

SESSION OF 2007

**CONFERENCE COMMITTEE REPORT BRIEF
SENATE BILL NO. 333**

As Agreed to April 3, 2007

Brief*

SB 333 would create the Kansas Fairness in Public Construction Contract Act. The bill would require that all persons who enter into a contract for public construction after the Act is published would be required to make all payments pursuant to the terms of the contract; however, the following provisions would be void and unenforceable in a contract:

- A provision that waives, releases, or extinguishes the right to resolve disputes through litigation in court; however, the contract may require binding arbitration as a substitute for litigation or require non-binding alternative dispute resolution as a prerequisite to litigation.
- A provision that waives, releases, or extinguishes rights to file a claim against a payment or performance bond, 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; and
- A provision that waives, releases, or extinguishes rights to subrogation for losses or claims covered or paid by liability or workers compensation insurance; provided however, that a contract may require waiver of subrogation for losses or claims paid by a consolidated or wrap-up insurance program, owners' and contractors' protective liability insurance, or project management protective liability insurance.

*Conference committee report briefs are prepared by the Legislative Research Department and do not express legislative intent. No summary is prepared when the report is an agreement to disagree. Conference committee report briefs may be accessed on the Internet at <http://www.kslegislature.org/kldr>

Contract would be defined to mean a contract or agreement concerning construction by and between an owner and a contractor, a contractor and a subcontractor, or a subcontractor and another subcontractor. The payment schedule would be as follows:

- The owner would be required to make payment to a contractor within 30 days after the owner receives an undisputed request for payment. If the owner fails to pay the contractor within the 30 days, of an undisputed request for payment, the owner would be required to pay interest at the rate of 18 percent per annum. However, when extenuating circumstances exist, then payment would be made within 45 days prior to the interest payment requirement.
- The contractor would be required to pay the subcontractors within seven business days of receipt of payment from the owner, including retainage, if the retainage is released by the owner. If the contractor fails to pay a subcontractor within the time requirement, the contractor will be required to pay interest at the rate of 18 percent per annum.
- The subcontractors would be required to pay their subcontractors within seven business days or the interest payment would be required.

The bill also would set the retainage an owner, contractor, or subcontractor may withhold at 10 percent. Failure to pay the released retainage by any party within the appropriate time frame also would trigger the interest provision. If any payment was not made within seven business days after the payment date established in a contract, the contractor and any subcontractors, regardless of tier, upon seven additional business days' written notice would be entitled to suspend further work until payment, including applicable interest, is paid. The contract time for each contract affected by the suspension would be extended and the contract sum for each affected

contract would be increased by the suspending party's reasonable costs of demobilization, delay, and remobilization. Any contract that purports to waive the rights of a party to the contract to collect damages for delays caused by another party to the contract would be void, unenforceable and against public policy.

The bill also would include the exemption from the definition of "construction" to not include the design, construction, alteration, renovation, repair or maintenance of a road, highway, or bridge.

The bill would require that the court or arbitrator award costs and reasonable attorney fees to the prevailing party and the venue of any action would be in the county where the real property is located.

The bill would amend the Prompt Payment By Government Agencies Act by amending the definition of services. Services would not be subject to the provisions of the Act.

The bill would amend the employment security law by deleting the liability of contractors for subcontractors' unemployment contributions. Under current law, a contractor is liable for a subcontractor's unpaid unemployment contributions, penalties, and interest to the Department of Labor (DOL) unless the contractor requires the subcontractor to provide a bond guaranteeing payment of all unemployment contributions, penalties, and interest.

Conference Committee Action

The Conference Committee adopted the House amendments to the bill with the following exceptions:

- Added the reference to Kansas Department of Transportation special provisions to standard specifications, 1990 edition, or any subsequent editions;

- Added the exemption from the definition of “construction”;
- Added to the bill a provision that amends employment security law by deleting the liability of contractors for subcontractors’ unemployment contributions; and
- Made technical changes to the bill.

Background

Proponents for the original bill included representatives from the American Subcontractors Association; Western Extralite Company; the Kansas Contractors Association; the Associated General Contractors of Kansas, Inc.; the Builders Association, the Kansas City Chapter; the American Institute of Architects; Mark One Electric Company; the Association of Kansas School Boards and a board member for Credit Professionals Alliance. Opponents included representatives from the League of Kansas Municipalities; the City of Lenexa; the Johnson County Commission; the City of Overland Park; the Blue Valley School District; and Water One of Johnson County.

The Senate Committee made several amendments to the bill that were recommended by a group of the proponents and opponents who had met to make recommendations to the legislation. The amendments included:

- Adding water and wastewater treatment facilities to the definition of construction projects and deleting the word building from the title;
- Adding a definition for undisputed amount to mean undisputed by any party to the contract;
- Changing the retainage amount from a minimum of 5 percent to a maximum of 10 percent to no more than 10 percent; and

- Making technical changes for clarification to the bill.

The House Committee deleted the exclusion provisions regarding the Kansas Department of Transportation and inserted the specific exclusions including water or sewer lines, public highways, roads, streets, bridges, dams, turnpikes or stand-alone parking lots.

The fiscal note indicates that all public organizations, including state agencies and state universities, could incur additional costs from the provision that would require public organizations to pay interest based on an 18 percent rate on any late payments for construction projects. However, the fiscal effect cannot be estimated because it is unknown how many public organizations would make late payments on future construction projects. Any fiscal effect resulting from passage of this bill would be in addition to amounts included in *The FY 2008 Governor's Budget Report*.

Kansas Fairness in Public Construction Contract Act