

*[As Amended by Senate Committee of the Whole]*

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*Session of 2006*

## SENATE BILL No. 516

By Committee on Commerce

2-7

12 AN ACT concerning public *[building]* construction contracts; enacting  
13 the Kansas fairness in public construction contract act; *amending*  
14 **K.S.A. 75-6402 and repealing the existing section.**  
15

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

17 Section 1. (a) Sections 1 through 7, and amendments thereto, shall  
18 be known and may be cited as the Kansas fairness in public *[building]*  
19 construction contract act.

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

23 Sec. 2. As used in this act:

24 (a) "Construction" means furnishing labor, equipment, material or  
25 supplies used or consumed for the design, construction, alteration, ren-  
26 ovation, repair or maintenance of a building, ~~structure, road, bridge, water~~  
27 ~~line, sewer line, oil line, gas line, appurtenance or other improvement to~~  
28 ~~real property, including any moving, demolition or excavation~~ *[of a build-*  
29 ~~ing]. Construction shall also include roads and bridges for which~~  
30 ~~payment is not regulated by federal law.~~

31 (b) "Contract" means a contract or agreement concerning construc-  
32 tion made and entered into by and between an owner and a contractor,  
33 a contractor and a subcontractor or a subcontractor and another  
34 subcontractor.

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

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

40 (e) "Public entity" means the state of Kansas, political subdivisions,  
41 cities, counties, state universities or colleges, school districts, all special  
42 districts, joint agreement entities, public authorities, public trusts, non-  
43 profit corporations and other organizations which are operated with pub-

1 lic money for the public good.

2 (f) “Retainage” means money earned by a contractor or subcontractor  
3 but withheld to ensure timely performance by the contractor or  
4 subcontractor.

5 (g) “Subcontractor” means any person performing construction cov-  
6 ered by a contract between an owner and a contractor but not having a  
7 contract with the owner.

8 **(h) “Substantial completion” means the stage of a construction**  
9 **project where the project, or a designated portion thereof, is suffi-**  
10 **ciently complete in accordance with the contract, so that the owner**  
11 **can occupy or utilize the constructed project for its intended use.**

12 Sec. 3. (a) Subject to the provisions of subsections (b), (c), (d), (e),  
13 (f), (g) ~~and (h)~~, **(h) and (i)** and sections 4 and 5, and amendments thereto,  
14 all persons who enter into a contract for public construction after the  
15 effective date of this act, shall make all payments pursuant to the terms  
16 of the contract.

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

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

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

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

35 (c) Any provision in a contract for public construction providing that  
36 a payment from a contractor or subcontractor to a subcontractor is con-  
37 tingent or conditioned upon receipt of a payment from any other public  
38 party, including an owner, is no defense to a claim to enforce a bond to  
39 secure payment of claims pursuant to the provisions of article 11 of chap-  
40 ter 60 of the Kansas Statutes Annotated, and amendments thereto.

41 (d) All contracts for public construction shall provide that payment  
42 of amounts due a contractor from an owner, except retainage, shall be  
43 made within 30 days after the owner receives a timely, properly com-

1 pleted, undisputed request for payment, **unless extenuating circum-**  
2 **stances exist which would preclude approval of payment within 30**  
3 **days. If such extenuating circumstances exist, then payment shall**  
4 **be made within 45 days after the owner receives such payment**  
5 **request.**

6 **(e) The architect or engineer of record shall review, approve**  
7 **and forward undisputed requests for payment to the owner within**  
8 **seven business days.**

9 ~~(e)~~ **(f)** If the owner fails to pay a contractor within 30 days following  
10 receipt of a timely, properly completed and undisputed request for pay-  
11 ment **[the time period set forth in subsection (d)]**, the owner shall pay  
12 interest to the contractor beginning on the thirty-first day after receipt of  
13 the request for payment, computed at the rate of 18% per annum on the  
14 undisputed amount **[day following the end of the time period set forth**  
15 **in subsection (d)]**.

16 ~~(f)~~ **(g)** A contractor shall pay its subcontractors any amounts due  
17 within seven business days of receipt of payment from the owner, includ-  
18 ing payment of retainage, if retainage is released by the owner, if the  
19 subcontractor has provided a timely, properly completed and undisputed  
20 request for payment to the contractor.

21 ~~(g)~~ **(h)** If the contractor fails to pay a subcontractor within seven  
22 business days, the contractor shall pay interest to the subcontractor be-  
23 ginning on the eighth business day after receipt of payment by the con-  
24 tractor, computed at the rate of 18% per annum on the undisputed  
25 amount.

26 ~~(h)~~ **(i)** The provisions of subsections ~~(f) and (g)~~ **(g) and (h)** shall also  
27 apply to all payments from subcontractors to their subcontractors.

28 Sec. 4. (a) An owner, contractor or subcontractor may withhold no  
29 more than 5% retainage from the amount of any undisputed payment  
30 due. ~~Retainage shall be released by the owner upon completion of any~~  
31 ~~portion of work that is described in a specification section, unless the~~  
32 **owner and the architect or engineer determine that a higher rate of**  
33 **retainage is required to ensure performance of the contract. Re-**  
34 **tainage, however, shall not exceed 10% of the value of the contract.**  
35 **An owner must release the retainage on any undisputed payment**  
36 **due on a construction project within 30 days after substantial com-**  
37 **pletion of the project; however, if any subcontractor is still per-**  
38 **forming work on the project under its subcontract, an owner may**  
39 **withhold that portion of the retainage attributable to such subcon-**  
40 **tract until 30 days after such work is completed.** No more than 150%  
41 of the value of work that is not completed due to no fault of the subcon-  
42 tractor may be withheld pending completion.

43 (b) If an owner, contractor or subcontractor fails to pay retainage, if

1 any, pursuant to the terms of a contract for public construction or as  
2 required by this act, the owner, contractor or subcontractor shall pay  
3 interest to the contractor or subcontractor to whom payment was due,  
4 beginning on the first business day after the payment was due, at a rate  
5 of 18% per annum.

6 ***(c) Nothing in this section shall prevent early release of retain-***  
7 ***age if it is determined by the owner, the contractor and the project***  
8 ***architect or engineer, that a subcontractor has completed perform-***  
9 ***ance satisfactorily and that the subcontractor can be released prior***  
10 ***to substantial completion of the entire project without risk to the***  
11 ***owner. The contractor shall request such adjustment in retainage,***  
12 ***if any, from the owner as necessary to enable the contractor to pay***  
13 ***the subcontractor in full, and the owner shall, as part of the next***  
14 ***contractual payment cycle, release the subcontractor's retainage to***  
15 ***the contractor, who shall, as part of the next contractual payment***  
16 ***cycle, release such retainage as is due to the subcontractor.***

17 Sec. 5. If any undisputed payment is not made within seven business  
18 days after the payment date established in a contract for public construc-  
19 tion or in this act, the contractor and any subcontractors, regardless of  
20 tier, upon seven additional business days' written notice to the owner and,  
21 in the case of a subcontractor, written notice to the contractor, shall,  
22 without prejudice to any other available remedy, be entitled to suspend  
23 further performance until payment, including applicable interest, is  
24 made. The contract time for each contract affected by the suspension  
25 shall be extended appropriately and the contract sum for each affected  
26 contract shall be increased by the suspending party's reasonable costs of  
27 demobilization, delay and remobilization.

28 Sec. 6. In any action to enforce K.S.A. sections 3, 4 or 5, and amend-  
29 ments thereto, including arbitration, the court or arbitrator shall award  
30 costs and reasonable attorney fees to the prevailing party. Venue of such  
31 an action shall be in the county where the real property is located and  
32 under Kansas law. The hearing in such an arbitration shall be held in the  
33 county where the real property is located.

34 Sec. 7. Any provision in a contract that purports to waive the rights  
35 of a party to the contract to collect ~~for~~ damages for delays caused by  
36 another party to the contract shall be void, unenforceable and against  
37 public policy. This provision is not intended to create a contract between  
38 parties where a contract did not otherwise exist.

39 ***[Sec. 8. The provisions of the Kansas fairness in public building***  
40 ***construction act shall not apply to the design, construction, alter-***  
41 ***ation, modification, improvement or repair of a public highway,***  
42 ***road, street, bridge, dam, turnpike, water or sewer lines or related***  
43 ***structures or stand-alone parking lots.]***

- 1     *Sec. 8- [9] K.S.A. 75-6402 is hereby amended to read as follows:*  
2     *75-6402. As used in the Kansas prompt payment act, unless the con-*  
3     *text clearly requires otherwise, the following words and phrases*  
4     *shall have the meanings respectively ascribed thereto.*
- 5     *(a) “State agency” means the state and any state agency, de-*  
6     *partment, division or authority thereof.*
- 7     *(b) “Government agency” means any state agency, library,*  
8     *community college or unified school district.*
- 9     *(c) “Vendor” means any person, corporation, association or*  
10    *other business concern engaged in a trade or business, either on a*  
11    *profit or not-for-profit basis, and providing any goods or services*  
12    *to a government agency.*
- 13    *(d) “Goods” means any goods, supplies, materials, equipment*  
14    *or other personal property, but does not mean any real property.*
- 15    *(e) “Services” means any contractual services including archi-*  
16    *tectural, engineering, medical, financial, consulting or other pro-*  
17    *fessional services, any construction services and any other personal*  
18    *services, but does not mean any services performed as an officer or*  
19    *employee of any government agency. Services shall not include con-*  
20    *struction contracts addressed in sections 1 through 7, and amendments*  
21    *thereto.*
- 22    *(f) “Bill” means a proper billing which requests payment and*  
23    *which contains or is accompanied by such substantiating documen-*  
24    *tation as may be required for payment for the goods or services.*
- 25    *(g) “Community college” means any community college organ-*  
26    *ized and operating under the laws of this state.*
- 27    *(h) “Library” means a library which serves the general public*  
28    *and is supported in whole or in part with tax money.*
- 29    *Sec. 9- [10.] K.S.A. 75-6402 is hereby repealed.*
- 30    *Sec. ~~8-10~~ [11.] This act shall take effect and be in force from and*  
31    *after its publication in the statute book.*