

Municipalities Must Be Careful With Improvement Plans

Municipalities in the state of Missouri that are engaged in municipal improvement programs need to be aware of the recent decision in *Penzel Construction Company, Inc. v. Jackson R-2 School District*, E.D.103878 (Feb. 14, 2017). This case was decided by the Missouri Court of Appeals Eastern District.

In an exhaustive 42-page opinion, the court concluded that a Spearin claim is an acceptable vehicle for bringing a cause of action in Missouri. The court also approved the modified, total cost method for damages in this case.

The claim was made by a construction contractor against the school district based on a breach of implied warranty for furnishing “deficient and inadequate plans with specifications” for a construction project. The plaintiff claimed that the school district impliedly warranted that the plans furnished were adequate for completing the project and that the district breached the implied contract; thereby, causing damages to plaintiff. The court relied on a U.S. Supreme Court Case entitled *U.S. v. Spearin*, 248 U.S. 132 (1918), wherein the U.S. Supreme Court found the government offered a warranty implied by law to a contractor that the plans it rendered were adequate for him to perform the work. The trial court granted summary judgment in favor of the defendant’s district. The court discussed the *Spearin* case and concluded that it is in accordance with the principles established by Missouri precedent. The court also concluded that the plaintiffs presented sufficient evidence to show that the plans were “defective” within the meaning of *Spearin*. The court pointed out that the *Spearin* doctrine places a risk of loss stemming from defective plans with specification on the owner who provides the plans to the contractor. The owner is in a better position to assess the plans and to prevent losses from occurring. The court noted that the owner could bring a claim against architects or subcontractors if the owner sustains damages due to their negligence or breach of contract. The court noted in a footnote that the contractor would have a duty to inquire as to inconsistent specifications and ambiguities if the plan includes obvious glaring defects. The court concluded that the plaintiff had satisfied its burden as to evidence presented and that summary judgment should not have been granted to the defendant’s district.

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In the second point on appeal, the court addressed the issue of what evidence needs to be provided to establish damages with reasonable certainty. The court examined two proposed methods of determining damages, the total-cost method and the modified total-cost method. Under the total-cost method, the contractor would calculate his damages by subtracting his bid from the total costs he incurred to fulfill the contractual obligations. The modified total-cost approach operates in a similar manner but it reduces any additional costs attributable to the plaintiff’s own errors. The court favored the modified total-cost method as compared to the rigid all-or-

nothing approach of the total-cost method. The court noted, however, that even under the modified total-cost method, the calculation of damages is merely a starting point subject to adjustments. The court found that the plaintiffs had produced sufficient evidence for a jury to determine the fact of damages and the amount of damages. The court again rejected the trial court’s determination regarding summary judgment.

As is the case in many other situations involving municipalities, a governmental entity is no longer solely governed by its express contract as stated by Section 432.070 RSMo. Without legislative guidance, courts have expanded the concept of implied agreements for municipalities leading to more exposure for litigation. The decision is still subject to rehearing or transfer to the Missouri Supreme Court that may choose to hear the matter and if so, may adopt or reject the decision of the Missouri Court of Appeals. In any event, municipalities would be well advised to take additional steps, such as new contract language, to protect themselves with building contracts against claims based on implied warranties.

NOTE: In an update to a matter previously reported in this column, the Missouri Court of Appeals Eastern District upheld the trial court’s rejection of an attempt by the County Executive of St. Louis County to assert control over municipal law enforcement. See City of Olivette vs. St. Louis County, E.D. 104432 (1/10/17), the County of St. Louis has decided not to litigate the matter any further.

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