the work either will or may be let out to subcontractors, and, if so, that it will or may be necessary for certain materialmen and laborers to furnish material and perform labor in the prosecution of those portions of the work thus sublet. Consequently it follows that *one who furnish* [sic] *material on the job or performs labor on the job for a subcontractor is in privity of contract and within the protection of the bond*, in that he furnishes his material or performs his labor at the instance of the subcontractor, who is of course in direct privity with the principal contractor.[83]

However, the *Stone Creek* court found the privity ended with those supplying labor or materials to a subcontractor, stating:

> *[O]ne who supplies material to a materialman, who in turn supplies the subcontractor, is to be relegated to the status of a stranger to the original contract*, since such person's contract or undertaking is neither with the principal contractor, nor with one who, as in the case of a subcontractor, deals directly with the principal contractor. Such person's contract is therefore but indirect and collateral to the original contract, and *for want of privity does not serve to bring such party within the purview of the principal contractor's bond.*[84]

Thus, parties supplying labor or materials to a sub-subcontractor are not permitted to recover against the statutory payment bond because they are too remote from the original contractor.[85]

As part of its analysis, the court in *Kansas City ex rel. Lafarge North*

*America, Inc. v. Ace Pipe Cleaning, Inc.* also examined the concept of "telescoping." "Telescoping … looks to the substance of contractual relations[hips] between the parties rather than the form."[86] The material supplier claimed that while it furnished materials to a sub-subcontractor, it was really furnishing them to the subcontractor. Based on this, it requested the court to determine that it was a party protected by the statutory payment bond. While the court did not adopt the term "telescoping," it did recognize the concept by indicating that the trial court must conduct "a common sense factual inquiry … when determining the number of tiers separating the general contractor and a claimant on a statutory lien bond under the Little Miller Act."[87] However, the court ultimately rejected the supplier's argument and concluded that it was too far removed from the general contractor to be an eligible claimant on the statutory payment bond. Thus, the statutory payment bond only extends protection to those parties furnishing labor or materials to the general contractor or to a subcontractor[88] and not to a sub-subcontractor.[89]

In *Kansas City N.O. Nelson Co. v. Mid-Western Construction Company of Missouri, Inc.*,[90] the court also determined that a supplier that had furnished materials to a sub-subcontractor was not entitled to recover against a payment bond. The court found that the right of a party furnishing materials or labor to recover under a contractor's bond is one based on the contractual concept of a third party beneficiary. Thus, "[b]efore a supplier is found to be a third-party beneficiary to the bond, it must be shown that the surety contract was entered into with the intention to benefit such third parties."[91]

In *Nelson*, the court determined that the terms of the bond at issue, which was provided by a subcontractor on the project, clearly limited the surety's obligation to claimants having a direct contract with the subcontractor. Since the claimant did not have a direct contract with the subcontractor, but rather with a sub-subcontractor, it was not an intended third party beneficiary of the payment bond.[92]

Thus, if a statutory bond is written more narrowly than § 107.170, the requirements of the statute will be read into it.[93] If the statutory bond is written more broadly than the statute[94] (or if the payment bond was provided on a private project), the third party beneficiary analysis set forth in *Nelson* should be used to determine if a party is entitled to assert a claim against the bond.[95]

> "Not withstanding . . . underlying policy goals, the protections afforded under § 107.170 are not identical to mechanic's liens."

Additionally, Missouri courts have determined that a party who did not complete its work was entitled to make a claim against a statutory payment bond.[96] Furthermore, laborers have been found to have a claim against a statutory payment bond.[97] However, a bank that lent funds for the furnishing of materials or the supplying of labor is not a "*subcontractor or otherwise*" protected by the terms of § 107.170.[98]

## Duties of Public Officials

Section 107.170.2 requires public entities to require every contractor to furnish the bond on projects exceeding $25,000. Section 107.170.1(2) defines "public entity"[99] as "any official, board, commission or agency" of the state or political subdivision. The statute, thus, imposes an absolute duty on the responsible public officials[100] to require that contractors obtain a payment bond; failure to do so subjects them to personal liability to those who thereby suffer a loss.[101]

Official immunity shields public officials from tort liability for discretionary acts, but not for ministerial duties.[102] "A discretionary act 'requires exercise of reason … and discretion in determining how or whether an act should be done or [a] course pursued.'"[103] Ministerial duties are "of a clerical nature which a public officer is required to perform upon a given set of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to the official's own judgment or opinion concerning the propriety of the act to be performed."[104]

Applying these principles to § 107.170, courts have held board members personally liable when they breach their duty to require a bond.[105] Similarly, individual commissioners of state agencies[106] or counties,[107] as well as utility board members,[108] have been held personally liable for failure to require a bond.

On the other hand, because § 107.170 prescribes no rules for "determining whether a bond is 'good and sufficient,' the decision whether to accept a particular bond [is] discretionary" and, in such instance, board members are entitled to immunity.[109] So, where a board obtains a bond from a company that behaves as a normal bonding company, it is protected by official immunity.[110] But the board has a responsibility to verify the surety's existence.[111]

As regards school board members, § 107.170.4 provides that they need not independently confirm the existence or solvency of any bonding company if the contractor represents to the members that the bonding company is solvent and that the representations made in the purported bond are true and correct. This protection does not apply, however, to board members with actual knowledge of the bonding company's insolvency or who have not acted in good faith.

It sometime happens that the entity has no liability for failure to obtain the bond, but individual officials do. A board that passes an ordinance incorporating the bond requirement into a contract cannot be held liable because it had fulfilled its ministerial duty.[112] As a legislative body, it has limited power to ensure compliance with the ordinance. The mayor, who has general supervisory powers over "executive affairs … and sees that each officer and employee performs his duty and that all … ordinances … are enforced[,]" and the comptroller, who supervises the city's fiscal affairs, are differently situated, however, and each can be held liable for breaching their ministerial duties in failing to require a payment bond on a construction project.[113]

For the duty to arise, there must be a contract for the construction project. A commissioner involved in the request for bids but who did not engage the contractor is not personally liable because there was no enforceable contract for a public work.[114] Nor are current public officials liable when they were not in their positions when the contract was entered.[115]

*Indemnity of Public Officials.* Section 107.170.5 provides that a public entity may defend, save harmless and indemnify any of its officers and employees against any claim or demand, whether groundless or otherwise, arising out of an alleged act or omission under § 107.170, excepting malfeasance in office or willful or wanton neglect of duty.

## Covered Materials and Labor

*Materials.* According to § 107.170.2, the payment bond is to ensure "payment of any and all materials, incorporated, consumed or used in connection with the construction of such work." Only those materials that actually went into the improvements, or were consumed or destroyed in the construction work, fall within the protection of a statutory payment bond.[116] However, a claimant on a statutory bond "is not limited [in its recovery for materials] to what [can] be recovered under the mechanic's lien" statutes.[117]

To recover, a material supplier is required "to produce evidence from which the trial court could reasonably find or infer that it sold or delivered materials … and that those materials were incorporated or consumed in the … project, and that it had not been paid for those materials."[118] Delivery of materials to the project site has been found to be prima facie evidence that they were used in the project and shifts the burden of proof to the party defending the claim.[119]

However, even where the materials are not delivered by the supplier to the project site, the supplier can recover if the amounts and kinds of materials sold to a party furnishing work on the project were required as part of the project and there is no evidence that the materials were supplied by others.[120] Additionally, failure to allocate materials furnished on account to specific projects is not necessarily fatal to recovery.[121] And, commingling of materials sold for one project on invoices or ledgers with other projects will not defeat a claim where the items can be properly identified and separated.[122] This is because a claim for materials on a statutory payment bond "may be established by circumstantial evidence."[123] A supplier that has furnished materials for use in a statutory bond project is entitled to recover the reasonable value of the materials.[124]

Items that are used or consumed in construction – such as gasoline, oil and grease,[125] and caps and dynamite,[126] – have been found to fall within the protections of a statutory bond.[127] Items such as hay, oats and salt provided to animals working on the job[128] and "tools, machinery and appliances which survived the performance of the work and could be used in other contracts" are not covered under the bond.[129] Additionally, installment payments for capital equipment purchased for use on the project have been found to be outside of the protection of the bond,[130] but amounts expended in renting[131] or repairing equipment on a project have been found to be covered by the bond.[132]

When applying payments received by a contractor, the material supplier is required to apply the payment to materials purchased for the statutory bond project if it knows or should know that the project is the source of the funds being paid.[133] This is true even if the contractor directs the payment to be applied to an open account.[134] However, in *Camdenton Consolidated School District No. 6 of Camden County ex rel. W. H. Powell Lumber Co. v. New York Casualty Company,* the Supreme Court has held that where a material supplier furnished materials and lent funds for labor on the same statutory bond project, it was immaterial whether it applied funds received from the project to repay the loan or to pay for the materials.[135]

*What Constitutes Labor.* Section 107.170 provides protection under a statutory bond "for all *labor* performed in such work."[136] "'[T]he evident purpose of the act' [is] to give a right of action on the bond of the contractor *to every person who would have a right to file and enforce a mechanic's lien on the building contracted for were public buildings not exempt from the operation of the mechanic's lien law*."[137] "To that end, the term *labor* as well as the public works bond statute itself, 'like mechanic's lien statutes, should be liberally construed to carry out its purpose.'"[138]

Based on the foregoing, the courts have found that a claimant has the right to sue for labor furnished by those it hired, including subcontractors.[139] The court has also determined that the term "labor" is broad enough to include architectural and engineering services.[140]

Laborers can sue on a statutory payment bond to recover amounts due under the Prevailing Wage Act (PWA).[141] The PWA requires contractors on public works projects to pay workmen the "prevailing hourly rate of wages."[142]

> This "prevailing hourly rate of wages" includes all the fringe benefit payments generally paid in the locality where the work is being performed pursuant to its definition in Section 290.210(5). When the "prevailing hourly rate of wages," including the appropriate fringe benefits, are not paid to a workman, that workman is entitled to bring suit for double damages under Section 290.300.[143]

In examining bond claims relating to prevailing wages, the courts have determined "that the liability of a surety is coextensive with [the liability] of its principal."[144] "Thus, the rights and liabilities of the surety are measured by those of the principal, absent some agreement to the contrary."[145] Accordingly, workers can recover double damages (and attorneys' fees) pursuant to the PWA on a claim against a payment bond for unpaid or underpaid wages and fringe benefits together with attorney's fees.[146]

Additionally, the PWA requires *all* bonds for public works projects to require the payment of prevailing wages, not just payment bonds.[147] In *Thomas v. A.G. Electrical, Inc.*,[148] the court found that workmen could assert a claim against a performance bond that failed to mention prevailing wages even though there was a separate statutory payment bond. According to the court,

> the plain language of the Prevailing Wage Act mandated that all contractors' bonds guarantee the payment of the prevailing wage.… Whether the bonding company has satisfied its obligation under the general public-works bonding requirements of Section 107.170 by issuing the Payment Bond is irrelevant to determining whether the Performance Bond is subject to the bonding requirements of the Prevailing Wage Act… The Performance Bond at issue here covers the workers' prevailing-wage claim.[149]

Thus, even if the bond does not require the payment of prevailing wages, the bond will be interpreted to include such a requirement.

## Damages Allowed

Under § 107.170.2, payment bonds cover "any and all materials, incorporated, consumed or used in connection with the construction of such work, and all insurance premiums, both for compensation, and for all other kinds of insurance, [on] said work, and for all labor performed in such work whether by subcontractor or otherwise." Covered materials presumably still include those items delineated before the 1995 amendment.[150]

Payment bonds have been held to cover the cost of repair of capital equipment (e.g., a crane),[151] extra costs incurred in finishing a job on time due to a subcontractor's negligence,[152] amounts due under the Prevailing Wage Act[153] and the "Public Works Prompt Pay Statute,"[154] cost of labor and materials,[155] cash loans to a subcontractor to procure mandated insurance,[156] and rental equipment (e.g., excavator).[157]

Although bonds issued pursuant to § 107.170 will be construed, at minimum, to incorporate the statute's terms, they may grant broader coverage. In such instances, normal rules of construction apply to determine coverage. Accordingly, where the bond covers all of the principal's obligations rather than only payment of materials and labor, it is "broad enough to cover payment of attorney's fees owed pursuant to the principal's subcontract."[158]

*Interest.* The statute does not require that bonds cover interest.[159] Thus, public entities have no liability for interest when sued for failure to obtain a payment bond.[160] Nevertheless, it has been held that because a surety's liability "for interest is coextensive with its principal[,]" interest accrues on a payment bond "from the date of [an] interlocutory judgment[,]"[161] or for interest due under the PWA.[162] Interest will also be allowed against the surety for recovery for its vexatious refusal to pay. [163]

*Loans.* Loans to contractors to pay for labor and materials are not covered by payment bonds because the act protects those supplying labor and materials, not entities that lend money.[164] A supplier who advances funds to the principal, however, is entitled to apply payment to funds advanced rather than to materials supplied.[165]

*Wage Penalties*. Sureties are not liable for penalties for failing to pay wages under § 290.110 because the surety is liable for labor and materials, not wages, and § 290.110 deals with employer-employee relationships.[166]

*Deductions.* Contractors who failed to finish work are entitled to the reasonable value of their work, less damages for non-completion.[167]

*Punitive Damages.* There is some support for prohibiting an award of punitive damages against public officials in claims under § 107.170 on the basis that the purpose is only to provide the relief available by mechanic's liens.[168]

## Vexatious Refusal

Section 375.420 permits recovery of the amount due under the bond, plus a penalty, interest and attorney fees if an insurer refuses to pay without reasonable cause or excuse.[169] The statute is penal in nature, with the purpose of deterring insurers from "vexatiously refus[ing] to pay" and, therefore, narrowly construed.[170] Section 375.420 applies to surety bonds.[171]

To recover "an award for vexatious refusal to pay," claimant must show that the refusal "was willful and without reasonable cause, as the facts would appear to a reasonable and prudent person."[172] A basis for showing such conduct is the surety's failure to investigate the matter, examine the claim's merits, or attempt to negotiate a settlement.[173] A surety's letters threatening suit or claiming inflated costs may evidence vexatious refusal.[174]

A claimant's demand in excess of the bond does not absolve a surety of vexatious conduct where the surety otherwise does nothing.[175] Nor does the presence of a litigable issue preclude a vexatious penalty where the evidence indicates the insurer's recalcitrant attitude.[176] Specific evidence of vexatious refusal is not needed; "the jury may find [it] upon a general survey and consideration of the whole … circumstances."[177] A surety's "defense of good faith" denial is limited to situations where there are "reasonable grounds for believing the law will preclude recovery" … "an 'honest error' cannot rest on a "question … definitely settled" to the contrary.[178]

On the other hand, a surety may insist upon a judicial determination of an open question of coverage without incurring the statutory penalty.[179] And, a "surety for a solvent principal need not independently investigate a claim on a bond[,]" but may rely upon a reasonable defense put forth by the principal to avoid a claim of vexatious refusal.[180] A surety cannot be found vexatious where there is a debatable question of applicable law[181] or where it correctly refuses to pay materialmen based upon the joint check rule.[182] Full payment of the amount due defeats a claim for vexatious delay.[183]

Absent evidence of vexatious conduct, a trial court properly directs a verdict for the surety.[184] And, where the claimant obtains and collects a judgment against the principal, it may not proceed against the surety for vexatious damages.[185]

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## Time for Making Claim

*Statute of Limitations.* The statute of limitations applicable to claims against statutory payment bonds is 10 years.[186] Charter provisions attempting to shorten the statute of limitations on payment bond claims are invalid.[187] Additionally, provisions of statutory or non-statutory payment bonds that seek to limit the time a claimant has to file a lawsuit are void.[188] However, the statute of limitations for claims against a bond under the PWA falls within the three-year statute of limitations found in § 516.400.[189]

*Notice Provisions*. Many payment bonds include provisions requiring notice of the claim to be given to the surety and others within 90 days of the last date that the contractor provided work, labor or materials. In examining additional conditions included in statutory payment bonds, courts have found that § 107.170 "makes no effort to regulate procedure and contemplates the possibility that the bond may embody conditions in addition to those specifically required."[190] Indeed, § 107.170 does not impose any limitation in the giving of notice.[191] Thus, "[t]he contracting parties had the authority to incorporate such a provision in the instrument as long as it was reasonable and did not thwart the purpose and intent of the statute."[192] Claims that notice provisions violate § 431.030, which prohibits contract provisions that would otherwise modify the applicable statute of limitations, have been rejected.[193]

Similar to mechanic's liens, the 90 days is calculated from the date that the claimant last furnished labor or materials, excluding corrective work.[194] Replacing a defective piece of material does not extend the time for giving notice.[195] Also, "furnishing small additional items … to circumvent … notice provision[s]" does not extend the time to provide notice.[196] "[F]urnishing labor or material necessary for the proper performance of the contract done in good faith at the … contractor's or owner's [direction] does extend the time."[197] "[W]hen the labor or material [is] furnished" to "complet[e] the contract and not merely a gratuity or act of … accommodation," then the time to provide notice is extended.[198] However, the provision of the work or material will not extend the time if it is trivial.[199]

While notice provisions have been found in several cases to be valid and enforceable,[200] the court has recently determined that a surety *cannot* avoid liability under a payment bond due to late notice absent a showing of prejudice.[201] This is because "the function of a notice requirement is to protect the insurer from being prejudiced."[202] Thus, if the surety's "interests have not been harmed by late notice, [then] the reason behind the notice condition in the policy is lacking."[203] Thus, absent a showing of prejudice by the surety, it cannot defeat its liability because of late notice.[204]

## Statute of Frauds

Contracts with public entities must be authorized by law and must be in the form of a signed writing to be valid and enforceable.[205] "[A]ny contract made in violation of this requirement is void."[206] However, "the invalidity of the contract between the public body and the contractor does not defeat the right of" a party furnishing labor or material "to recover on a [statutory payment] bond, at least where the claimant had no knowledge of the invalidity of the contract."[207] Additionally, the contractor and the surety cannot defend a payment bond claim by claiming that the contract with the public entity is invalid or not in accordance with § 432.070.[208]

## Sureties' Rights and Obligations

"[A] surety which executes a performance [or payment] bond on a construction contract, and which thereafter is required to pay unpaid labor or material claims, has an equitable right of subrogation and an equitable lien on funds *retained* by the owner."[209] The surety's "right of subrogation and an equitable lien … is superior to the right of one who takes by assignment from the contractor after the execution of the bond."[210] This is because "the surety's equitable lien relates back to the date of its bond."[211]

"[T]he surety is subrogated to the rights of the owner or obligee, who could, on default, continue to retain funds which it had not paid to the contractor, forfeit his right thereto, and apply them to payment of claims on the job."[212] Thus, "[t]he surety … steps in the shoes of the owner … to the extent of the surety's performance" under the applicable bond.[213]

Since "the equitable lien [is] created by the courts[, it] does not arise from the consent of the parties or by their intent, but by operation of law."[214] The surety's equitable lien is not a security interest or a financing arrangement, and the surety is not required to file a financing statement for the retained earnings on the project.[215] Additionally, the surety's equitable lien is not subject to § 60(a) of the Bankruptcy Act.[216]

"[T]he equitable lien [of a surety] attache[s] to progress payments earned, as well as to a[ny] specifically retained percentage"[217] free from setoff by the public entity.[218] However, the equitable lien only pertains to funds that are unpaid and in the hands of the owner or placed under the control or joint control of the surety.[219] Thus, "money paid unconditionally to a contractor for work done under the contract becomes his 'to do with as he

pleases' and is 'freed of any equity or right of subrogation in the surety.'"[220]

A surety does "not become entitled to … *earned, but unpaid progress payments,* until it [becomes] obligated to and [does] pay labor and materials claims on the construction project."[221] Therefore, a surety's equitable lien remains potential until there has been a "failure of performance" by the contractor.[222] Additionally, the surety has the burden to show that it paid out funds of its own in "performance of its contract of suretyship," thereby entitling it to earned and unpaid funds on the project.[223]

Several Missouri cases have examined the priority of claims between various parties and sureties. In *Massachusetts Bonding & Insurance Co. v. Ripley County Bank,*[224] a contractor borrowed money from a bank and agreed to assign the sums received on a school contract to the bank. The surety paid various claims on the project as a result of the contractor's default. In spite of the foregoing, the school paid part of the retainage to the bank, rather than the surety. The surety filed a lawsuit against the bank claiming that it had a superior right to the funds. Judgment was entered in favor of the surety and against the bank for the amounts paid by the school.[225]

In *U.S. Fidelity & Guaranty Co. v. Missouri Highways & Transportation Commission,*[226] the court held that a state commission had no right to setoff against retainage held from progress payments after the surety paid to complete the construction project. The court determined that the surety "'becomes subrogated not only to the rights of the prime contractor but to the government.' It 'has the right to the accumulated funds free from setoff by the government.'"[227] In *Kansas City v. Tri-City Construction Co.,*[228] the court determined that a surety was entitled to earned but unpaid progress payments on a construction project when the contractor sent a letter to the city directing all future payments be made to the surety.

*Rules of Construction.* "The rule that sureties are favorites of the law" does not apply to a surety in the business of making surety bonds or contracts for cash.[229] Such contracts are construed "under the rules applicable to ordinary contracts."[230] "The intention of the parties is vital[,]" and that must "be gathered from the four corners of the instrument" using "ordinary rules of construction."[231] Where the form has portions that are typewritten and handwritten and contains a conflict, typing prevails over printing, and handwriting prevails over typing.[232] Where the conflict is merely apparent, differences must be reconciled if possible, giving reasonable interpretation to all terms.[233] The construction the parties place upon a contract may aid its interpretation.[234]



Bonds issued pursuant to § 107.170 are construed as if the statute's terms are written into it.[235] "Ambiguit[ies] are construed most strongly against the surety."[236]

## Making a Claim on Bond

*Parties*. Under § 522.300, "[e]very person furnishing material or … labor … as an individual or as a subcontractor for [a] contractor" may sue on the bond in the name of the public entity "for his use and benefit."[237] "[I]n such suit, the plaintiff [must] file a copy of [the] bond, certified by the party" who has charge of it. Unless the bond's execution is "denied under oath, [it shall] be prima facie evidence of the [original bond's] execution and delivery."[238] Similarly, under Rule 55.13 where a party fails to specifically deny execution of a bond, its execution stands confessed.[239]

Where liability is joint and several on the surety bond, a claimant may sue surety or principal or both.[240] A surety may require a party "to commence suit against the principal debtor[,]"[241] and "[i]f … suit is not commenced within thirty days …, and proceeded in with due diligence, … to judgment and execution, [the] surety … exonerated from liability to the person so notified."[242] A surety may also intervene to challenge the awarding of funds on which it has an equitable lien.[243]

*Pleading*. In a suit against public officials, the petition must "allege that recovery cannot be made against the contractor[,]" or the contractor must be party as well.[244]

To place in issue the bond's execution, the surety must make a specific denial directed to that particular allegation; a general denial confesses the bond's execution.[245]

A contractor's payment in full of a subcontractor is no defense to a material supplier's claim on the bond.[246] Failure to comply with notice requirements is properly pled as an affirmative defense,[247] as is the claim the contractor granted an unauthorized extension of time to make demand.[248]

*Proof*. An admission by a contractor is binding on the surety, and the contract amount is prima facie evidence of the value of work.[249] A judgment against a contractor, however, does not bind public officials who are not parties to the suit.[250]

*Default*. In a claim for vexatious refusal, interest accrues from the date of default against the principal, not from the date of judgment against the surety.[251]

## Conclusion

Because § 107.170 provides an important remedy for material suppliers and workmen and creates liability for public officials, and because it contains complex, technical requirements for its enforcement, attorneys representing public entities, contractors and subcontractors should possess a knowledge of its workings.

## Endnotes

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3 Among those are the Missouri Public Prompt Payment Act, § 34.057, RSMo 2000; Prevailing Wage Act ("PWA"), §§ 290.210-290.340, RSMo Supp. 2013; construction safety training, § 292.675, RSMo Supp. 2013; bid requirements, § 34.040, RSMo Supp. 2013; preference for Missouri products, § 34.070, RSMo Supp. 2013; statute of frauds, § 432.070, RSMo Supp. 2013; nonresident employers-bonding requirements, § 285.230, RSMo Supp. 2013; and a requirement for Missouri laborers during periods of high unemployment, § 290.550.3, RSMo 2000.

4 Section 290.230, RSMo 2000 requires that public bodies contracting for public works specify in their call for bids and contracts that not less than the prevailing hourly wage be paid to workmen.

5 See *Bowers v. Kansas City Pub. Serv. Co.,* 41 S.W.2d 810 (Mo. 1931) (laws existing at time of contract affecting "its validity, performance, enforcement, or discharge are as much a part of the contract" as express terms). *Id.* at 812-13.

6 Payment and performance bonds are indemnity bonds, which differentiates them from insurance policies. A party purchasing a payment or performance bond for a construction project is typically required to sign an agreement whereby they agree to indemnify and defend the surety (the party furnishing the bond) for any claims that are paid against the bond. This differs significantly from claims against an insurance policy. Typically, an insured is not required to reimburse the insurance company for payments made on claims (except to the extent of any deductible).

7 *Miller-Stauch Constr. Co. v. Williams-Bungart Elec., Inc.,* 959 S.W.2d 490, 494 (Mo. App. W.D. 1998).

8 *Id.* at 494.

9 *Stahlhut v. Sirloin Stockade, Inc.,* 568 S.W.2d 269 (Mo. App. W.D. 1978) (subcontractor could not assert claim for unpaid work against performance bond because it was provided for the benefit of the owner).

10 *Miller-Stauch,* 959 S.W.2d at 494.

11 *Id.*

12 *Id.*

13 40 U.S.C. §§ 3131-3134.

14 *Lafarge,* 349 S.W.3d 399.

15 *Transamerica*, 633 S.W. 2d 238; *First State Bank v. Reorganized Sch. Dist. R-3,* 495 S.W.2d 471 (Mo. App. S.D. 1973); *Pub. Water Dist. No. 3*, 708 S.W.2d 190, 191-93 (the Miller Act favorably compared to § 107.170 in determining rental of construction equipment covered by payment bond).

16 *Bertolino*, 963 S.W.2d 331 (applying joint check rule to claim under § 107.170).

17 *Finch,* 901 F. 2d 665 (§107.170 covers repairs whereas Miller Act protects only "labor and materials").

18 Section 107.170, RSMo Supp. 2013.

19 *City of St. Louis ex rel. Glencoe Lime & Cement Co. v. Von Phul,* 34 S.W. 843, 844 (Mo. 1896).

20 What is hereinafter referred to a "mechanic's lien" is found in § 429.010, RSMo Supp. 2013.

21 *Glencoe Lime*, 34 S.W. at 844. See *Home*

*Bldg. Corp. v. Ventura Corp.,* 568 S.W.2d 769 (Mo. banc 1978). (But once a mechanic's lien attaches, a public authority's acquisition of the tract does not destroy the lien.) *Id.* at 776.

22 34 S.W. at 845.

23 *Hydraulic Press Brick Co. v. School Dist. of Kirkwood*, 79 Mo. App. 665 (1899).

24 *Mo. Dept. of Transp. ex rel. On Point Contractors, LLC v. Aura Contractors, LLC,* 391 S.W.3d 11, 15 (Mo. App. E.D 2012); *Layne, Inc. v. Moody,* 956 S.W.2d 325 (Mo. App. W.D. 1997) (*Layne II)*; *Layne, Inc. v. Moody,* 886 S.W.2d 115 (Mo. App. W.D. 1994) (*Layne I)*; *Energy Masters Corp. v. Fulson,* 839 S.W.2d 665 (Mo. App. W.D. 1992); *Frank Powell Lumber Co. v. Federal Ins. Co.,* 817 S.W.2d 648 (Mo. App. S.D. 1991).

25 *Collins & Hermann, Inc. v. TM2 Constr. Co.,* 263 S.W.3d 793, 798 (Mo. App. E.D. 2008), *citing Energy Masters,* 839 S.W.2d 665, 669.

26 *Id.*

27 *Finch Equip. Corp. v. Frieden,* 901 F.2d 665, 667 (8th Cir. 1990); *Maurer v. Werner,* 748 S.W.2d 839 (Mo. App. E.D. 1988).

28 *Board v. Eurostyle, Inc.,* 998 S.W.2d 810 (Mo. App. S.D. 1999).

29 *Kansas City ex rel. Lafarge N. Am., Inc. v. Ace Pipe Cleaning, Inc.,* 349 S.W.3d 399, 406-07 (Mo. App. W.D. 2011), citing *City of St. Louis ex rel. Stone Creek Brick Co. v. Kaplan-McGowan Co.,*108 S.W.2d 987, 991 (Mo. App. E.D. 1937).

30 Section 107.170 was amended in 1995. However, "[u]nder the new version of § 107.170, all of the entities that had a duty to require a bond under the older version of the statute are included in the term 'public entity.'" *Van Sharp v. Power Line Consultants, LLC*, No. 1:08CV76 CDP, 2008 WL 4596152 (E.D. Mo. Oct. 14, 2008 ). Thus, the modification has had no impact on the way that the term "public entity" has been interpreted by the courts.

31 *Bonney v. Envtl. Eng'g, Inc.,* 224 S.W.3d 109 (Mo. App. S.D. 2007) (applying the requirements of § 107.170 on a state prison project); *Layne II* (requirements of § 107.170 applied to the Department of Natural Resources); *State ex rel. Fager & Friesen Ins. Agency v. Storms-Green Constr. Co.*, 382 S.W.2d 812 (Mo. App. W.D. 1964) (§ 107.170 applied to Missouri Highways Commission); *State ex rel. Francesconi v. Aetna Cas. & Surety Co.,* 350 S.W.2d 418 (Mo. App. W.D. 1961) (applying § 107.170 to State Department of Public Health and Welfare).

32 *Nat'l Oil & Supply, Inc. v. Vaughts, Inc.,* 856 S.W.2d 912 (Mo. App. S.D. 1993); *County of Audrain ex rel. First Nat'l Bank of Mexico v. Walker*, 155 S.W.2d 251 (Mo. App. E.D. 1941).

33 *Lafarge*, 349 S.W.3d 399; *City of Kansas City ex rel. Jennings v. Integon Indem. Corp.*, 857 S.W.2d 233 (Mo. App. W.D. 1993); *Maurer,* 748 S.W.2d 839; *City of St. Louis ex rel. Stone Creek*, 108 S.W.2d 987.

34 *Thomas v. A.G. Elec., Inc.,* 304 S.W.3d 179 (Mo. App. E.D. 2009); *Jerry Bennett Masonry, Inc. v. Crossland Constr. Co., Inc.*, 171 S.W.3d 81 (Mo. App. S.D. 2005); *Bd. of Educ. ex rel. Bertolino v. Vince Kelly Constr. Co.*, 963 S.W.2d 331 (Mo. App. E.D. 1997); *S & W Cabinets, Inc. v. Consol. Sch. Dist. No. 6 of Jefferson Cnty.*, 901 S.W.2d 266 (Mo. App. E.D. 1995); *George Weis Co. v. Dwyer*, 867 S.W.2d 520 (Mo. App. E.D. 1993) (*George Weis I)*; *Energy Masters Corp. v. Fulson,* 839 S.W.2d 665 (Mo. App. W.D. 1992); *Reorganized Sch. Dist. R-3, Potosi ex rel. Ahrens & McCarron, Inc. v. L. D. Compton Constr. Co.*, 483 S.W.2d 674 (Mo. App. E.D. 1972); *Rupard Asphalt Co. v. O'Dell*, 382 S.W.2d 832 (Mo. App. W.D. 1964); *Camdenton Consol. Sch. Dist. No. 6 of Camden Cnty. ex rel. W. H. Powell Lumber Co. v. New York Cas. Co.*, 104 S.W.2d 319 (Mo. 1937).

35 *Van Sharp v. Power Line Consultants, LLC*, No. 1:08CV76 CDP, 2008 WL 4596152 (E.D. Mo. Oct. 14, 2008 ).

36 *Bellon Envtl. Co. v. Port Auth.*, 956 S.W.2d 906 (Mo. banc 1997). In *Bellon*, the Court found the directors of the Port Authority liable for failing to require a bond on property that was leased by it to another party.

37 *Public Water Supply Dist. No. 3 ex rel. Victor L. Phillips Co. v. Reliance Ins. Co.*, 708 S.W.2d 190 (Mo. App. W.D. 1986).

38 *Housing Auth. of Clinton ex rel. Evans Elec. Constr. Co. v. Baumann*, 512 S.W.2d 436 (Mo. App. W.D. 1974).

39 *See Rizzo v. State*, 189 S.W.3d 576, 579 (Mo. banc 2006); *Jackson Cnty. Pub. Water Supply Dist. No. 1 v. State Highway Comm'n*, 365 S.W.2d 553, 557 (Mo. 1963) (public water supply district is a political subdivision); § 68.010 (port authority is a political subdivision).

40 806 S.W.2d 695, 698 (Mo. App. E.D. 1991).

41 *Ladue Local Lines, Inc. v. Bi-State Dev. Agency*, 433 F.2d 131, 134 (8th Cir. 1970).

42 *Redbird*, 806 S.W.2d at 697.

43 *Id.*

44 *Id.* at 698; *citing River's Bend Red-E-Mix, Inc. v. Parade Park Homes, Inc.,* 919 S.W.2d 1, 4 (Mo. App. W.D. 1996) (natural gas pipelines serving Kansas City and owned by quasi-public entity were reasonably necessary for public use and were exempt from mechanic's liens).

45 *Id.* at 698.

46 *Id.*

47 "…any county, city, town, township, school, road district or other political subdivision of this state[.]" Section 107.170.1(2), RSMo Supp. 2013.

48 *Redbird,* 806 S.W.2d at 700.

49 *Id.* The court cited to a similar definition of agent, that "[a]n 'agent' is, '[o]ne who acts for or in place of another by authority from him; a substitute, a deputy, appointed by a principal with power to do the things which the principal may do.' *Black's Law Dictionary*, 59 (5th ed. 1979)."

50 *Id.* at 698.

51 *Id.* at 700.

52 952 S.W.2d 791 (Mo. App. S.D. 1997).

53 Public hospital districts are formed under Chapter 206 RSMo., which is known as the "Hospital District Law."

54 *Johnson Controls,* 952 S.W.2d at 792.

55 *Id.* at 793.

56 *Id.*

57 *Id. at* 793-94.

58 263 S.W.3d 793 (Mo. App. E.D. 2008).

59 *TM2,* 263 S.W.3d at 794-95.

60 *Id.* at 796. In stating this, the court indicates that the plaintiffs should either have a right to file a mechanic's lien or to assert a claim against a payment bond. Thus, if there is no right to file a mechanic's lien because the property is "for the benefit of the public" or "reasonably necessary for public use," there must be a claim against a payment bond.

61 *Id.* at 797.

62 *Id.* at 799.

63 *Id.*

64 *Id.*

65 *Id.* at 793.

66 *Bellon,* 956 S.W. 2d 906.

67 *Layne II,* 956 S.W.2d 325 (Mo. App. W.D. 1997).

68 *River's Bend,* 919 S.W.2d 1.

69 *Redbird*, 806 S.W.2d 695.

70 *Maurer,* 748 S.W. 2d at 841.

71 *Id.*

72 *Id.*

73 *Nussbaum v. Springfield R-XII Sch. Dist.*, No. 6:10-CV-03405-BCW, 2012 WL 5942480 (W.D. Mo. Nov. 27, 2012).

74 *Maurer,* 748 S.W.2d 839.

75 *Union Pac. R.R. Co. v. St. Louis Marketplace, L.P.,* 212 F.3d 386, 389-90 (8th Cir. 2000).

76 *TM2,* 263 S.W. 3d at 798.

77 *On Point,* 391 S.W.3d at 13.

78 Section 107.170.2 RSMo Supp. 2013. *See C. A. Burton Mach. Co. v. Ruth*, 186 S.W. 737 (Mo. App. S.D. 1916) (Since laborers and materialmen on a public project have no lien, they are under the protection of the bond). *Id.*

79 *Lafarge*, 349 S.W.3d at 405.

80 "There is no dispute that a materialman or laborer can assert and enforce a mechanic's lien in Missouri even if more remote from the original contractor than the tier of sub-subcontractor." *Lafarge*, 349 S.W.3d at 406, citing *Fruin-Bambrick Constr. Co. v. Jones*, 60 Mo. App. 1, 7-9 (1894).

81 *Lafarge,* 349 S.W.3d at 404.

82 108 S.W.2d 987 (Mo. App. E.D. 1937).

83 *Id.* at 991 (emphasis added).

84 *Id.* (emphasis added).

85 *Lafarge*, 349 S.W.3d 399.

86 *Id.* at 408.

87 *Lafarge*, 349 S.W.3d at 410.

88 *City of St. Louis v. Hill-O'Mera Constr. Co.,* 158 S.W. 98 (Mo. App. E.D. 1913) (party contracting with subcontractor in privity and protected by statutory payment bond).

89 *Board of Educ. ex rel. Johnson Heat Regulating Co. v. U.S. Fid. & Guar. Co.*, 149 S.W. 46 (Mo. App. E.D.1912).

90 782 S.W.2d 672 (Mo. App. W.D. 1989).

91 782 S.W. 2d at 678-78. *See Frank Powell,* 817 S.W.2d at 651 (This is because the "[l]iability of a surety is limited to the terms and conditions [of] the bond."). *See also Wiss v. Royal Indem. Co.,* 282 S.W. 164, 165 (Mo. App. E.D. 1926) ("[T]here is no question but that a third party, for whose benefit a bond is made, may enforce the contract in an action prosecuted in his own name").

92 It is important to note that this project was performed on property owned by the Army Corp. of Engineers and, as such, § 107.170 would *not* have been applicable. Additionally, on private projects where there is a payment bond, the court has undertaken a similar review examining the bond to determine whether the claimant is a third party beneficiary. *La Salle Iron Works, Inc. v. L. J. Largen,* 410 S.W.2d 87 (Mo. banc 1966) (supplier of materials was third party beneficiary on private project where bond required payment of all materials and labor), *overruling Uhrich v. Globe Sur. Co*., 166 S.W. 845 (Mo. App. W.D. 1914). In *Ceco Corp. v. Plaza Point, Inc.*, 573 S.W.2d 92 (Mo. App. W.D. 1978), the stove supplier was not found to be a third party beneficiary of the bond because it furnished its materials directly to the owner.

93 If the statutory bond's terms are written more narrowly than § 107.170, the courts read the requirements of the statute into the bond. *Public Water Supply Dist. No. 3*, 708 S.W.2d at 191; *School Dist. of Springfield, R-12 ex rel. Midland Paving Co. v. Transamerica Ins. Co.*, 633 S.W.2d 238, 249 (Mo. App. S.D. 1982); *City of Springfield ex rel Horton v. Koch*, 72 S.W.2d 191, 195 (Mo. App. S.D. 1934).

94 In *Hilton v. Universal Constr. Co.,* 216 S.W. 1034, 1037 (Mo. App. E.D. 1919), the court determined that pubic entities have the "full power and authority to enter into the contract[s] and bond[s]" that are broader than the statutory requirements.

95 *Nelson*, 782 S.W.2d at 678-79.

96 *Francesconi*, 350 S.W.2d at 423 ("A building contractor who is wrongfully forbidden by the owner to carry out his contract was entitled to recover the reasonable value of the work done and materials furnished by him … without diminution by damages suffered by the owner [due to] contractor's failure to complete the contract.").

97 *Thomas*, 304 S.W.3d at 186; *State ex rel. Griffin v. R.L. Persons Constr., Inc*., 193 S.W.3d 424, 426 (Mo. App. S.D. 2006) (workers on public works project may sue on payment bond to recover amounts due under Prevailing Wage Act); *Eurostyle*, 998 S.W.2d 810, 813 (employees of subcontractor could sue the contractor and its surety on the payment bond for subcontractor's failure to pay prevailing wages); *Jennings,* 857 S.W.2d at 236 (laborer has right to recover from payment bond for amounts due under PWA).

98 According to the court in *First Nat'l Bank*, 155 S.W.2d 251, 256,

> This section does not contain a provision to protect any one other than a person furnishing material or performing labor, and does not provide that a person furnishing money with which to pay for material or for the performance of labor shall have a right to sue upon the bond given in conformity with the preceding section.

However, this case could be contrasted with *Camdenton,* 104 S.W.2d 319, 328 (Mo. 1937), where a party supplying materials on a statutory payment bond project also loaned funds on the project that were used by the contractor to pay for labor. The supplier received a payment that was applied almost entirely to repay the loan. The supplier was not paid for the remaining materials and brought a claim against the bond. The surety argued that the payment should have been applied to the materials rather than the loan. However, the court disagreed, finding that it was "immaterial to which account the payment was credited since it is shown…that the case advanced…was used solely to pay for labor performed in the construction of this building and for no other purpose…" Thus, the surety was not entitled to a credit for the payment and the supplier was entitled to recover for the unpaid materials. An analysis of the foregoing led the court in *Fager*, 382 S.W.2d 812, 817, to conclude, "It is apparent that the qualifications of a person to sue on a contractor's performance bond given in connection with public work must be determined on the particular facts and statutory requirements involved in the particular case."

99 This definition was added in a 1995 amendment that made § 107.170 more readable but did not change its meaning. *Van Sharp v. Power Line Consultants, LLC*, No. 1:08CV76 CDP, 2008 WL 4596152 (E.D. Mo. Oct. 14, 2008).

100 Although the statute did not originally provide for personal liability, *Hydraulic Press Brick,* 79 Mo. App. 665 (Mo. App. E.D. 1899), a 1909 amendment imposed the duty on "officials."

101 *Rupard*, 382 S.W.2d 832 (board of education members); *George Weis I*, 867 S.W.2d 520, 522 (school board members); *Energy Masters Corp. v. Fulson,* 839 S.W.2d 665 (Mo. App. W.D. 1992) (directors of school district).

102 *State ex rel. Howenstine v. Roper,* 155 S.W.3d 747, 752 (Mo. banc 2005), abrogated on other grounds by *Southers v. City of Farmington,* 263 S.W.3d 603, 612-13 (Mo. banc 2008).

103 *Green v. Lebanon R-III Sch. Dist.*, 13 S.W.3d 278, 284 (Mo. banc 2000).

104 *S & W Cabinets*, 901 S.W.2d at 268.

105 *Burton*, 186 S.W. at 739.

106 *Layne I,* 886 S.W.2d 115 (Mo. App. W.D. 1994) (Commissioner of Missouri Office of Administration).

107 856 S.W.2d 912 (county commissioners).

108 *Van Sharp v. Power Line Consultants, LLC*, No. 1:08CV76 CDP, 2008 WL 4596152 (E.D. Mo. Oct. 14, 2008) (members of board of municipal utility).

109 *S & W Cabinets*, 901 S.W.2d at 269 (board immune from claim it accepted bond from out-of-state surety that became insolvent).

110 *George Weis Co. v. Dwyer,* 956 S.W.2d 335, 338 (Mo. App. E.D. 1997).

111 *George Weis I*, 867 S.W.2d 520, 522.

112 *Union Pac.,* 212 F.3d 386, 391.

113 *Id.*

114 *Layne II,* 956 S.W.2d 325 (Mo. App. W.D. 1997)

115 *Nussbaum,* No. 6:10-CV-03405-BCW, 2012 WL 5942480, at *3 (W.D. Mo. Nov. 27, 2012).

116 *Public Water Supply Dist. No. 8 v. Maryland Cas. Co.,* 478 S.W.2d 293, 299 (Mo. 1972) (surety was entitled to a credit on claim under bond brought by water district for amounts paid to satisfy claim of material supplier in other litigation); *Wiss*, 282 S.W. 164, 165 (only materials that "actually went into" the work "became a part of it" or were "substantially consumed or destroyed in construction … fall within the protection of [a statutory] bond" and feed for animals did not).

117 *City of Springfield ex rel. Horton v. Koch*, 72 S.W.2d at 194.

118 *Transamerica*, 633 S.W.2d 238, 243.

119 *Koch*, 72 S.W.2d at 194. Under the "'every stick' rule … [w]here there is evidence that the materials forming the basis of the lien were delivered to the respective construction sites pursuant to a contract, the materialman [is] entitled to a lien for those materials consumed in the erection of the structure." *Dave Kolb Grading, Inc. v. Lieberman Corp.*, 837 S.W.2d 924, 932 (Mo. App. E.D. 1992).

120 *Transamerica*, 633 S.W.2d at 245.

121 *Id.* at 242.

122 *C. A. Burton Machinery Co. v. Nat'l Surety Co.*, 182 S.W. 801, 804 (Mo. App. W.D. 1916).

123 *Transamerica*, 633 S.W.2d at 243.

124 *Camdenton*, 104 S.W.2d 319, 330.

125 *State ex rel. Penn Lubric Oil Co. v. Lyle*, 5 S.W.2d 453 (Mo. App. W.D. 1928).

126 *Kansas City ex rel. Kansas City Hydraulic Press Brick Co. v. Youmans*, 112 S.W. 225 (Mo. 1908).

127 *See also Hilton v. Universal Constr. Co.,* 216 S.W. 1034, 1037 (Mo. App. E.D. 1919), where the court considered whether coal used on a construction project and lumber that washed away from the project were covered under a statutory payment bond. The court did not reach the issue as to whether the statute required coverage for these materials because the bond furnished on the project was broader than the terms of the statute. The court did find that the city had the authority to require a bond broader than the terms of the statute.

128 *Wiss*, 282 S.W. 164 (held that "hay, oats and salt" used to feed animals working on project were not recoverable under statutory payment bond). *See Penn Lubric*, 5 S.W.2d at 455-56.

129 *Penn Lubric*, 5 S.W.2d at 455. *See State ex rel. Hernleben v. Detroit Fid. & Sur. Co.*, 21 S.W.2d 494, 495-96 (Mo. App. W.D. 1929).

130 *Public Water Supply Dist. No. 3*, 708 S.W.2d 190, 193.

131 *Id.* at 192. This is because rental payments, as opposed to the equipment itself as a capital item, are wholly consumed or used in the construction project. Rental payments simply represent an increment of the useful life of the rented equipment, and it is perfectly logical to say that these increments are "equipment…consumed or used in connection with the construction of such work."

132 *Finch*, 901 F.2d 665. It should be noted that § 107.170 has been amended and the phrase "repairs on machinery" has been removed from the statute. It was added to the statute "April 4, 1933. ch. 15, 1933 Mo.Laws 179-80. Prior [to its addition], equipment repairs [were determined to be] outside of the scope of the statute." *Id.* at 667, citing *State ex rel. Hernleben v. Detroit Fid. & Sur. Co.*, 21 S.W.2d 494, 495-96 (Mo. Ct. App. W.D. 1929).

133 *Transamerica*, 633 S.W.2d 250, 252.

134 *Transamerica*, 633 S.W.2d 250. In *Campbell Glass & Paint Co. v. Davis-Page Planing Mill Co.*, 110 S.W. 24 (Mo. App. W.D. 1908), the court held that "payments made by an original contractor to a subcontractor, without any application thereof by either party, will be applied to the account of the oldest items of the account." *Id.* at 26.

135 *Camdenton*, 104 S.W.2d 319, 328.

136 *Energy Masters Corp. v. Fulson,* 839 S.W.2d at 667.

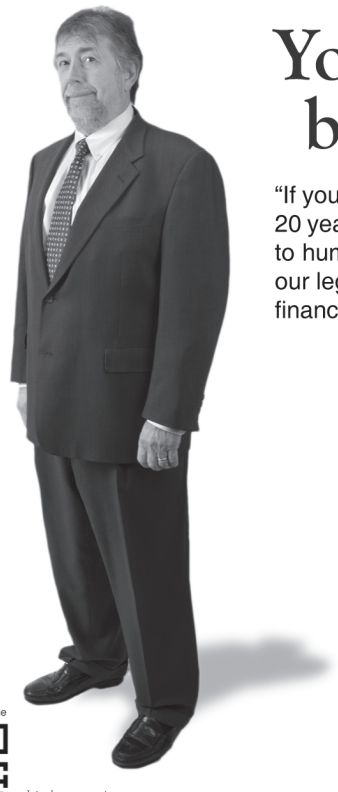
137 *Energy Masters*, 839 S.W.2d 665, 669. *See also L. D. Compton Constr.*, 483 S.W.2d 674, 676 (§ 107.170 "afford[s] laborers and materialmen the same measure of protection in public construction as that afforded by the mechanic's lien law in the private sector.").

138 *Id.*

139 *City of St. Louis ex rel. Sears v. Southern Sur. Co.,* 62 S.W.2d 432, 435 (Mo. 1933).

140 *Energy Masters*, 839 S.W.2d at 670; *see also Layne I,* 886 S.W.2d at 116. The statutory definition for "contractor" specifically excludes "professional engineers, architects or land surveyors." Section 107.170, RSMo Supp. 2013. However, since this term as used in the statute pertains to the party that contracts with the public entity, and not a bond claimant, it would seem that a party furnishing architectural or engineering services to a contractor on a public works project would still fall under the protection of the statutory payment bond.

141 *Griffin,* 193 S.W.3d 424, 426; *Eurostyle,* 998 S.W.2d 810, 813 (employees of subcontractor could sue contractor and its surety on the payment bond for subcontractor's failure to pay prevailing wages) distinguishing *Coates v. U.S. Fid. & Guar. Co.*, 525 S.W.2d 654 (Mo. App. E.D. 1975) and *Bd. of Educ. ex rel. Berto-*

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*lino v. Vince Kelly Constr. Co.*, 963 S.W.2d 331 (Mo. App. E.D. 1997).

142 Section 290.250, RSMo. According to § 290.210 (5), "[p]revailing hourly rate of wages" includes:

> *the basic hourly rate of pay and the amount of the rate of contributions irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan or program, and the amount of the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workmen and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the workmen affected, for medical or hospital care, pensions or retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability or sickness insurance, accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits.*

*See also Bonney,* 224 S.W.3d 109, 121.

143 *Id.* at 122.

144 *Jennings*, 857 S.W.2d 233, 236; *Thomas*, 304 S.W.3d at 185.

145 *Id.*; *Thomas*, 304 S.W.3d at 185.

146 *Bonney*, 224 S.W.3d at 120; *see also Thomas*, 304 S.W.3d at 185, "The Act expressly provides that the workman 'shall have a right of action for double whatever the difference there may be between the amount so paid and the rates provided by the contract [the prevailing hourly rate of wage] together with a reasonable attorney's fee…'" As discussed in *Bonney*, 224 S.W.3d at 121, the "prevailing hourly rate of wages" includes fringe benefits.

147 Section 290.250, RSMo Supp. 2013.

148 *Thomas*, 304 S.W.3d at 186.

149 *Id.* at 186-87.

150 Pre-1995, the statute delineated recoverable damages as "all materials, lubricants, oil, gasoline, grain, hay, feed, coal and coke, repairs on machinery, groceries and food-stuffs, equipment and tools, consumed or used in connection with the construction of such work…." Section 107.170.1, RSMo 1959.

151 *Finch,* 901 F.2d 665.

152 *General Ins. Co. of America v. Hercules Constr. Co.,* 385 F.2d 13 (8th Cir. 1967).

153 *Thomas*, 304 S.W. 3d 179; *Bonney*, 224 S.W.3d 109; *Griffin*, 193 S.W.3d 424; *Eurostyle*, 998 S.W. 2d 810; *Jennings*, 857 S.W.2d 233.

154 *City of Independence ex rel. Briggs v. Kerr Constr. Paving Co.,* 957 S.W.2d 315 (Mo. App. W.D. 1997).

155 *Maurer,* 748 S.W. 2d 839.

156 *Fager*, 382 S.W. 2d 812.

157 *Public Water Supply Dist. No. 3 ex rel. Victor L. Phillips Co. v. Reliance Ins. Co*., 708 S.W.2d 190, 191-93 (Mo. App. W.D. 1986).

158 *Brooke Drywall of Columbia, Inc. v. Bldg. Constr. Enters., Inc.* 361 S.W.3d 22, 28 (Mo. App. W.D. 2011).

159 A*ustin v. Ransdell,* 230 S.W. 334 (Mo. App. W.D. 1921).

160 *Id.*

161 *Howard Constr. Co. v. Teddy Woods Constr. Co.,* 817 S.W.2d 556, 564 (Mo. App. W.D. 1991); *see also Transamerica*, 633 S.W 2d 238 (interest allowed on payment bond without discussion). To the extent interest is allowed on mechanic's lien, this would offer some policy basis to argue for coverage under § 107.170. *Mid-West Eng'g & Constr. Co. v. Campagna*, 421 S.W.2d 229, 234 (Mo. 1967) (mechanic's lien).

162 *Jennings,* 857 S.W.2d 233.

163 *Howard Constr.,* 817 S.W.2d 556.

164 *First Na'tl Bank*, 155 S.W.2d 251.

165 *Camdenton*, 104 S.W.2d 319.

166 *Coates*, 525 S.W.2d 654.

167 *Francesconi*, 350 S.W.2d 418.

168 *George Weis I*, 867 S.W.2d 520, 522 (but case may be self-limited to negligent acts).

169 *State ex rel. Pemiscot Cnty. v. Western Sur. Co*., 51 F.3d 170 (8th Cir. 1995).

170 *Id.*; *Baumann*, 512 S.W. 2d 436.

171 *Bertolino,* 963 S.W.2d 331; *Howard Constr.,* 817 S.W.2d 556; *State ex rel. U.S. Fid.& Guar. Co. v. Walsh*, 540 S.W.2d 137 (Mo. App. E.D. 1976); *Baumann***,** 512 S.W. 2d 436; *Camdenton,* 104 S.W.2d 319.

172 *Howard Constr.,* 817 S.W.2d at 562.

173 *Baumann***,** 512 S.W. 2d 436.

174 *Howard Constr.,* 817 S.W.2d at 563.

175 *Baumann***,** 512 S.W. 2d 436.

176 *Howard Constr.,* 817 S.W.2d at 562.

177 *Id.* at 563.

178 *J. R. Meade & Co. v. Barrett & Co.*, 453 S.W.2d 632, 635 (Mo. App. E.D. 1970).

179 *State ex rel. Pemiscot Cnty. v. Western Sur. Co*., 51 F.3d 170 (8th Cir. 1995).

180 *Id.*; *See Jerry Bennett,* 171 S.W. 3d 81; *General Plywood Corp. v. S. R. Brunn Constr. Co.,* 511 S.W.2d 905 (Mo. App. W.D. 1974).

181 *Camdenton*, 104 S.W.2d 319.

182 *Bertolino*, 963 S.W.2d 331, 333. "The joint check rule provides that," absent a contrary agreement, "if a material supplier receives and endorses a joint check without collecting the amount then due from the maker, the supplier is not entitled to assert a mechanic's lien or payment bond claim." *Id.* at 333.

183 *Walsh*, 540 S.W.2d 137.

184 *Lindsey Masonry Co. v. Jenkins & Assocs.,* 897 S.W.2d 6 (Mo. App. W.D. 1995).

185 *Walsh*, 540 S.W. 2d 137.

186 Section 516.110(2), RSMo 2000; *City of Kansas City ex rel. Copper v. St. Paul Fire & Marine Ins. Co*., 639 S.W.2d 903, 903-04 (Mo. App. W.D. 1982); *see also Hughes Dev. Co. v. Omega Realty Co.,* 951 S.W.2d 615, 617 (Mo. banc 1997), wherein the Court stated, "[T]he ten-year statute of limitations applies to every breach of contract action in which the plaintiff seeks a judgment from the defendant for payment of money the defendant agreed to pay in a written contract."

187 In *St. Paul Fire & Marine,* 639 S.W.2d at 905, the Court invalidated a Kansas City Charter provision stating, "It is incongruous that all suits on contractors' bonds, required as a matter of state policy as expressed by state statutes, § 107.170 and § 522.300, *supra*, should come within the state statute of limitations, § 516.110, *supra*, save that claims upon bonds given in connection with Kansas City contracts are barred if not sued upon within 90 days." Contrast this with the Court's decision in *City of St. Louis ex rel. Atlas Plumbing Supply Co. v. Aetna Cas. & Sur. Co*., 444 S.W.2d 513 (Mo. App. E.D. 1969), wherein the court found a similar provision to be enforceable; *see also City of St. Louis ex rel. Glasco Elec. Co. v. Dunham Constr. Co.*, 138 S.W.2d 707 (Mo. App. E.D. 1940) (Court upheld 90-day statute of limitations in city code citing statute of limitations for mechanic's lien claims for reasonableness); *Kansas City ex rel. Ingalls Stone Co. v. New Amsterdam Cas. Co.*, 269 S.W. 693 (Mo. App. W.D. 1925).

188 Section 431.030, RSMo 2000; *Frank Powell*, 817 S.W.2d 648, 652-53 ("[Section 516.110] is the statute of limitation that is applicable to actions on surety bonds.").

189 *Griffin*, 193 S.W.3d at 429.

190 *Atlas Plumbing Supply Co. v. Aetna Cas. & Sur. Co*., 444 S.W.2d 513, 516.

191 *L. D. Compton Constr.*, 483 S.W.2d 674, 676.

192 *Id.*

193 *Frank Powell*, 817 S.W.2d at 652-53. In *Frank Powell*, the court found that notice provisions found in statutory payment bonds are not attempting to alter the applicable statute of limitations.

194 *L. D. Compton Constr.*, 483 S.W.2d at 677; *S & R Builders & Suppliers, Inc. v. Marler,* 610 S.W.2d 690, 694 (Mo. App. E.D. 1980); *J. R. Meade Co. v. Forward Constr. Co.,* 526 S.W.2d 21, 32 (Mo.App. E.D. 1975).

195 *L. D. Compton Constr.*, 483 S.W.2d at 677, stating,

> If the time to give notice be expanded to include any replacement or repair when a discrepancy is found in material or equipment supplied to a subcontractor, then the original contractor and his surety might be held under the bond for defaulting subcontractors' obligations to their materialmen at any

> time work is done and materials replaced under a warranty, even months or years after the original work has been completed and the materials for which claim is made have been furnished.

196 *School Dist. of Univ. City ex rel. H & M Mech. Corp. v. Reliance Ins. Co.,* 904 S.W.2d 253, 256 (Mo. App. E.D. 1995).

197 *Id.* at 256.

198 *Id.*

199 *Id.*

200 *State ex rel. E.A. Martin Mach. Co. v. Line One, Inc.*, 111 S.W.3d 924, 928 (Mo. App. S.D. 2003); *L. D. Compton Constr.,* 483 S.W.2d at 675; *Frank Powell*, 817 S.W.2d at 652-53.

201 *Thomas*, 304 S.W.3d at 188. The decision in *Thomas* does not discuss prior decisions relating to notice provisions in payment bonds.

202 *Thomas*, 304 S.W.3d at 187.

203 *Thomas*, 304 S.W.3d at 188.

204 *Id.*

205 Section 432.070, RSMo Supp. 2013.

206 *Duckett Creek Sewer Dist. v. Golden Triangle Dev. Corp.*, 32 S.W.3d 178, 182 (Mo. App. E.D. 2000).

207 *Nat'l Oil*, 856 S.W.2d 912, 915 (judgment entered against county commissioners and in favor of material supplier for failure to require bond even though there was no written contract as required by § 432.070). The court in *National Oil* indicated that *Metz v. Warrick,* 269 S.W. 626 (Mo. App. S.D. 1925), "should no longer be followed." *Id.* at 915.

208 *Kansas City ex rel. Diamond Brick & Tile Co. v. Schroeder,* 93 S.W. 405 (Mo. 1906).

209 *National Sur. Corp. v. Fisher*, 317 S.W.2d 334, 341 (Mo. banc 1958); *Keytesville v. Kelco Indus., Inc.,* 773 F. Supp. 1264, 1265 (E.D. Mo. 1991).

210 *Nat'l Sur.*, 317 S.W.2d at 341; *Massachusetts Bonding & Ins. Co. v. Ripley Cnty. Bank*, 237 S.W. 182, 186 (Mo. App. E.D. 1921):

> The contractor could not transfer to the bank any greater right in or to the fund than he himself possessed; and his right in respect thereto was subordinate to the equity which arose in favor of [the surety] by virtue of, and at the time of, the latter's execution of the contract of suretyship. *Id.*

211 *Nat'l Sur.*, 317 S.W.2d at 341; *Div. of Emp. Secur. v. Trice Constr. Co.*, 555 S.W.2d 65, 67 (Mo. App. W.D. 1977); *First State Bank,* 495 S.W.2d 471, 481.

212 *Trice Constr.*, 555 S.W.2d at 67.

213 *In re J.V. Gleason Co. v. Aetna Cas. & Sur. Co.*, 452 F.2d 1219, 1224 (8th Cir. 1971).

214 *Id.* at 1222.

215 *Id.* According to the *Gleason* court, "[t]o introduce further complications of filing so-called financing arrangements, which are not in fact true financing arrangements, where no legitimate purpose is served is a waste of time and energy." *Id.* at 1224.

216 *Id.* at 1225.

217 *Nat'l Sur.*, 317 S.W.2d at 342; *Trice Constr.*, 555 S.W.2d at 67; *Gleason*, 452 F.2d at 1224.

218 *U.S. Fid. & Guar. Co. v. Mo. Hwys. & Transp. Comm'n*, 783 S.W.2d 516, 519 (Mo. App. W.D. 1990).

219 *Capitol Indem. Corp. v. Citizens Nat'l Bank of Fort Scott*, 8 S.W.3d 893, 900 (Mo. App. W.D. 2000).

220 *Id.* at 900

221 *Id.* at 901; *see also International Fid. Ins. Co. v. United States*, 949 F.2d 1042 (8th Cir. 1991) (determining that surety's claim of priority to progress payments depended on the date of default). In addition to its right to earned and unpaid progress payments and retainage, a surety is entitled to a credit for amounts paid to satisfy bond claimants. *Pub. Water Supply Dist. No. 8 v. Maryland Cas. Co.,* 513 S.W.2d 311, 312 (Mo. 1974).

222 *First State Bank*, 495 S.W.2d at 480.

223 *Mass. Bonding*, 237 S.W. at 186. The bank was entitled to a setoff in the case for amounts paid by the contractor to the surety for materials and labor on the project.

224 *Mass. Bonding*, 237 S.W. 182.

225 *Id.*

226 783 S.W.2d 516, 520 (Mo.App. W.D. 1990). Similarly, in *Trice Constr.*, 555 S.W.2d at 67, the court determined that a surety's lien was superior to the Division of Employment Security's right to certain funds held for a contractor for construction since the funds were not part of the contractor's general assets.

227 *Id.* at 520.

228 666 F. Supp. 170, 172 (W.D. Mo. 1987).

229 *School Dist. No. 18 v. McClure,* 224 S.W. 831, 833 (Mo. 1920).

230 *Id.* at 833; *First Nat'l Bank*, 155 S.W.2d 251, 255 (Mo. App. E.D. 1941).

231 *Id.*; *First Nat'l Bank,* 155 S.W.2d at 255.

232 *Id.*

233 *Id.*

234 *Noonan v. Independence Indem. Co.*, 41 S.W.2d 162 (Mo. 1931).

235 *State ex rel. Winebrenner v. Detroit Fid. & Sur. Co.,* 32 S.W.2d 572, 573 (Mo. 1930).

236 *Id.*

237 Section 522.300, RSMo 2000. While a party may file its lawsuit in the name of the public entity, it is not required to do so. *Pickel Stone Co. v. McClinton*, 160 S.W. 833 (Mo. App. E.D. 1913).


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238 Section 522.300, RSMo 2000. *Baumann*, 512 S.W.2d 436; *L. D. Compton Constr.*, 483 S.W.2d 674, 676.

239 *J. Louis Crum Corp. v. Alfred Lindgren, Inc.,* 564 S.W.2d 544 (Mo. App. W.D. 1978).

240 *Walsh*, 540 S.W. 2d at 140; *Gen. Ins. Co. of Am. v. Hercules Constr. Co.,* 385 F.2d 13 (8th Cir. 1967).

241 Section 433.010, RSMo 2000; *Howard Constr.*, 817 S.W.2d 556.

242 Section 433.030, RSMo 2000.

243 *National Sur.*, 317 S.W. 2d 334.

244 *George Weis I*, 867 S.W.2d 520, 522.

245 *City of St. Louis ex rel. Esmar v. Tru-Bounce, Inc.,* 562 S.W.2d 158, 161 (Mo. App. E.D. 1978).

246 *Hill-O'Meara*, 158 S.W. at 101.

247 *L. D. Compton Constr.*, 483 S.W.2d 674, 676.

248 *C. A. Burton Mach. Co. v. Nat'l Sur. Co.,* 182 S.W. 801 (Mo. App. W. D. 1916).

249 *City of St. Louis ex rel. Sears v. Southern Sur. Co.,* 62 S.W.2d 432 (Mo. 1933).

250 *Austin,* 230 S.W. at 335 (certified copy of judgment against contractor not binding on board members as to proof of damages).

251 *Howard Constr.,* 817 S.W.2d 556, 564.