

# Getting Paid: Navigating the Changing Landscape of Public-Private Partnerships

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West Virginia Code § 38-2-1, *et al.* provides contractors, subcontractors and material persons the right to file a mechanic's lien against an owner's property if they fail to receive payment for their work or materials on the project. The threat or filing of a mechanic's lien often motivates an owner and/or contractor to pay. An exception to this general rule exists under West Virginia Code § 38-2-39, which prevents the filing of a mechanic's lien on projects involving public buildings or property. For these projects, owners often require a payment bond to provide a mechanism for aggrieved parties to obtain payment for properly performed work. The recent phenomenon of public-private partnerships in construction blurs these distinctions.

Generally, a public-private partnership consists of a combination of a government agency or agencies working together with private entities for the purpose of financing, acquiring, planning, designing, constructing, expanding, improving and/or maintaining a property or project. See, e.g., W. VA. CODE § 17-28-3(10) (2010) (defining "public-private partnerships" under the West Virginia Community Empowerment Transportation Act.) A growing number of states recognize that the involvement of the private sector on these public projects, under certain circumstances, may create lien rights for an aggrieved contractor or material supplier. See, e.g., *EnviroFinance Group, LLC v. Env't Barrier Co.* 113 A.3d 775, 789 (N.J. Super. Ct. 2015); *In re South Bay Expressway, L.P.*, 434 B.R. 589, 601 (S.D. Cal. 2010); see also *Cornerstone Land Dev. Co. of Pittsburgh LLC v. Wadwell Group*, 959 A.2d 1264, 1268 (2008). Other

than a reference under its Community Empowerment Transportation Act, West Virginia has not yet expressly recognized public-private partnerships and their impact on West Virginia's longstanding jurisprudence on liens.

In *Lemartec v. Entsorga West Virginia, LLC*, the United States District Court for the Northern District of West Virginia examined whether lien rights existed following the non-payment of \$1,694,192.60 to Lemartec for services it provided constructing a waste-to-biofuel processing plant in Martinsburg, West Virginia. 386 F. Supp. 3d 726 (N.D. W. Va. 2019). The Berkeley County Solid Waste Authority ("Authority") entered into a 50-year lease with Entsorga West Virginia, LLC ("Entsorga") to construct and operate the waste-to-biofuel processing plant on property owned by the Authority. The lease provided Entsorga with almost unfettered discretion on how to utilize the property during the 50-year period. After entering into the lease, the Authority ceded all project decisions to Entsorga, effectively making them the owner rather than general contractor for this project.

Lemartec initially served as a subcontractor to the general contractor, Biochemtex S.p.A. ("Biochemtex") on the project. Unfortunately, almost a year into the construction, disputes arose between Lemartec, Biochemtex and Entsorga concerning the direction, workmanship and payment for work on the project. These disputes culminated in Entsorga terminating Biochemtex and later terminating Lemartec from the project. At the time Lemartec stopped working, it had incurred over one-and-a-half mil-

lion dollars (\$1,629,192.60) in unpaid work and expenses.

Neither the Authority nor Entsorga obtained a payment bond for the project. This lack of a payment bond, along with the public-private partnership, led Lemartec to pursue a mechanic's lien for its unpaid work. Under West Virginia Code § 38-2-39, the Authority resisted the mechanic's lien, asserting that because the project occurred on public property, no lien rights existed. The District Court agreed with the Authority. No. 3:18-cv-22, 2018 WL 9988269 \*3-4 (N.D. W. Va. Sept. 14, 2018). Importantly, in its analysis, the District Court elected not to analyze whether the public-private partnership created a lien right. Instead, the District Court found that the mere fact that the project involved public property insulated it from being liened against under the West Virginia Code.

The District Court's refusal to allow Lemartec to proceed on a mechanic's lien led Lemartec to pursue a claim against the Authority for failing to obtain a payment bond. West Virginia Code § 38-2-39 requires a bond to be obtained for all public projects. Notwithstanding, the District Court found that the Authority could be liable for failing to obtain a bond and, instead, placed the onus on Lemartec for proceeding on the work without confirming the existence of a bond. In reaching this conclusion, the District Court observed that:

*[T]he West Virginia Supreme Court never refers to the court's immunity in deciding [J.E. Moss Iron Works]. Rather, the court reasoned that the subcontractor could have demanded the requi-*

site bond before beginning work on the project. The subcontractor's failure to do so was squarely its own fault; thus, the subcontractor could not later seek to impose damages upon the county court. Similarly, Lemartec could have demanded a bond before beginning work on the Project. Lemartec's failure to do so lies solely upon it, not the Solid Waste Authority.

386 F. Supp. 3d at 731-32. Unless the West Virginia legislature or West Virginia Supreme Court of Appeals addresses public-private partnerships on construction projects, the District Court's analysis of the current law could create significant issues for subcontractors and material persons receiving payments on these types of projects.

For instance, last year, West Virginia authorized the creation of charter schools. See, W. VA. CODE § 18-5G-1 (2019). Charter schools envision a public-private partnership. Ordinarily, on a school construction

project, a contractor, subcontractor or material person would look towards a payment bond to recover for any unpaid work. Here, and under the analysis utilized in Lemartec, the charter school is not required to obtain a bond, and the working entity likely does not have lien rights against the charter school. In the event a contractor goes bankrupt during a construction project involving a public-private partnership, the subcontractors and material persons may be left with limited avenues to recover for the work they performed.

Public-private partnerships are the future for big state construction projects. The vast majority of states recognize these partnerships and have altered their lien statutes to ensure protections still exist for working entities to receive payment. To date, West Virginia remains in the minority. Until this position changes, a critical review of the contract and assurance of a bond is needed prior to participating in a public-private partnership construction project.

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