

HOUSE BILL No. 2274

By Committee on Commerce and Labor

2-3

9 AN ACT concerning private construction contracts; enacting the Kansas
10 fairness in private construction contract act.

11

12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. (a) Sections 1 through 9, and amendments thereto, shall
14 be known and may be cited as the Kansas fairness in private construction
15 contract act.

16 (b) The rights and duties prescribed by this act shall not be waived
17 or varied under the terms of a contract. The terms of any contract waiving
18 or varying the rights and duties prescribed by this act shall be
19 unenforceable.

20 Sec. 2. As used in this act:

21 (a) "Bank" means an institution the deposits of which are insured by
22 the federal deposit insurance corporation and which legally is doing busi-
23 ness in the state of Kansas.

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

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

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

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

37 (f) "Person" means an individual, corporation, estate, trust, partner-
38 ship, limited liability company, association, joint venture or other legal
39 entity.

40 (g) "Retainage" means the money earned by a contractor or subcon-
41 tractor but withheld to ensure proper performance by the contractor or
42 subcontractor.

43 (h) "Subcontractor" means any person performing construction cov-

1 ered by a contract between an owner and a contractor but not having a
2 contract with the owner.

3 Sec. 3. (a) All contracts for private construction shall provide that
4 payment of amounts due a contractor from an owner, except retainage,
5 shall be made within 30 days after the owner receives a timely, properly
6 completed undisputed request for payment.

7 (b) If the owner fails to pay a contractor within 30 days following
8 receipt of a timely, properly completed, undisputed request for payment,
9 the owner shall pay interest to the contractor beginning on the 31st day
10 after receipt of the request for payment, computed at 1.5% of the undis-
11 puted amount per month or fraction of a month until the payment is
12 made.

13 (c) If the owner receives an improperly completed request for pay-
14 ment or in good faith disputes a request for payment, the owner shall
15 notify the contractor within five days of receipt of the improperly com-
16 pleted or disputed request for payment. No payment shall become due
17 on such a request until such request is properly completed or the dispute
18 is resolved. If within the five-day period the owner fails to notify the
19 contractor of any improper completion or dispute, the request for pay-
20 ment shall be considered proper and the owner shall make payment
21 thereon in accordance with subsection (a). Any undisputed portion of any
22 request shall be paid in accordance with subsections (a), (b) and (c).

23 (d) Within five days after the owner makes a payment (including pay-
24 ment of retainage) to the contractor, the owner shall give notice of the
25 date and amount of the payment to any subcontractor that makes a writ-
26 ten request to the owner for such notice.

27 (e) A contractor shall pay its subcontractors any amounts due within
28 five days of receipt of payment (including payment of retainage) from the
29 owner, if the subcontractor has provided to the contractor a timely, prop-
30 erly completed, undisputed request for payment.

31 (f) If the contractor fails to pay a subcontractor within the five-day
32 period, the contractor shall pay interest to the subcontractor beginning
33 on the sixth day after receipt of payment by the contractor, computed at
34 1.5% of the undisputed amount per month or fraction of a month until
35 the payment is made.

36 (g) If the contractor receives an improperly completed request for
37 payment or in good faith disputes a request for payment from a subcon-
38 tractor, the contractor shall notify the subcontractor within five days of
39 receipt of the improperly completed or disputed request for payment.
40 No payment shall become due on such a request until such request is
41 properly completed or the dispute is resolved. If within the five-day pe-
42 riod the contractor fails to notify the subcontractor of any improper com-
43 pletion or dispute, the request for payment shall be considered proper

1 and the contractor shall make payment thereon in accordance with sub-
2 section (e). Any undisputed portion of any request shall be paid in ac-
3 cordance with subsections (e), (f) and (g).

4 (h) The provisions of subsections (e), (f) and (g) shall apply to all
5 payments from subcontractors to their sub-subcontractors.

6 Sec. 4. (a) An owner may withhold retainage of not more than 10%
7 of the amount of any payment due a contractor.

8 (b) A contractor shall not withhold from a subcontractor, and a sub-
9 contractor from a lower-tier subcontractor, more retainage than the
10 owner withholds from the contractor, or the contractor from the subcon-
11 tractor, for that party's work.

12 (c) Retainage may be withheld only until completion of each separate
13 division of the contract for which a price is stated separately in the con-
14 tract or for which a separate price can be ascertained from the contractor's
15 schedule of values. Upon completion of each such division, any retainage
16 withheld on such division shall be paid by the owner to the contractor in
17 the manner and within the time specified in section 3, and amendments
18 thereto. Upon completion of the entire contract, any remaining retainage
19 shall be paid by the owner to the contractor in the manner and within
20 the time specified in section 3, and amendments thereto.

21 (d) (1) A contractor may tender to an owner acceptable substitute
22 security with a written request for release of retainage in the amount of
23 the substitute security. To the extent of the security tendered, and pro-
24 vided the contractor is not in default of any of its obligations under the
25 contract, the contractor shall be entitled to receive cash payment of re-
26 tainage already withheld and shall not be subject to the withholding of
27 further retainage.

28 (2) A subcontractor may tender to a contractor or subcontractor ac-
29 ceptable substitute security with a written request for release of retainage
30 in the amount of the substitute security. To the extent of the security
31 tendered, and provided the subcontractor is not in default of any of its
32 obligations under the contract, the subcontractor shall be entitled to re-
33 ceive cash payment of retainage already withheld and shall not be subject
34 to the withholding of further retainage.

35 (e) If the tender described in subsection (d) is made after retainage
36 has been withheld, the party holding the retainage, within five days after
37 receipt of the tender shall pay over to the tendering party the withheld
38 retainage to the extent of the substitute security. If the tender of substi-
39 tute security is made before retainage has been withheld, the party en-
40 titled to hold retainage, to the extent of the substitute, shall refrain from
41 withholding any retainage from all future payments properly due.

42 (f) The following shall constitute acceptable substitute security for
43 purposes of this section:

- 1 (1) Negotiable securities which have a market value equal to or
2 greater than the amount of retainage and which are:
- 3 (A) Obligations of the United States government;
 - 4 (B) obligations of the state of Kansas; or
 - 5 (C) certificates of deposit issued by banks.
- 6 (2) A retainage bond naming the owner as obligee, issued by a surety
7 company authorized to issue surety bonds in the state of Kansas, in the
8 amount of the retainage to be released and conditioned upon substantial
9 completion of the work of the party tendering the bond.
- 10 (3) An irrevocable and unconditional letter of credit in favor of the
11 owner, issued by a bank, in the amount of the retainage to be released.
- 12 (g) The party tendering the substitute security shall be entitled to all
13 interest or other income earned on any such substitute security deposited
14 by such party.
- 15 (h) Upon completion of the work of the party tendering the substitute
16 security, such substitute security shall be returned to such party.
- 17 (i) If an owner, contractor or subcontractor fails to pay retainage as
18 required by this act, the owner, contractor or subcontractor shall pay an
19 additional 1.5% of the amount not paid for each month or fraction of a
20 month until such retainage is paid.
- 21 (j) In no event shall any retainage be withheld from a contractor or
22 subcontractor which has provided payment and performance bonds at the
23 request of the owner or contractor.
- 24 Sec. 5. If any payment properly due, including payment of retainage,
25 is not made in accordance with the provisions of this act, the contractor
26 and any subcontractors, regardless of tier, upon five days' written notice
27 to the owner, shall be entitled to suspend further performance under any
28 contract for construction until payment, including applicable interest, is
29 made. Any party to whom payment is due shall be entitled to recover
30 from the party obligated to make payment any costs incurred on account
31 of suspension.
- 32 Sec. 6. Any provision in a contract or subcontract for construction in
33 the state of Kansas that purports to waive, release or extinguish the right
34 of a contractor or subcontractor to recover costs or damages, or obtain
35 an equitable adjustment for delay in performing the contract or subcon-
36 tract if the delay is caused in whole or in part by acts or omissions within
37 the control of the other party to the contract or subcontract or persons
38 acting on behalf of the other party, is against public policy and void and
39 unenforceable. This section shall not affect the validity or enforceability
40 of any contract provision that (a) precludes a contractor or subcontractor
41 from recovering the portion of any delay costs or damages that are caused
42 by acts or omissions within the control of the contractor or subcontractor
43 or persons acting on behalf of the contractor or subcontractor or (b)

1 requires the contractor or subcontractor to give notice of any delay.
2 Sec. 7. In any action to enforce sections 3, 4 and 5, and amendments
3 thereto, including arbitration, the court or arbitrator shall award costs and
4 reasonable attorney fees to the prevailing party. Venue of such an action
5 shall be in the state or federal court for the district or county where the
6 real property is located. The hearing in such an arbitration shall be held
7 in the county where the real property is located.
8 Sec. 8. The provisions of this act shall not apply to single-family res-
9 idential housing and multi-family residential housing of four units or less.
10 Sec. 9. This act shall take effect and be in force from and after its
11 publication in the statute book.