

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE

The meeting was called to order by Chairman Don Dahl at 9:00 A.M. on March 22, 2005 in Room 241-N of the Capitol.

All members were present.

Committee staff present:

Jerry Ann Donaldson, Kansas Legislative Research Department
Norm Furse, Office of Revisor of Statutes
June Evans, Committee Secretary

Conferees appearing before the committee:

Trudy Aron, American Institute of Architects
John Frederick, Government Relations Manager, The Boeing Company

Others attending:

See attached list.

The Chairman said the hearing on **Sub SB 33 - Fairness in private construction contract act** would be continued.

Trudy Aron, Executive Director, American Institute of Architects in Kansas (AIA Kansas) testified in opposition to **Sub SB 33**. **Sub SB 33** affects those engaged in private construction contracts and hampers individuals by severely limiting issues that are normally covered in contracts. Compromises have been made on the bill and the bill is less onerous than the original proposal.

Private contracts are not cast in stone and can and are modified to meet the needs of owners, contractors, subcontractors, and others. AIA Kansas does not believe the state should dictate the terms in private construction contracts.

Building construction is complex. No building gets completed without the participations of many professions, trades and crafts. With few exceptions, construction of each building project is unique and the requirements for each are different (Attachment 1).

John Frederick, Government Relations Manager for The Boeing Company, an opponent to **Sub SB 33**, testified Kansas law has historically embraced the concept of freedom of parties to contract on mutually agreeable terms and conditions. Contracts are comprised of various provisions that reflect the parties' allocation of risks and liabilities. In Boeing's experience, all these provisions are subject to substantial negotiation by the parties to produce an agreement that reflects the parties' allocation of risk and liability in exchange for an agreed upon purchase price for the building project. Under current Kansas law, the bargain ultimately reached by the parties on all of these points has been enforceable in the courts of Kansas by each party in situations where disputes arise.

Boeing is concerned that if **Sub SB 33** becomes law it would generate undue and expensive litigation as to its applicability because it does not address multi-jurisdictional issues nor does it define "private construction project" (Attachment 2).

The Chairman closed the hearing on **Sub SB 33**.

Representative Grange explained a balloon to **Sub SB 33**. On page 2, line 43, after "owner," add "but in any case retainage shall be paid to a subcontractor not more than 60 days after the subcontractor has completed all the work of the subcontractor under the contract,".

Staff briefed a proposed amendment to **Sub SB 33** (Attachment 3).

Representative Grant moved and Representative Kiegerl seconded to accept the Revisor's amendments to Sub SB 33, (everything in the amendment that has "Revisor" behind it). The motion carried.

CONTINUATION SHEET

MINUTES OF THE House Commerce and Labor Committee at 9:00 A.M. on March 22, 2005 in Room 241-N of the Capitol.

Representative Grange moved and Representative Humerickhouse seconded to accept amendment on page 2, line 43 regarding retainage. The motion carried.

Representative Novascone moved and Representative Ruiz seconded on page 2, line , line 42 and page 3, line 3, change "five" to "seven" and on page 3, line 5, change "sixth" to "eighth". The motion carried.

Representative Pauls moved and Representative Ruff seconded to amend on page 1, lines 25 - 28 to read: (b) " 'Contract' means a contract or agreement concerning construction made and entered into by and between an owner and a contractor, a contractor and a subcontractor or a subcontractor and another sub contractor." Strike on page 1, lines 32 - 35 and reletter the remaining subsections. On page 2, line 18, add ", except that a contract may require a contractor or subcontractor to provide a waiver or release of such rights as a condition for payment, but only to the extent of the amount of payment received" after "thereto". On page 2, line 29, add "or bond to secure payment of claims" after "lien". The motion carried.

Representative Pauls moved and Representative Jack seconded on page 3, lines 30 and 31, strike "and reasonable attorney fees". The motion carried.

Representative Sharp voted NO.

Representative Grant moved and Representative Grange seconded on page 2 lines 38, 39 and 40, Page 3, lines 6 and 7, to delete "1.5% of the undisputed amount per month or fraction of a month until the payment is made." Replace with "the rate of 18% per annum". On page 3, lines 15 thru 17, delete "an additional 1.5% of the amount not paid for each month or fraction of a month until such retainage is paid" and replace with "interest to the contractor or subcontractor to whom payment was due, beginning on the first business day after the payment was due, at a rate of 18% per annum". The motion carried.

Representative Pauls moved and Representative Ruff seconded on page 3, line 11, to remove "uncontested" and replace with "undisputed". The motion carried.

Representative Grant moved and Representative Grange seconded to move **Sub SB 33** as amended out favorably for passage.

A Division was called: 10 Ayes and 5 Nays

Sub SB 33 was moved out favorably as amended.

The Chairman thanked the committee and staff for their work this year. This will be the last committee meeting this year.

March 21, 2005



TO: Chairman Dahl and Members of the House Commerce and Labor Committee

FROM: Trudy Aron, Executive Director

RE: **Opposition to SB 33**

Good morning, Representative Dahl and Members of the Committee. I am Trudy Aron, executive director, of the American Institute of Architects in Kansas (AIA Kansas.) We would like to express our opposition to SB 33.

AIA Kansas is a statewide association of architects and intern architects. Most of our 700 members work in over 120 private practice architectural firms designing a variety of project types for both public and private clients including justice facilities, schools, hospitals and other health facilities, industrial buildings, offices, recreational facilities, housing, and much more. The rest of our members work in industry, government and education where many manage the facilities of their employers and hire private practice firms to design new buildings and to renovate or remodel existing buildings.

SB 33 affects those engaged in **private** construction contracts and hampers individuals by severely limiting issues that are normally covered in contracts. I know you have heard that compromises on the bill have been made. That is true. And, this bill is less onerous than the one originally proposed, however we continue to oppose it.

We are talking about **private** contracts. These contracts are not cast in stone and can and are modified to meet the needs of owners, contractors, subcontractors, and others. AIA Kansas does not believe the State should dictate the terms in private construction contracts.

As one example, consider that, unlike State and other government entities that have many construction projects annually, private sector projects may be "once-in-a-lifetime" projects. Whereas the state and other government entities have future projects to provide incentives for quality and timely completion of construction projects, private sector entities may have only retainage as incentive

Building construction is complex. No building gets completed without the participations of many professions, trades and crafts. With few exceptions, construction of each building project is unique and the requirements for each are different. We believe the terms in these contracts should continue to be negotiated on a project by project bases and the State should not dictate their terms.

Thank you. I will be happy to answer any questions the committee may have.

President
Mark Franzen, AIA
Overland Park
President Elect
Jan Burgess, AIA
Wichita
Secretary
Keith Blackburn, AIA
Topeka
Treasurer
Douglas R. Cook, AIA
Olathe

Directors
Rich Bartholomew, AIA
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Daniel Crouch, Assoc. AIA
Manhattan
Morris C. Dozier, Jr., AIA
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John Gaunt, FAIA
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Chad P. Glenn, AIA
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David S. Heit, AIA
Topeka
Jane Huesemann, AIA
Lawrence
Michael G. Mayo, AIA
Manhattan
Rick McCafferty
Wichita
Hans Nettelblad, AIA
Overland Park
C. Stan Peterson, AIA
Topeka
David Sachs, AIA
Manhattan
Andrew D. Steffes, AIA
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Gregory D. Tice, AIA
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Commerce Labor
3-22-05
Atch #1

House Commerce and Labor Committee
Substitute for Senate Bill No. 33
March 21, 2005

Mr. Chairman and members of the House Commerce and Labor Committee, I am John Frederick, Government Relations Manager for The Boeing Company. Thank you for the opportunity to offer our perspective on Substitute for Senate Bill No. 33 and why Boeing cannot support it.

Kansas law has historically embraced the concept of freedom of parties to contract on mutually agreeable terms and conditions. As is well known, contracts are comprised of various provisions that reflect the parties' allocation of risks and liabilities. In Boeing's experience, all these provisions are subject to substantial negotiation by the parties to produce an agreement that reflects the parties' allocation of risk and liability in exchange for an agreed upon purchase price for the building project. Under current Kansas law, the bargain ultimately reached by the parties on all of these points has been enforceable in the courts of Kansas by each party in situations where disputes arise.

Boeing believes the freedom to contract on legally permissible terms should continue to prevail. The provisions in Substitute for SB 33 relating to legislatively-mandated payment terms constitute a dramatic shift in the public policy of the State of Kansas. Again, in Boeing's experience, matters of payment are negotiated in construction contracts as a part of reaching an overall bargain between the parties, and Boeing submits that the parties to a contract should remain free to allocate risk and liability as mutually agreed by the parties. Even in its revised form, the Bill is contrary to the established concept of freedom to contract and continues to selectively identify construction contracts apart from all other types of contracts in Kansas to receive a different expression of public policy.

Moreover, Boeing is concerned that if this Bill becomes law it will generate undue and expensive litigation as to its applicability because it does not address multi-jurisdictional issues nor does it define "private construction project". For example, regarding the former, many projects do not have the owner, the contractor, the subcontractor, and project all located in the state of Kansas. What if one or more of these constituents are outside Kansas? On the latter, is a construction contract for project built with industrial revenue bonds and thereby owned by the municipality issuing the bonds a private construction contract, or is it a public works project excluded by Section 7 of the Bill?

In closing, Boeing believes the freedom to contract on legally permissible terms should continue to prevail. Boeing believes the negotiation of private construction contract issues should remain outside of the legislative process.

Thank you for allowing us to present our perspective today.

Commerce Labor
3-22-05
Atch # 2

Command labor
3-22-05
Atch #3

Substitute for SENATE BILL No. 33

By Committee on Commerce

Conferees and Revisor

3-10

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:*

Sections (Revisor)

13 Section. 1. (a) ~~Section 1~~ through 7, 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 waivable
17 or varied under the terms of a contract. The terms of any contract waiving
18 the rights and duties prescribed by this act shall be unenforceable.

19 Sec. 2. As used in this act:

20 (a) "Construction" means furnishing labor, equipment, material or
21 supplies used or consumed for the design, construction, alteration, ren-
22 ovation, repair or maintenance of a building, structure, road, bridge, water
23 line, sewer line, oil line, gas line, appurtenance or other improvement to
24 real property, including any moving, demolition or excavation.

25 (b) "Contract" means a contract or agreement made and entered into
26 by and among an owner, contractor or subcontractor concerning con-
27 struction. A contract shall not include an agreement between a contractor
28 or subcontractor and a lender.

concerning construction

between

and a contractor, a contractor and a subcontractor or a subcontractor and
another subcontractor

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

32 ~~(d) "Lender" means all state and national banks, trust companies,
33 state and federally chartered savings banks or state and federally char-
34 tered credit unions, mortgage companies or any person making a com-
35 mercial loan.~~

Strike subsection (d) and reletter remaining subsections.

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

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

The Boeing Co.: "private construction project" is not defined. (No specific
amendments suggested.)

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

2
3

1 (h) "Subcontractor" means any person performing construction cov-
2 ered by a contract between an owner and a contractor but not having a
3 contract with the owner.

4 Sec. 3. (a) Subject to the provisions of subsections (b), (c), (d), (e),
5 (f), (g) and (h) and sections 4 and 5, and amendments thereto, all persons
6 who enter into a contract for private construction after the effective date
7 of this act, shall make all payments pursuant to the terms of the contract.

Westar Energy: Terms of payment should be negotiated between contractor
and subcontractor (No specific amendments suggested.)

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

10 (1) a provision that purports to waive, release or extinguish the right
11 to resolve disputes through litigation in court or substantive or procedural
12 rights in connection with such litigation; provided, however, that a con-
13 tract may require binding arbitration as a substitute for litigation or re-
14 quire non-binding alternative dispute resolution as a prerequisite to
15 litigation;

except (Revisor)

16 (2) a provision that purports to waive, release or extinguish rights
17 provided by article 11 of chapter 60 of the Kansas Statutes Annotated,
18 and amendments thereto; and

, except that a contract may require a contractor or subcontractor to provide a
waiver or release of such rights as a condition for payment, but only to the
extent of the amount of payment received.

19 (3) a provision that purports to waive, release or extinguish rights of
20 subrogation for losses or claims covered or paid by liability or workers
21 compensation insurance; provided, however, that a contract may require
22 waiver of subrogation for losses or claims paid by a consolidated or wrap-
23 up insurance program, owners and contractors protective liability insur-
24 ance, or project management protective liability insurance.

except (Revisor)

25 (c) Any provision in a contract for private construction providing that
26 a payment from a contractor or subcontractor to a subcontractor is con-
27 tingent or conditioned upon receipt of a payment from any other private
28 party, including a private owner, is no defense to a claim to enforce a
29 mechanic's lien pursuant to the provisions of article 11 of chapter 60 of
30 the Kansas Statutes Annotated, and amendments thereto.

or bond to secure payment of claims

31 (d) All contracts for private construction shall provide that payment
32 of amounts due a contractor from an owner, except retainage, shall be
33 made within 30 days after the owner receives a timely, properly com-
34 pleted, undisputed request for payment.

35 (e) If the owner fails to pay a contractor within 30 days following
36 receipt of a timely, properly completed, undisputed request for payment,
37 the owner shall pay interest to the contractor beginning on the thirty-first
38 day after receipt of the request for payment, computed at ~~1.5%~~ of the
39 undisputed amount per month or fraction of a month until the payment
40 is made.

the rate of 18% per annum

seven AGC of Kansas)

41 (f) A contractor shall pay its subcontractors any amounts due within
42 five business days of receipt of payment from the owner, including pay-
43 ment of retainage, if retainage is released by the owner, if the subcon-

Westar Energy suggests amending the bill's language on the interest rate to
"not to exceed the statutory rate established by K.S.A. 16-207."

m. g.

1 tractor has provided a timely, properly completed and undisputed request
2 for payment to the contractor.

Kansas Building Industry Assn.: p. 2 lines 41-43 and lines 1 and 2 page 3, and
lines 3-7 page 3 "This seems onerous." (No specific amendments suggested.)

3 (g) If the contractor fails to pay a subcontractor within ~~five~~ business
4 days, the contractor shall pay interest to the subcontractor beginning on
5 the ~~sixth~~ business day after receipt of payment by the contractor, com-
6 puted at ~~1.5% of the undisputed amount per month or fraction of a month~~
7 ~~until the payment is made.~~

seven (AGC of Kansas)

eight (AGC of Kansas)

the rate of 18% per annum

8 (h) The provisions of subsections (f) and (g) shall apply to all pay-
9 ments from subcontractors to their subcontractors.

10 Sec. 4. (a) An owner, contractor or subcontractor may withhold no
11 more than 10% retainage from the amount of any uncontested payment
12 due.

13 (b) If an owner, contractor or subcontractor fails to pay retainage, if
14 any, pursuant to the terms of a contract for private construction or as
15 required by this act, the owner, contractor or subcontractor shall pay ~~an~~
16 ~~additional 1.5% of the amount not paid for each month or fraction of a~~
17 ~~month until such retainage is paid.~~

interest to the contractor or subcontractor to whom payment was due,
beginning on the first business day after the payment was due, at a rate of 18%
per annum

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

undisputed (original balloon and Westar Energy)

29 Sec. 6. In any action to enforce section 3, 4 or 5, and amendments
30 thereto, including arbitration, the court or arbitrator shall award costs and
31 reasonable attorney fees to the prevailing party. Venue of such an action
32 shall be in the ~~state or federal court for the district or~~ county where the
33 real property is located. The hearing in such an arbitration shall be held
34 in the county where the real property is located.

An owner shall not be subject to payment of the costs of demobilization, delay
and remobilization, if the dispute exists between the general contractor and
subcontractor. (Westar Energy)

(Revisor)

Sec. 6. Westar Energy, the attorney fees clause "can be agreed to
contractually." (No specific amendments suggested.)

35 Sec. 7. The provisions of this act shall not apply to single family res-
36 idential housing and multifamily residential housing of four units or less.
37 The provisions of this act shall not apply to public works projects.

The provisions of this act shall not apply to contracts entered into prior to the
effective date of this act. (Revisor)

38 Sec. 8. This act shall take effect and be in force from and after its
39 publication in the statute book.