

Substitute for HOUSE BILL No. 2238

By Committee on Commerce and Labor

2-17

9 AN ACT concerning construction contracts; relating to retention in pub-
10 lic and private construction contracts; amending K.S.A. 16-1802, 16-
11 1804, 16-1902 and 16-1904 and repealing the existing sections.
12

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

14 Section 1. K.S.A. 16-1802 is hereby amended to read as follows: 16-
15 1802. As used in this act:

16 (a) “Alternate security” means a retainage bond, an irrevocable bank
17 letter of credit, certificate of deposit, cash bond or other type of asset or
18 security of value equal to or exceeding the amount of retained funds.
19 Provided however, “alternate security” shall not include performance and
20 payment bonds.

21 ~~(a)~~ (b) “Construction” means furnishing labor, equipment, material
22 or supplies used or consumed for the design, construction, alteration,
23 renovation, repair or maintenance of a building, structure, road, bridge,
24 water line, sewer line, oil line, gas line, appurtenance or other improve-
25 ment to real property, including any moving, demolition or excavation.

26 ~~(b)~~ (c) “Contract” means a contract or agreement concerning con-
27 struction made and entered into by and between an owner and a con-
28 tractor, a contractor and a subcontractor or a subcontractor and another
29 subcontractor.

30 ~~(c)~~ (d) “Contractor” means a person performing construction and
31 having a contract with an owner of the real property or with a trustee,
32 agent or spouse of an owner.

33 ~~(d)~~ (e) “Owner” means a person who holds an ownership interest in
34 real property.

35 ~~(e)~~ (f) “Person” means an individual, corporation, estate, trust, part-
36 nership, limited liability company, association, joint venture or any other
37 legal entity.

38 ~~(f)~~ (g) “Retainage” or “retention” means money earned by a contrac-
39 tor or subcontractor but withheld to ensure proper performance by the
40 contractor or subcontractor.

41 ~~(g)~~ (h) “Subcontractor” means any person performing construction
42 covered by a contract between an owner and a contractor but not having
43 a contract with the owner.

- 1 (i) “Substantial completion” means the stage of a construction project
2 where the project, or a designated portion thereof, is sufficiently complete
3 in accordance with the contract, so that portion thereof can be used for
4 its intended purpose.
- 5 Sec. 2. K.S.A. 16-1804 is hereby amended to read as follows: 16-
6 1804. (a) Retainage shall not exceed 5% of the value of the contract or
7 subcontract unless the owner, architect or general contractor determine
8 that a higher rate of retainage is required to ensure performance of the
9 contract. Retainage, however, shall not exceed 10% of the value of the
10 contract or subcontract.
- 11 (b) If the general contractor or subcontractor has failed to meet the
12 terms of the contract, is not performing according to schedule or there is
13 a problem with workmanship or other issues, the owner and architect
14 may increase retainage up to 10%.
- 15 (c) An owner shall release the retainage on any undisputed payment
16 due on a construction project within 30 days after substantial completion
17 of the project; however, if any subcontractor is still performing work on
18 the project under its subcontract, an owner may withhold that portion of
19 the retainage attributable to such subcontract until 30 days after such
20 work is completed.
- 21 (d) An owner, contractor or subcontractor shall not withhold more
22 than 150% of the value of incomplete work provided that the incomplete
23 work is due to no fault of the subcontractor. Any amounts retained for
24 incomplete work shall be paid within 45 days after completion of the work
25 as a part of the regular payment cycle.
- 26 (e) Prior to commencement of work, a general contractor or subcon-
27 tractor may request an alternate security in lieu of retainage.
- 28 (f) If a general contractor or subcontractor requests the use of an
29 alternate security, as defined in subsection (a) of section 1, and amend-
30 ments thereto, in lieu of retainage one may be accepted. However, the
31 owner or general contractor who would otherwise withhold the retainage
32 shall have the right to determine which type of alternate security, as de-
33 fined in subsection (a) of section 1, and amendments thereto, shall be
34 accepted.
- 35 ~~(a)~~ (g) An owner, contractor or subcontractor may withhold no more
36 than 10% retainage from the amount of any undisputed payment due.
- 37 ~~(b)~~ (h) If an owner, contractor or subcontractor fails to pay retainage,
38 if any, pursuant to the terms of a contract for private construction or as
39 required by this act, the owner, contractor or subcontractor shall pay
40 interest to the contractor or subcontractor to whom payment was due,
41 beginning on the first business day after the payment was due, at a rate
42 of 18% per annum.
- 43 (i) Nothing in this section shall prevent early release of retainage if it

1 *is determined by the owner, the contractor and the project architect or*
2 *engineer, that a subcontractor has completed performance satisfactorily*
3 *and that the subcontractor can be released prior to substantial completion*
4 *of the entire project without risk or additional cost to the owner or con-*
5 *tractor. Once so determined, the contractor shall request such early re-*
6 *lease of retainage from the owner as necessary to enable the contractor*
7 *to pay the subcontractor in full. The owner shall, as part of the next*
8 *contractual payment cycle, release the subcontractor's retainage to the*
9 *contractor, who shall, as part of the next contractual payment cycle, re-*
10 *lease such retainage as is due to the subcontractor.*

11 Sec. 3. K.S.A. 16-1902 is hereby amended to read as follows: 16-
12 1902. As used in this act:

13 (a) "Alternate security" means a retainage bond, an irrevocable bank
14 letter of credit, certificate of deposit, cash bond or other type of asset or
15 security of value equal to or exceeding the amount of retained funds.
16 Provided however, "alternate security" shall not include performance and
17 payment bonds.

18 ~~(a)~~ (b) "Construction" means furnishing labor, equipment, material
19 or supplies used or consumed for the design, construction, alteration,
20 renovation, repair or maintenance of a building, water or waste water
21 treatment facility, oil line, gas line, appurtenance or other improvement
22 to real property, including any moving, demolition or excavation of a
23 building. "Construction" shall not mean the design, construction, altera-
24 tion, renovation, repair or maintenance of a road, highway or bridge.

25 ~~(b)~~ (c) "Contract" means a contract or agreement concerning con-
26 struction made and entered into by and between an owner and a con-
27 tractor, a contractor and a subcontractor or a subcontractor and another
28 subcontractor.

29 ~~(c)~~ (d) "Contractor" means a person performing construction and
30 having a contract with an owner of the real property or with a trustee or
31 agent of an owner.

32 ~~(d)~~ (e) "Owner" means a public entity that holds an ownership inter-
33 est in real property.

34 ~~(e)~~ (f) "Public entity" means the state of Kansas, political subdivisions,
35 cities, counties, state universities or colleges, school districts, all special
36 districts, joint agreement entities, public authorities, public trusts, non-
37 profit corporations and other organizations which are operated with pub-
38 lic money for the public good.

39 ~~(f)~~ (g) "Retainage" or "retention" means money earned by a contrac-
40 tor or subcontractor but withheld to ensure timely performance by the
41 contractor or subcontractor.

42 ~~(g)~~ (h) "Subcontractor" means any person performing construction
43 covered by a contract between an owner and a contractor but not having

1 a contract with the owner.

2 ~~(h)~~ (i) “Substantial completion” means the stage of a construction
3 project where the project, or a designated portion thereof, is sufficiently
4 complete in accordance with the contract, so that ~~the owner can occupy~~
5 ~~or utilize the constructed project for its intended use~~ *the owner can oc-*
6 *cupy or utilize the constructed project for its intended use.*

7 ~~(i)~~ (j) “Undisputed payment” means payments which all parties to the
8 contract agree are owed to the contractor.

9 Sec. 4. K.S.A. 16-1904 is hereby amended to read as follows: 16-
10 1904. ~~(a) An owner, contractor or subcontractor may withhold no more~~
11 ~~than 10% retainage from the amount of any undisputed payment due.~~

12 (a) *Retainage shall not exceed 5% of the value of the contract or sub-*
13 *contract unless the owner, architect or general contractor determine that*
14 *a higher rate of retainage is required to ensure performance of the con-*
15 *tract. Retainage, however, shall not exceed 10% of the value of the contract*
16 *or subcontract.*

17 (b) *If the general contractor or subcontractor has failed to meet the*
18 *terms of the contract, is not performing according to schedule, shows poor*
19 *workmanship or other issues, the owner and architect may increase re-*
20 *tainage up to 10%.*

21 (c) *An owner, contractor or subcontractor shall not withhold more*
22 *than 150% of the value of incomplete work provided that the incomplete*
23 *work is due to no fault of the subcontractor. Any amounts retained for*
24 *incomplete work shall be paid within 45 days after completion of the work*
25 *as a part of the regular payment cycle.*

26 (d) *Prior to commencement of work, a general contractor or subcon-*
27 *tractor may request an alternate security in lieu of retainage.*

28 (e) *If a general contractor or subcontractor requests the use of an*
29 *alternate security, as defined in subsection (a) of section 1, and amend-*
30 *ments thereto, in lieu of retainage one may be accepted. However, the*
31 *owner or general contractor who would otherwise withhold the retainage*
32 *shall have the right to determine which type of alternate security, as de-*
33 *finied in subsection (a) of section 1, and amendments thereto, shall be*
34 *accepted.*

35 ~~(h)~~ (f) *An owner, contractor or subcontractor must release the re-*
36 *tainage on any undisputed payment due on a construction project within*
37 *30 days after substantial completion of the project as part of the regular*
38 *payment cycle; however, if any subcontractor is still performing work on*
39 *the project under its subcontract, an owner may withhold that portion of*
40 *the retainage attributable to such subcontract until 30 days after such*
41 *work is completed.*

42 ~~(e)~~ (g) *If an owner, contractor or subcontractor fails to pay retainage,*
43 *if any, pursuant to the terms of a contract for public construction or as*

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

5 ~~(h)~~ (h) Nothing in this section shall prevent early release of retainage
6 if it is determined by the owner, the contractor and the project architect
7 or engineer, that a subcontractor has completed performance satisfacto-
8 rily and that the subcontractor can be released prior to substantial com-
9 pletion of the entire project without risk or additional cost to the owner
10 or contractor. Once so determined, the contractor shall request such ad-
11 justment in retainage, if any, from the owner as necessary to enable the
12 contractor to pay the subcontractor in full, and the owner shall, as part
13 of the next contractual payment cycle, release the subcontractor's retain-
14 age to the contractor, who shall, as part of the next contractual payment
15 cycle, release such retainage as is due to the subcontractor.

16 Sec. 5. K.S.A. 16-1802, 16-1804, 16-1902 and 16-1904 are hereby
17 repealed.

18 Sec. 6. This act shall take effect and be in force from and after its
19 publication in the statute book.