

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairman Karin Brownlee at 8:30 A.M. on February 2, 2005 in Room 123-S of the Capitol.

Committee members were in attendance

Committee staff present:      Kathie Sparks, Legislative Research  
   Susan Kannarr, Legislative Research  
   Helen Pedigo, Revisor of Statutes  
   Jackie Lunn, Committee Secretary

Conferees appearing before the committee:

Dean Ferrell-Ferrell Construction  
Mark Hutton-Hutton Construction  
Corey Peterson-AGC  
Phil Sewell-Central Mechanical  
Trudy Aron-American Institute of Architects  
Rick Dodds-Legal Counsel for Boeing  
Wayne Hardy-Westar Energy-Mgr. Contract Administration  
Sandy Jocquot-League of Municipalities

Others attending:

See attached list.

Chairperson Brownlee opened the meeting by calling the committee's attention to written testimony from proponents for **SB 33**: Jim DeHoff, Executive Secretary Kansas AFL-CIO (Attachment 1), Kathy Damron, Kansas City Kansas Area Chamber of Commerce (Attachment 2), and Robert L. Switzer, Jr., A. T. Switzer Company (Attachment 3). Chairperson Brownlee announced today's hearing was for opponents of **SB 33** and introduced Dean Ferrell, President of Farrell Construction of Topeka, Inc. as the first conferee.

Mr. Ferrell testified in opposition of **SB 33** (Attachment 4). Mr. Ferrell feels that this legislation would impose restrictions on private owners which would be a deterrent to future investment in capital projects in the State of Kansas. Mr. Farrell also has concerns on the 5 day limit to dispute subcontractors' billings and the release of retainage by line item on General Contractors' schedule of Values.

Chairperson Brownlee introduced Mark Hutton, Hutton Construction. Mr. Hutton expressed his opposition to **SB 33**. (Attachment 5) Mr. Hutton feels the bill fails to recognize the freedom of private industry and individuals to negotiate between themselves mutually beneficial terms and conditions upon which they freely choose to do business. He also feel it singles out the construction industry.

Chairperson Brownlee introduced Corey Peterson with AGC of Kansas. Mr. Peterson testified in opposition to **SB 33**. (Attachment 6) Mr. Peterson stated negotiations had been ongoing with the subcontractors and believed significant progress had been made. He was disappointed when they could not reach an agreement and the subcontractors chose to go forward with **SB 33**. He agreed that there are issues that need to be resolved but believes **SB 33** would protect poor subcontractors, while putting owners and quality general contractors at unnecessary risk. Therefore, he offered an amendment (balloon) which deletes a large portion of the bill's text. (Attachment 6) The primary focus of the proposed amendment is to make contracts more enforceable, while not prohibiting the ability of private parties to negotiate contract terms.

Chairperson Brownlee asked Mr. Peterson if the Proponents to this bill had been offered copies of this balloon before today. Mr. Peterson stated "no".

Chairperson Brownlee introduced Phil Sewell with Central Mechanical Wichita, Inc. Mr. Sewell stated he did not oppose the intent of **SB 33** which he believes is to insure all private party construction contracts are promptly paid in accordance with their respective contracts, but stated the balloon to **SB 33** satisfies the intent of **SB 33**, prompt payment of monies rightfully due and does so without the mandating of prescriptive contract terms. Mr. Sewell urged the committee to amend **SB 33** per the balloon. (Attachment 7)

CONTINUATION SHEET

MINUTES OF THE Senate Commerce at 8:30 A.M. on February 2, 2005 in Room 123-S of the Capitol.

Chairman Brownlee introduced Trudy Aron, Executive Director of the American Institute of Architects. Ms. Aron stated AIA is opposed to the language in **SB 33**, they believe that the Associated General Contractors of Kansas have amendments that make it possible to address the problems without wholesale changes that are not in the best interest of the owner. In closing she stated that AIA Kansas supports these amendments. (Attachment 8).

Chairperson Brownlee introduced Rick Dodds, Legal Counsel for the Boeing Company. Mr. Dodds stated that the Boeing Company could not support **SB 33** and believe the bill would result in a significant restriction on the legal rights of citizens of Kansas. The negotiation of private contract issues should remain outside of the legislative process. (Attachment 9)

Chairperson Brownlee introduced Wayne Hardy, Manager Contract Administration of Westar Energy. Mr. Hardy stated that Westar Energy is in opposition to **SB 33** due to the fact it disrupts normal contract negotiations. Matters addressed by **SB 33** are better dealt with in the negotiation process. If either a firm or its contractor breaches a contract, both have adequate recourse. Weststar Energy encourages the committee to oppose **SB 33**. (Attachment 10)

Chairperson Brownlee introduced Sandy Jocquot the Director of Law/General Counsel of the League of Kansas Municipalities. Ms. Jocquot stated the League of Kansas Municipalities opposes the language in **SB 33**. (Attachment 11) stated the League of Kansas Municipalities opposition is primarily based upon the public policy of allowing municipalities the flexibility to contract for public improvement projects to the benefit of the public. Most cities only have meetings once a month at which time they pay bills and may not be able to meet a strict 30 day payment requirement as set forth in **SB 33**. This bill could be amended to make it clear that only private construction projects are covered by the language in **SB 33**. If **SB 33** is clarified to exclude construction projects undertaken by municipalities, the League of Kansas Municipalities would withdraw its opposition to the bill.

Chairperson Brownlee referred the committee to written testimony from Bob Totten, Kansas Contractors Assoc., Inc. (Attachment 12), Joe Levens, Vice President of the Martin K. Eby Construction Company, Inc. (Attachment 13), and Marlee Carpenter, Vice President of Government Affairs for the Kansas Chamber. (Attachment 14)

During questions and answers the committee asked if the balloon had been shared with the other opponents such as Boeing and Westar before this meeting. With the answer being no, the committee suggested that possibly the Opponents and Proponents should get together and address the issue of the balloon.

Senator Barone asked for a report showing the number of lawsuits filed by subcontractors to collect their monies. It was stated that a report was not available and if this information was compiled it would not be factual. Most subcontractors do not file lawsuits because it would cost more to process than what was owed.

Chairperson Brownlee asked for a meeting of the minds between the Opponents and Proponents to work on the issues of the number of days and early retainage.

Chairperson Brownlee recognized Chris Wilson a representative from the Kansas Building Industry. Ms. Wilson stated the Kansas Building Industry was in opposition to **SB 33** and she would provide written testimony to the committee.

Chairperson Brownlee closed the hearing and adjourned the meeting at 9:30 a.m. The next meeting to be held on Thursday, February 3, 2005 at 8:30 a.m. in room 123S.

# Senate Commerce Committee

## Guest List

Date: February 2, 2005

|                |                                 |
|----------------|---------------------------------|
| BART SPRAGUE   | Kingsinger & Assoc.             |
| WAYNE HARDY    | WESTAR ENERGY                   |
| Mark Schreiber | Westar Energy                   |
| Eric Stafford  | AGC                             |
| Cory Peterson  | AGC of KS                       |
| PHIL SEWELL    | CENTRAL MECHANICAL WICHITA      |
| MARK HUTTON    | HUTTON CONSTRUCTION CORPORATION |
| Doug Hutchins  | Vincent Roofing Inc             |
| Ken Valley     | Kelley Construction Co. Inc.    |
| Will CARSON    | AGC of KS                       |
| Tom Slattery   | AGC KS                          |
| DEAN FERRELL   | FERRELL CONST. OF TOPEKA        |
| TIM BROWDER    | FURUM CONST OF TOPEKA.          |
| Paula Kafka    | Intern (Wysong)                 |
| Kathleen Smith | KODR                            |
| STEVE JOHNSON  | KANSAS GAS Service              |
| Larry Olsen    | Kansas Bankers Assoc.           |
| Doug Wardham   | Kansas Bankers Assn.            |
| Jim May        | Foulton Siekkin LLP             |
| Diane Costello | Olathe Chamber                  |
| Parker Young   | Assoc Bldrs Contractors         |
| Wendy Mathews  | KAPA - KEMCA                    |
| John Frederick | Boeing                          |
| Rich Dadds     | Boeing                          |
| Judy Jaquet    | LKM                             |
| Ron Seebert    | Hun Law Firm                    |



# Kansas AFL-CIO

2131 S.W. 36th St.

Topeka, KS 66611

785/267-0100

Fax 785/267-2775



President  
**Ron Eldridge**

Executive Secretary  
Treasurer  
**Jim DeHoff**

Executive Vice  
President  
**Wil Leiker**

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Jim Clapper  
Robin Cook  
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Hoyt Hillman  
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Lloyd Lavin  
Jerry Lewis  
Shawn Lietz  
Pam Pearson  
Dave Peterson  
Emil Ramirez  
Steve Rooney  
Debbie Snow  
Richard Taylor  
Wilma Ventura  
Betty Vines  
Dan Woodard*

## TESTIMONY ON S.B. 33 to the Senate Commerce Committee

by Jim DeHoff, Executive Secretary  
Kansas AFL-CIO  
February 2, 2005  
8:30 A.M., Rm. 123-S

Chairperson Karin Brownlee and Committee Members:

I am Jim DeHoff, Executive Secretary of the Kansas AFL-CIO. I appear before you today in support of S.B. 33.

In the Construction Industry there has been a major problem collecting payments for completed construction work. The reason this problem exists, in some cases, is that if an owner or contractor can hold onto payments owed to subcontractors or general contractors, they simply make more money. This can be in the form of interest earned or simply not having to pay interest on a construction loan from a bank. The delay in payments to general contractors or subcontractors has caused contractors to be late on health and welfare payments and other fringe benefits owed to individual workers.

We ask that you support S.B. 33 and help correct this serious problem.

Thank you.

Jim DeHoff  
Executive Secretary

JD:da  
kape/aft4565



Senate Commerce Committee

2-2-05  
Attachment 1-1

**Kathy  
Damron**

(785) 235-2525  
(785) 354-8092 FAX  
E-MAIL: MKDTopeka@aol.com

919 SOUTH KANSAS AVENUE

Topeka, Kansas 66612-1210

TO: Senate Commerce Committee  
FROM: Kathy Damron, Kansas City Kansas Area  
Chamber of Commerce  
RE: Support for Senate Bill 33  
DATE: February 1, 2005

The Kansas City Kansas Area Chamber of Commerce appreciates the opportunity to appear before you in support of Senate Bill 33, enacting a prompt pay in private construction act.

The proposal under consideration has the support of the businesses and individuals who participate in the KCK Chamber. Brought to the chamber's consideration by members of the American Subcontractor's Association, this bill brings forward good business practices for inclusion in state statute. If enacted, Kansas would join the list of some 18 states where prompt pay laws govern contractors and subcontractors. In the Kansas City area, the state of Missouri operates under prompt pay laws, although they are less stringent than those embodied in this proposal.

We urge the Senate Commerce Committee to give full, thoughtful consideration to this measure. Many small Kansas companies who may not be able to fight for due payment would benefit greatly by consideration of this measure.

Thank you for your interest and consideration.

Senate Commerce Committee

2-2-05

Attachment 2-1

# A. T. Switzer Company

P. O. BOX 300257 • 4710 BLUE PARKWAY  
KANSAS CITY, MO 64130



Telephone (816) 861-1700  
FAX (816) 861-1702

Painting Contractors - Since 1911

January 28, 2005

Kansas Commerce Committee  
Kansas Senate Labor and Commerce Committee  
Kansas House Federal and State Affairs  
State Capital Building  
300 SW 19<sup>th</sup> Street  
Topeka, Kansas 66612

Re: Senate Bill 33

To all Honorable Members:

As President of A.T. Switzer Painting Company, Inc., a Missouri Corporation, located in Kansas City, Missouri I am writing you in support of Senate Bill 33. My two brothers and myself are the 4th generation owners of the company, which my great grandfather started in 1911. We would like to pass it on to the 5<sup>th</sup> generation!!! Passing Senate Bill 33 would greatly help.

As a medium sized painting company, 35 plus employees, operating in both Kansas and Missouri, we often find the easiest part of our work is actually the painting. Collecting from General Contractors and Owners often becomes a little game. We have heard every excuse from "out of checks" to "we only pay our bills the 3<sup>rd</sup> Friday of each month". Trying to send interest charges to cover the delays does nothing. Passage Bill 33 provides us with leverage to collect our money.

The above referenced bill is long overdue!!! It will greatly help stay competitive in a very tough construction market.

Thank you in advance for you support for this bill.

Respectfully submitted,

**A.T. SWITZER COMPANY, INC.**

Robert L. Switzer Jr.,  
President.

Senate Commerce Committee

2-2-05

Attachment 3-1

**FERRELL**

**CONSTRUCTION  
OF TOPEKA, INC.**

TESTIMONY PRESENTED TO THE SENATE

COMMERCE COMMITTEE

FEBRUARY 2, 2005

BY

DEAN F. FERRELL

Madam Co-Chair, Mr. Co-Chair, and Members of the Committee

My name is Dean Ferrell. I am President and Owner of Ferrell Construction of Topeka, Inc., and am a past president of the Associated General Contractors of Kansas. My company specializes in commercial building construction and, through the years, we have completed several State of Kansas projects.

I am here to voice my opposition to **Senate Bill No. 33**, regarding private construction contracts. At a time when private investors are struggling to rationalize funding construction projects in this state, I fear this proposed legislation would only make matters worse. It will impose restrictions on private Owners that will be a deterrent to future investment in capital projects in the State of Kansas.

Besides the affect this bill would have on private Owners, I'd like to point out that this bill places a general contractor in an extremely difficult position for the following reasons:

1. 5 DAY LIMIT TO DISPUTE SUBCONTRACTOR'S BILLINGS (Section 3)  
A general contractor (G.C.) compiles the billings from subcontractors and then submits a complete billing to the Owner. This usually takes five or six days, roughly the amount of time a G.C. has to dispute a subcontractor's billing. If the Owner has a dispute with the subcontractor's billing, it is too late for the G.C. to go back to the subcontractor with the Owner's concerns. So basically, the Owner will be adjusting the G.C.'s billing downward; however, the G.C., according to this bill, will be obligated to pay the full amount to the subcontractor. This is not a fair situation.

Senate Commerce Committee

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Attachment 4-1

2. RELEASE OF RETAINAGE BY LINE ITEM ON G.C.'S SCHEDULE OF VALUES (Section 4, Paragraph C)

This is unworkable. What happens if the line item values on early completed work activities are inflated and the values on a late completed work activity are undervalued? It basically means the G.C. or the subcontractor will be "overpaid" up front. This leads to serious problems to the Owner if a G.C. defaults on its contract. By the same token, it leads to serious problems for the G.C. should a subcontractor default. Nothing in this bill can keep this dilemma from happening.

These are just a couple examples of how this bill could affect my business. I also have problems with early release of retainage just because performance and payment bonds, or some other form of security are provided. Retainage is not a bad thing – since I've been in the construction business, it's been a way of life. It provides Owners with a sense of security, sometimes leverage to ensure their project is completed correctly and on time. Successful contractors and subcontractors have learned to deal with retainage by allowing for financing costs in their estimates.

Presently, we have contract laws and lien laws that work. They've been updated and tested through time to ensure that our rights are protected, including subcontractors'. There is no need for this burdensome bill.

Lastly, I wonder why this bill is directed solely at "private" construction. If it's so good, - and I point out again, I don't think it is – why is there not an attempt to include "all" construction, including "public funded" projects? and "residential" projects? This appears to be a discriminatory policy. What's good for one should be good for all.

**I ask that you oppose Senate Bill No. 33.** Thank you.

Senate Commerce Committee

2-2-05

Attachment

4-2

**TESTIMONY OF MARK E. HUTTON  
BEFORE SENATE COMMITTEE ON COMMERCE  
SB 33**

February 2, 2005

Madam and Mr. Chairpersons, and Members of the Committee my name is Mark Hutton. I am president of Hutton Construction Corporation, a mid-sized general contractor operating primarily in the Wichita and surrounding areas of Kansas.

Thank you for allowing me the opportunity today to speak in opposition of SENATE Bill No. 33. As a past president of the Associated General Contractors of Kansas, and an active member in our industry, I agreed to be part of the committee that worked with the members of the Kansas City Subcontractor Association that initiated this bill. From the beginning, it was our goal to work together to present a bill that all segments of the industry could support. The result of our numerous meetings was to reach what we believed to be a viable compromise on many of the issues that were brought to the table. When consensus could not be reached on all of their issues, the subcontractors association broke off discussions and introduced a bill that ignored the progress made on the other key issues.

I oppose this bill primarily because it fails to recognize the freedom of private industry and individuals to negotiate between themselves mutually beneficial terms and conditions upon which they freely choose to do business and it singles out the construction industry. Our discussions with the Subcontractors group were a good faith attempt to correct issues that place contractors and subcontractors in unfair situations, yet preserve the basic right for everyone to conduct business as they see fit. Proponents of this bill claim that this law is needed to correct a problem with prompt and fair payment when the real issue is they want protection from the consequences of making poor business decisions.

The rigid payment terms dictated in SB 33 are based on the traditional industry model of project delivery known as design-bid-build and fail to recognize the non-traditional methods, such as design build and construction management. In these delivery methods the contract terms and conditions reflect a much different customer relationship. More and more private owners are looking to their general contractor as a fiduciary relationship, intrusting them with a higher level of financial management of their project. This includes management of retained funds when many times there is no retainage held on the GC. This bill would not allow this to occur and because of its unreasonable time requirements could force a general contractor to pay for work that has not yet been proven to be complete, satisfactory, or accepted by the owner.

This bill also represents that by the subcontractor providing a bond this will protect the general contractors and owners from the issues surrounding early release of retainage. This is a false sense of security. Those that are familiar with the surety business will

Senate Commerce Committee

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Attachment

5-1



attest to the fact that bond claims are the most expensive method to resolve performance issues and usually result in significant legal costs, long delays, and poor outcomes for all parties involved. Additionally, subcontractors that do not enjoy the robust financial statements required by sureties, would be precluded from competing for work on a level playing field with those that do. The result will be to stifle the growth of new companies.

In conclusion, I would also like to point out the effect on the bigger picture of attracting and keeping business to the State of Kansas. As an example, I offer a project that our company is currently bidding for a large international company, Honeywell. Their request for proposal clearly states the retainage provisions and that payment will be a 60-day cycle. I am quite certain that a company of this stature didn't choose 60 days arbitrarily or established their retainage policy flippantly. They made a business decision based on their internal and external requirements and experience. This bill would prohibit Honeywell from making these decisions and more importantly, it sends a message that our State likes to meddle in those areas where they simply don't belong.

Thank you for allowing me the opportunity to speak on this matter and I respectfully request that you vote unfavorably on SB 33 as it is written.



Senate Commerce Committee

2-2-05

Attachment

5-2



**TESTIMONY OF  
ASSOCIATED GENERAL CONTRACTORS OF KANSAS  
BEFORE SENATE COMMITTEE ON COMMERCE**

**SB 33**

February 2, 2005

By Corey D Peterson, Associated General Contractors of Kansas, Inc.

Madam Chairman, Mister Chairmen and members of the committee, my name is Corey D Peterson, Executive Vice President of the Associated General Contractors of Kansas, Inc. The AGC of Kansas is a trade association representing the commercial building construction industry, including general contractors, subcontractors and suppliers throughout Kansas (with the exception of Johnson and Wyandotte counties).

**The AGC of Kansas opposes Senate Bill 33 and requests that you not report it favorably for passage as introduced. However, I respectfully ask that you consider the attached balloon.**

AGC of Kansas opposes SB 33 as introduced for the following reasons:

- Calls for government (state of Kansas) to dictate private business contract terms. It is AGC's opinion that private individuals should continue to have the invaluable right to contract. Contract law is already in place, additional state statutes are not needed.
- Prescriptive nature of the bill would protect poor subcontractors, while putting owners and quality general contractors at unnecessary risk.
- Discourages private companies from wanting to construct buildings in Kansas, even preventing them from doing so if extended billing cycles are needed. SB 33 would not allow for negotiated payment terms between an owner and general contractor.
- Alternative construction delivery methods are becoming more prevalent. These processes are continually evolving. It would be difficult to change state laws to reflect changing business practices on such a frequent basis.
- Contract terms stipulated in the bill would restrict the ability for small and disadvantaged businesses from getting work. If retainage is disallowed, GCs will only select bondable subs.

Last year, the AGC of Kansas opposed an almost identical bill heard in this committee (SB 445). Since that time, AGC member general contractors and subcontractors met numerous times to develop a position on legislation that would benefit the specialty contractor (subcontractor), but not erode the ability for the general contractor to effectively do business with its owner/client.

Senate Commerce Committee

2-2-05

Attachment 6-1

AGC of Kansas also hosted four meetings this summer and fall with the proponents of SB 33 (American Subcontractors Association—KC Chapter), along with industry groups such as The Builders' Association, National Electrical Contractors Association – Kansas and other members from industry, in an attempt to develop legislation on which all could agree and support. Much was accomplished, with several good faith concessions being made by all sides. While the discussions were healthy and progress was being made, these discussions closed in late November, when the proponents of SB 33 determined the concessions made by AGC and the other groups were not adequate and announced they would introduce their original bill (SB 33). AGC did not go back to its original position of opposing any bill dictating private contract language, but instead kept moving forward, seeking a compromise.

Following this, AGC general contractors and specialty contractors again met and developed a position which included the items previously offered and more. This position is the basis for the attached balloon. It has been ratified by the AGC board of directors and the AGC Specialty Contractors Council and a portion of which is supported by The Builders Association (Kansas City).

While the balloon deletes a large portion of the bill's text, it preserves most of the critical provisions affecting the subcontractors in the state. Key points the balloon provides include:

- Calls for the enforcement of the contract,
- Caps retainage at 10%,
- Allows retainage to be capped at what is being held on the prime contractor if the subcontractor is bonded,
- Provides for the "right to stop work" and recovery of the costs for such shut down,
- Venue of arbitration or court proceedings shall be in the locale of the project, and
- Loser pays legal fees and court costs.

The primary focus of the proposed amendment is to make contracts more enforceable, while not prohibiting the ability of private parties to negotiate contract terms.

The amendment is closely modeled after the current Missouri private sector prompt pay law. It allows the private parties the ability to contract, but makes the contracts more enforceable. The other states surrounding Kansas (Oklahoma, Colorado, Nebraska, Iowa and Arkansas) have no private sector prompt pay law. Very few states in the union (less than five by our last count) have private sector payment laws as intrusive as SB 33.

The AGC of Kansas **respectfully requests that you not recommend SB 33 for passage as originally introduced, but to consider the AGC proposed balloon for passage.** Thank you for your consideration.

Senate Commerce Committee

2-2-05  
Attachment 6-2

SENATE BILL No. 33

By Committee on Commerce

1-13

Proposed 2/2/05

Coney Peterson  
AGC

Senate Commerce Committee  
2-2-05  
Attachment 6-3

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) Section 1 through 8, and amendments thereto, shall  
14 be known and may be cited as the Kansas fairness in private construction  
15 contract act.

7

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) ~~“Bank” means an institution, the deposits of which are insured by~~  
21 ~~the federal deposit insurance corporation and which is legally doing business~~  
22 ~~in the state of Kansas.~~

(a)

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

(b)

29 (c) ~~“Contract” means a contract or agreement made and entered into~~  
30 ~~by an owner, contractor or subcontractor concerning construction.~~

(c)

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

(d)

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

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

(e)

39 (g) ~~“Retainage” means money earned by a contractor or subcontractor~~  
40 ~~but withheld to ensure proper performance by the contractor or~~  
41 ~~subcontractor.~~

(f)

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

(g)

1 contract with the owner.

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

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

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

22 ~~(d) Within five days after the owner makes a payment, including payment~~  
23 ~~of retainage, to the contractor, the owner shall give notice of the~~  
24 ~~date and amount of the payment to any subcontractor that makes a written~~  
25 ~~request to the owner for such notice.~~

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

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

35 ~~(g) If the contractor receives an improperly completed request for~~  
36 ~~payment or in good faith disputes a request for payment from a subcontractor,~~  
37 ~~the contractor shall notify the subcontractor within five days of~~  
38 ~~receipt of the improperly completed or disputed request for payment.~~  
39 ~~No payment shall become due on such a request until such request is~~  
40 ~~properly completed or the dispute is resolved. If the contractor fails to~~  
41 ~~notify the subcontractor within the five-day period of any improper completion~~  
42 ~~or dispute, the request for payment shall be considered proper~~  
43 ~~and the contractor shall make payment thereon in accordance with sub~~

Contract for private construction work,  
scheduled payments-action for failure to  
pay. (a) All persons who enter into a  
contract for private construction work after  
(July 1, 2005), shall make all scheduled  
payments pursuant to the terms of the  
contract.

(b) Any person who has not been  
paid in accordance with subsection (a) of  
this section may bring an action in a court  
of competent jurisdiction against a person  
who has failed to pay.

9-2-09

1 section (e). Any undisputed portion of any request shall be paid in accordance  
2 with subsection (e).

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

5 Sec. 4. (a) An owner may retain no more than 10% of the amount of  
6 any payment due a contractor.

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

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

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

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

34 (e) If the tender described in subsection (d) is made after retainage  
35 has been withheld, the party holding the retainage, within five days after  
36 receipt of the tender, shall pay over to the tendering party the withheld  
37 retainage to the extent of the substitute security. If the tender of substitute  
38 security is made before retainage has been withheld, the party entitled  
39 to hold retainage, to the extent of the substitute security, shall refrain  
40 from withholding retainage from future payments.

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

43 (1) Negotiable securities with a market value equal to or greater than

An owner, contractor, and subcontractor may withhold no more than 10% retainage from the amount of any uncontested payment due.

, provided the subcontractor has provided performance and payment bonds for the full value of the subcontract and provided the subcontractor's surety consents to the amount of retainage to be withheld and/or released.

1 the amount of retainage, which are:

2 (A) Obligations of the United States government;

3 (B) obligations of the state of Kansas; or

4 (C) certificates of deposit issued by banks.

5 (2) ~~A retainage bond naming the owner as obligee, issued by a surety~~  
6 ~~company authorized to issue surety bonds in the state of Kansas, in the~~  
7 ~~amount of the retainage to be released and conditioned upon completion~~  
8 ~~of the work of the party tendering the bond.~~

9 (3) ~~An irrevocable and unconditional letter of credit in favor of the~~  
10 ~~owner, issued by a bank, in the amount of the retainage to be released.~~

11 (g) ~~The party depositing the substitute security shall be entitled to all~~  
12 ~~interest or other income earned on any such substitute security deposited~~  
13 ~~by such party.~~

14 (h) ~~Upon completion of the work of the party tendering the substitute~~  
15 ~~security, such substitute security shall be returned to such party.~~

16 (i) ~~If an owner, contractor or subcontractor fails to pay retainage as~~  
17 ~~required by this act, the owner, contractor or subcontractor shall pay an~~  
18 ~~additional 1.5% of the amount not paid for each month or fraction of a~~  
19 ~~month until such retainage is paid.~~

20 (j) ~~In no event shall any retainage be withheld from a contractor or~~  
21 ~~subcontractor that has provided payment and performance bonds at the~~  
22 ~~request of the owner or contractor.~~

23 Sec. 5. ~~If any payment properly due, including payment of retainage,~~  
24 ~~is not made in accordance with the provisions of this act, the contractor~~  
25 ~~and any subcontractors, regardless of tier, shall be entitled to suspend~~  
26 ~~further performance under any contract for construction until payment,~~  
27 ~~including applicable interest, is made. Any party to whom payment is due~~  
28 ~~shall be entitled to recover from the party obligated to make payment any~~  
29 ~~costs incurred on account of the suspension.~~

30 Sec. 6. ~~No provision in a contract or subcontract for construction in~~  
31 ~~the state of Kansas that purports to waive, release or extinguish the right~~  
32 ~~of a contractor or subcontractor to recover costs or damages, or obtain~~  
33 ~~an equitable adjustment, for delay in performing the contract or subcontract,~~  
34 ~~if the delay is caused in whole or in part by acts or omissions within~~  
35 ~~the control of the other party to the contract or subcontract or persons~~  
36 ~~acting on behalf of the other party, is against public policy and void and~~  
37 ~~unenforceable. This section shall not affect the validity or enforceability~~  
38 ~~of any contract or subcontract provision that (a) precludes a contractor~~  
39 ~~or subcontractor from recovering the portion of any delay costs that are~~  
40 ~~caused by acts or omissions within the control of the contractor or damages~~  
41 ~~or subcontractor or persons acting on behalf of the contractor or~~  
42 ~~subcontractor or (b) requires the contractor or subcontractor to give notice~~  
43 ~~of any delay.~~

(a) If the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the undisputed amount or amount awarded by arbitration, then the Contractor may, upon seven additional days' written notice to the Owner, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.

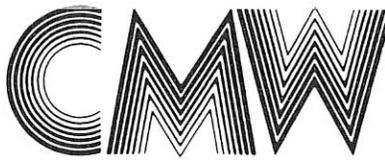
(b) If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to any other available remedies, upon seven additional days' written notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate adjustment, be increased by the amount of the Subcontractor's reasonable costs of demobilization, delay and remobilization.

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

Senate Commerce Committee

2-2-05

Attachment 6-7



**Central Mechanical Wichita, Inc.**

Plumbing #2395 • Mechanical #1787

P.O. Box 47343 • Wichita, KS 67201-7343 • 316-267-7676 • FAX 316-267-7684

**TESTIMONY  
BY PHIL SEWELL  
BEFORE SENATE COMMITTEE ON COMMERCE  
SB 33**

February 2nd, 2005

Phil Sewell, Central Mechanical Wichita, Inc., Wichita, KS

Madame Chairman, Mister Chairman and members of the committee, my name is Phil Sewell and I am president of Central Mechanical Wichita, Inc. I also serve as board member of the Specialty Contractors Council of the Associated General Contractors of Kansas. My company is a mechanical contractor, where I do work as both a subcontractor and prime contractor. The Specialty Contractors Council represents the **104 subcontractor members** of the AGC of Kansas.

I am speaking to amend **Senate Bill 33** and ask that you amend it per our balloon which is attached.

As you know last year I testified against a similar bill, SB 445, which had similar prescriptive private party contract terms and escrow accounts for retainage. The current bill before you, SB 33, has been revised to delete the escrow provisions from last year's SB 445.

The AGC of Kansas, ASA, KC-Builders Association, and the Specialty Contractors Council of the AGC of Kansas, have tried since September of 2004 to compromise on a prompt pay bill that is modeled after the Missouri Statute. Unfortunately in December of 2004 the compromise with the ASA could not be reached. Today you have before you, for your consideration, SB 33 (the ASA proposal) and the AGC balloon to that bill.

I do not oppose the intent of SB 33 which I believe is to insure all private party construction contracts are promptly paid in accordance with their respective contracts. Our balloon to SB 33 satisfies the intent of SB 33, prompt payment of monies rightfully due, and does so without the mandating of prescriptive contract terms.

Again, I respectfully request that you amend **SB 33 per our balloon**. Thank you for your time and I would be glad to answer any questions that you may have.

Phil A Sewell  
President CMW Inc.

Senate Commerce Committee

2-2-05

Plumbing • Heating • Air Conditioning

Attachment 7-1



February 1, 2005

TO: Co-Chairs Brownlee and Jordan and Members of the Senate Commerce Committee

FROM: Trudy Aron, Executive Director

RE: **Opposition to SB 33; Support for AGC Amendments**

*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  
Overland Park  
Daniel Crouch, Assoc. AIA  
Manhattan  
Morris C. Dozier, Jr., AIA  
Manhattan  
John Gaunt, FAIA  
Lawrence  
Chad P. Glenn, AIA  
Wichita  
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  
McPherson  
Gregory D. Tice, AIA  
Wichita  
J. Michael Vieux, AIA  
Leavenworth

*Executive Director*  
Trudy Aron, Hon. AIA, CAE  
aron@aiaks.org

Good morning, Co-Chairs Brownlee and Jordan 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 affects prompt pay and retainage. The bill hampers individuals by severely limiting issues that are normally covered in contracts. A number of times yesterday, the proponents advocated the use of language in AIA Contract Documents. We couldn't agree more, in fact we would support a public policy that would require the use of these industry-standard documents to be required for all building construction projects. However, the provisions in SB 33 go significantly beyond what is included in AIA Documents.

Every business is hindered by those who do not pay their debts promptly. However, SB 33 would require those in construction to observe a stringent and demanding schedule of payments or face severe penalties.

More importantly, the bill severely limits common practices regarding retainage. One of the most frustrating times for owners and architects is at the end of a construction project when most, but not all, of the work has been done. The owner is anxious to occupy or use the project and the contractor is anxious to move on to other work. The contractor says the project is complete but when the owner and architect walk through the project, many items have not been completed satisfactorily. The withholding of funds, in many cases, becomes the owner's only leverage to get the contractor or subcontractors to finish the work. We believe the decision on the percentage of funds is retained and when they should be released should rest with the owner. The owner would continue to have the option to reduce the amount withheld and/or return all retainage depending on many factors including the sequencing of the work (paying retainage as the work is completed,) the relationship among the design and construction team, the progress of the work, etc.

While we oppose the language in SB 33, we do believe that the Associated General Contractors of Kansas have amendments that make it possible to address the problems without wholesale changes that are not in the best interests of the owner. AIA Kansas supports these amendments.

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

**Senate Commerce Committee**  
**Senate Bill No. 33**  
**February 2, 2005**

Madame Chair and Mr. Chairman and members of the Senate Committee on Commerce, I am Rick Dodds, Legal Counsel for The Boeing Company. Thank you for the opportunity to present this testimony to the Committee

As the Committee will recall, Senate Bill No. 33 is substantially similar to proposed Senate Bill No. 445, which was introduced in 2004. The Boeing Company would like to offer its perspective on Senate Bill No. 33 and explain why, like the old Senate Bill 445, 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. Examples include provisions relating to warranty, liquidated damages, indemnity for mechanics liens, and indemnity for patent infringement and trade secret information, all of which are commonly found in construction contracts, as are indemnity provisions for personal injury, property damage, and economic loss, clauses pertaining to retainage, and limitation of remedies for delay which are included in the subjects covered by SB 33. 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 SB 33 relating to legislatively-mandated payment terms, retainage limits, and non-waiver of damages for delay constitute a dramatic shift in the public policy of the State of Kansas. Section 3 of the Bill contains over 40 lines of text devoted to an owner's and contractor's payment responsibilities to a contractor or subcontractor, respectively, including specification of the number of days allowed for payment to be made, the interest rate for late payments, specification of the parties' rights over a disputed request for payment, and required timelines for objections to submission of an improper invoice. Again, in Boeing's experience, each of these matters are negotiated in

Senate Commerce Committee

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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.

Section 4 of the Bill goes into detail specifying the contractual requirements for retainage by owners and contractors. This section contravenes the traditional practices in construction contracting regarding retainage, and in fact, effectively eliminates the parties' ability to agree on retainage as a method to protect the property owner. If property owners and contractors are unable to bargain for retainage as a tool to attempt to ensure the timely and correct completion of the building contract by the contractor, property owners will be forced to insist upon performance bonds issued by sureties to substitute for such protection. In Boeing's experience, only the largest, long-established contractors are able to obtain surety bond coverage in today's business climate, and as a result, if SB 33 would become law, many small and medium sized contractors who otherwise would have been willing to agree to an appropriate retainage in lieu of surety bond coverage in order to have an opportunity to build a project will instead be passed over for consideration on many projects. For these reasons, Boeing is concerned that the ultimate effect of the proposed retainage and other provisions of the Bill will be to increase the risk and cost of improving property in Kansas, thereby putting Kansas in a competitive disadvantage relative to states which continue to allow property owners and contractors to bargain on the matters covered by the Bill.

From Boeing's perspective as a project owner, SB 33 would impose substantial restrictions and cause fundamental and inappropriate changes to our contracts with general contractors. Boeing has no contractual privity with subcontractors, yet the effects of SB 33 reach directly into our negotiations with our contractors. As between Boeing and its contractors, payment terms and schedule, retainage percentages and payment obligation, and all the rest are open for negotiation. Freedom to contract is no different between general contractors and subcontractors. If a party so desired, any or all the contractual obligations specified in SB 33, including a requirement to pay attorney fees to a prevailing party, can be included in a contract upon mutual agreement of both parties.

In closing, Boeing submits that SB 33 would result in a significant restriction on the legal rights of the citizens of Kansas. Boeing believes the negotiation of private contract issues should remain outside of the legislative process.

###

Senate Commerce Committee

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Attachment 9-2

**Testimony on SB 33 before the  
Senate Commerce Committee**

**By**

**Wayne Hardy, Manager Contract Administration  
Westar Energy  
February 2, 2005**

Good morning Chairs Brownlee and Jordan and members of the committee.

I am Wayne Hardy, manager contract administration for Westar Energy. We oppose SB 33 because it would disrupt normal negotiations between contractors and my company. In our experience, both sides negotiate their differences and agree to terms of a contract.

Westar processes on average about 250 contracts for services every year. Our contract administration staff is comprised of four employees. Field management is responsible for tracking contracted projects. SB 33 would increase the burden placed on tracking these projects by requiring notifications to sub-contractors when payment is made to the general contractor.

We believe that retention requirements should be negotiated. In our industry, the norm is 10 percent, but it varies depending on the type of contracted work. It varies from industry to industry, depending on the size of projects and the amount of money and risk involved. Another item outside the norm is the tendering of a security interest in order to release the retainage. It appears that retainage/security interest may be used to forego a performance bond. It is not unusual for our contracts to require both retainage and a performance bond. Again, we believe these issues are best left to the negotiation process and not dictated within statutes.

The provision on invoice disputes is unreasonable. SB 33 would require billing disputes be initiated within five days of receipt of the invoice. If not, the invoice would be deemed correct. Westar contracts multi-million dollar projects, invoicing for which can be complicated and detailed. It simply is not reasonable to expect a contract administrator to catch errors and initiate disputes in such a short time. The provision encourages confusing invoicing and increased disputes, neither of which is a desirable business practice.

In summary, SB 33 disrupts normal contract negotiations. Matters addressed by SB 33 are better dealt with in the negotiation process. If either a firm or its contractor breaches a contract, both have adequate recourse. We encourage the committee to oppose SB 33.

Thank you for the opportunity to address the committee this morning. I would be glad to answer your questions at the appropriate time.

Senate Commerce Committee

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Attachment 10-1



League of Kansas Municipalities

300 SW 8th Avenue  
Topeka, Kansas 66603-3912  
Phone: (785) 354-9565  
Fax: (785) 354-4186

TO: Senate Commerce Committee  
FROM: Sandy Jacquot, Director of Law/General Counsel  
DATE: February 2, 2005  
RE: Opposition to SB 33

I would like to thank the committee on behalf of the League of Kansas Municipalities for the opportunity to testify in opposition to SB 33. We believe the intent of this bill is to only impact private construction contracts, but some of the language in the bill would extend the applicability to municipalities as well. Therefore, LKM will explain its objection to including municipalities in the effect of this act and how it can be amended to eliminate any confusion about to whom it applies.

The League's opposition is primarily based upon the public policy of allowing municipalities the flexibility to contract for public improvement projects to the benefit of the public. Most cities only have meetings once per month at which time they pay bills and may not be able to meet a strict 30 day payment requirement set forth in Section 3 of the bill. If this is an issue for a municipality, Section 1(b) of the bill would not allow the parties to contract for a more reasonable bill payment schedule. Thus, the cost of a public construction contract could be increased simply by a municipality not having a meeting timed to meet the invoicing of the contractor. In addition, for some public projects a greater than 10% retainage, which is prohibited in Section 4, would be appropriate, but again, the municipality would be prohibited from negotiating for such a term, perhaps to the detriment of the public. Municipalities should not have their hands tied in negotiating for public construction projects.

This bill could be amended to make it clear that only private construction projects are covered by the language. First, the definition of "construction" sets forth an extensive list of public improvement projects, such as highways, bridges, water lines and sewer lines. If this bill addresses only private construction, it is misleading to define construction to include what are usually considered public construction projects. The definition should specifically exclude any project undertaken by a municipality from the definition. Second, the definition of "person" in the bill extends to "any other legal entity." This is broad enough to encompass municipalities. The League would suggest that municipalities be specifically excluded in this definition.

To the extent that SB 33 is clarified to exclude construction projects undertaken by municipalities, the League of Kansas Municipalities would withdraw its opposition to the bill. Without such clarification, however, the League believes that the language is broad enough to apply to municipal projects and we must strongly object to the passage of SB 33. Thank you again for allowing the League to testify in opposition to SB 33.

Senate Commerce Committee

2-2-05

Attachment 11-1

# THE KANSAS CONTRACTORS ASSOCIATION, INC.



## OFFICERS

MARY SULLIVAN, President  
Kansas City, Kansas

CORKY BEACHNER, Vice President  
St. Paul, Kansas

MIKE MORRAND, Treasurer  
Paola, Kansas

## STAFF

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Leawood, Kansas

## Testimony

By the Kansas Contractors Association

before the Senate Commerce Committee regarding SB 33

February 2, 2005

Co-chairman Browlee and Co-chairman Jordan and members of the Senate Commerce Committee, I am Bob Totten, Public Affairs Director for the Kansas Contractors Association. Our organization represents over 400 companies who are involved in the construction of highways and water treatment facilities in Kansas and the Midwest.

Today, I want to thank you for allowing me to testify in opposition to Senate Bill 33. This measure outlines requirements for how contracts should be written in the private sector. We oppose such intrusion as our members believe the legislation is not needed. We know there are private contracts our members don't like...but they all know they don't have to sign them.

In the private sector, our members believe they have the ability either to negotiate the work with the owner or they don't have to take on the work as outlined

Senate Commerce Committee

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in the contract.

It is different playing field than what it is in the public sector as our members believe everyone should have the same and equal opportunity to bid the work.

When reviewing the language as outlined in this bill, our members question the language on page 2 which stipulates when a subcontractor is to be paid. It says the sub will be paid within five days of the general contractor getting paid by the owner.

Our members indicate that time frame is too stringent. Most contractors pay their subs within 30 days or even sooner but putting this into state law indicating subs had to be paid within 5 days is almost physically impossible when you have other bills to pay and other accounting things to accomplish.

There is also language in this legislation which says a penalty of up to 18 % would be required if payment doesn't occur within five days. We think such a penalty is too severe and uncalled for. For those reasons and others I have not mentioned, the Kansas Contractors Association is opposed to SB 33. I thank you for your attention and would be glad to answer questions if I may.

Senate Commerce Committee

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Attachment

12-2



**TESTIMONY OF  
JOSEPH D LEVENS, JR., CPC  
BEFORE SENATE COMMITTEE ON COMMERCE  
SENATE BILL 33 (SB 33)  
February 2, 2005**

Madam Chairman, Mister Chairman and members of the committee, my name is Joe Levens, Vice President of Martin K. Eby Construction Co., Inc. Eby Construction is based in Wichita and has been a proud member of the construction industry serving our many customers in the state of Kansas for over 67 years.

**Eby Construction opposes Senate Bill 33 and respectfully asks that you vote unfavorably should there be a motion for approval as written.**

This bill has been submitted by the American Subcontractors Association (ASA) of Kansas City and represents the viewpoint of only one sector of the multi faceted construction industry. It is essentially the same bill (SB 445) introduced by the ASA in 2004.

As the current vice president of the Associated General Contractors of Kansas (AGC) I participated in numerous meetings conducted over the last six months with other AGC members, representatives of the ASA, the AGC Specialty Contractor members and other industry groups to establish a compromise that would assist our valued specialty contractor members, but not damage the general contractor's ability to contract and effectively do business with (and for) its owner client. Much was accomplished but after four meetings, ASA decided the AGC concessions were inadequate and decided to go back to their original bill.

In general, SB 33 imposes a number of prescriptive payment and retainage terms that, should they become state law, would prevent the owner and/or prime contractor from negotiating the terms of the construction contract to meet the needs of a specific project.

A few of the items included in Senate Bill 33 are as follows:

- Specifically Section 1 (b) prevents private contracts from superseding the provisions in the bill. This would prevent the private owner and/or prime contractor from negotiating the terms of the construction contract to meet the needs of a specific project.
- Section 3 (a) requires owners to pay a contractor within 30 days after the owner receives a timely, properly completed, undisputed request for payment. Personally, while I would prefer payment terms of 30 days or less I also understand the needs of the owner to establish the terms within their own accounting procedures. Currently, I am responsible for projects with payment terms of 30, 45 and 60 days. In each case, participating specialty contractors were aware of the payment terms and able to include the appropriate financing costs in their pricing for the project.
- Section 3 (e) requires the contractor to pay its subcontractors any amounts due within 5 days of receipt of payment from the owner. Assuming the 5 days are calendar days, a payment received on a Thursday would be due on the following Tuesday which would

include two non-working days (Saturday and Sunday). Five calendar days does not allow enough time for the processing of the payment which includes the owner's payment clearing the bank, writing checks associated with the payment, auditing the checks for proper payment, sorting and addressing for mailing, etc. In order to remain competitive in our industry my company has established a systematic process that issues all payments on Fridays of each week. Depending on when the owner's payment is received our normal processing time requires 7 to 10 days.

- Section 4 (b) states a contractor shall not withhold from a subcontractor, and a subcontractor from a lower-tier subcontractor, more retainage than the owner withholds from the contractor, or the contractor from the subcontractor, for that party's work. Currently I have several projects where the owner holds no retainage on our work because of our proven ability to perform successfully on many projects over a long period of time. In some cases, we are able to pass on these same benefits to our specialty contractors who have, over time, proven their ability to also finish projects successfully. Section 4(b) would require the contractor to treat all specialty contractors as equals when this is definitely not the case.
- Section 4 (c) requires retainage to be released as separate divisions of work are completed during the progression of the project. The construction process is a highly orchestrated series of events requiring many parties work to be integrated like a jig saw puzzle. If one of those pieces does not fit, the contractor must have the means to insure all parties are responsive to make corrections as needed. If retainage is released early and the party at fault is not available to make corrections, the contractor is at risk to make those corrections with its own funds.

As the vice president of the AGC of Kansas I have listened to and understand the specialty contractor's concern to be treated fairly by all contractors. I also understand the executing of a contract and who you contract with is a business choice. Any new legislation concerning construction contracts in the private sector must be fair to all parties involved without increasing the risk of doing business. As proposed, I do not believe SB 33 fulfills this goal.

**Therefore, I respectfully ask you to vote unfavorably on SB 33 should there be a motion for approval as written.**

Thank you for your consideration.

Senate Commerce Committee

22-05  
Attachment 13-2



**THE KANSAS  
CHAMBER**

The Force for Business

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## Legislative Testimony

**SB 33**

**Tuesday, February 2, 2005**

**Testimony before the Kansas Senate Commerce Committee  
By Marlee Carpenter, Vice President of Government Affairs**

Senator Brownlee and members of the committee;

The Kansas Chamber has concerns with SB 33. This bill would legislate contract rights in Kansas. We believe that negotiations should take place between parties and should not be mandated by the legislature.

The Kansas Chamber believes that the provisions in SB 33 would affect the legal climate in the state and our competitive position. The bill would also increase the cost of doing business in the state by legislating additional burdens for businesses of all sizes.

We urge careful consideration of this matter.

Senate Commerce Committee

2-2-05

Attachment 14-1

*The Kansas Chamber, with headquarters in Topeka, is the statewide business advocacy group moving Kansas towards becoming the best state in America to do business. The Kansas Chamber and its affiliate organization, The Kansas Chamber Federation, have more than 10,000 member businesses, including local and regional chambers of commerce and trade organizations. The Chamber represents small, medium and large employers all across Kansas.*