

SESSION OF 2010

**SUPPLEMENTAL NOTE ON HOUSE
SUBSTITUTE FOR SENATE BILL NO. 377**

As Amended by House Committee of the Whole

Brief*

House Sub. for SB 377 would amend the Kansas Fairness in Private Construction Act and the Kansas Fairness in Public Construction Act dealing with retainage and alternate security. In addition, the substitute bill would create the state construction registry.

Under current law, the statute defines “retainage” as money earned by a contractor or subcontractor, but withheld to ensure proper performance by the contractor or subcontractor.

The bill would amend the Kansas Fairness in Private Construction Act and the Kansas Fairness in Public Construction Act to require that an owner, contractor or subcontractor:

- Shall not withhold more than a five percent limit of the amount of the contract as retainage unless they determine that a higher rate of up to ten percent of the contract as retainage is required to ensure performance of the contract. The bill would cap the retainage at ten percent;
- Shall be required to release the retainage on any undisputed payment due on a contract within 30 days after substantial completion of the contract. If the subcontractor has not completed the project, an owner may withhold that portion of the retainage attributable to the contract until 30 days after the work is completed. Substantial completion

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

would mean the stage of a construction project, or a designated portion thereof, where the project is sufficiently complete, in accordance with the contract, so that the owner can use the completed portion for its intended use; and

- Shall not withhold more than 150 percent of the value of the incomplete work, provided that the incomplete work is the fault of the subcontractor. Any amounts retained for incomplete work shall be paid within 45 days after the work is completed as part of the regular payment cycle.

Under the bill, a general contractor or subcontractor may request an alternate security in lieu of retainage. The bill would define “alternate security” as a retainage bond, an irrevocable bank letter of credit, certificate of deposit, cash bond, or other type of asset or security of value equal to or exceeding the amount of the retained funds. Alternate security would not include performance and payment bonds. If the owner or general contractor or subcontractor accepts an alternate security, they have the right to determine which type of alternate security shall be accepted.

The bill would reconcile the language of the Kansas Fairness in Public Construction Act and the Kansas Fairness in Private Construction Act so that the acts dealing with retainage would be similar.

State Construction Registry

Additionally, the bill would require the Secretary of State to implement and maintain the State Construction Registry for the purposes of filing and maintaining notifications by original contractors, subcontractors, and remote claimants. The Secretary would be required to adopt rules and regulations prescribing the form and manner of filing any notice required to be filed with the State Construction Registry and establish the fees to be charged and collected. Any fees collected would be credited to the Information and Services Fee Fund. Original contractors would be allowed to file a notice of commencement

with the State Construction Registry prior to, but no later than 15 calendar days after the commencement of physical construction work at the project site. The notice would include:

- The name and address of the owner of the project contracting for the construction or improvement;
- The name and address of any original contractor;
- The legal description of the real property or the street address, city, state, county, and zip code of the real property on which the construction or improvement is to be made;
- A brief description of the construction or improvement to be performed on the property;
- The date the owner first executed a contract with an original contractor for the construction or improvement;
- The name and address of the person preparing the notice of commencement; and
- The following statement:

“To remote claimants, subcontractors or suppliers: Take notice that labor or work is about to begin on or materials are about to be furnished for an improvement to the real property described in this notice. Any remote claimant or subcontractor may preserve their lien rights by filing a notice of furnishing with the State Construction Registry, which serves as notice to the original contractor or contractors, within 21 days of furnishing labor, equipment, materials, or supplies to this project.”

The original contractor would be allowed to take protective measures by making direct payments or payments by joint check to remote claimants to ensure the remote claimant is paid. If the original contractor files a notice of commencement with the State Construction Registry for a project in which a subcontractor or remote claimant has furnished labor,

equipment, materials, or supplies, the subcontractor or remote claimant would be required to file a notice of furnishing (a notice from a subcontractor or remote claimant filed prior to recording of a mechanic's lien) with the State Construction Registry. This notice would include:

- The name and address of persons with whom the remote claimant or subcontractor has contracted concerning the project at the time of filing;
- The name, address, telephone number, fax number, and e-mail address of the subcontractor or remote claimant;
- A brief description of the construction or improvement to be performed on the project; and
- The unique project number assigned by the State Construction Registry.

An original contractor could not file a notice of furnishing with the State Construction Registry if a notice of commencement had not been filed. Additionally, if any original contractor had filed a notice of commencement concerning a project for which a subcontractor or remote claimant has furnished labor, equipment, materials, or supplies, a lien for the furnishing of labor, equipment, materials or supplies by the subcontractor or remote claimant could be claimed only if the subcontractor or remote claimant filed a notice of furnishing within 21 calendar days of the date of furnishing. If the subcontractor or remote claimant does not file within this time period, the subcontractor or remote claimant could file at a later date. In that event, the subcontractor or remote claimant's lien rights would only be effective from the date of the filing of the notice of furnishing.

If materials are delivered prior to the filing of a notice of commencement, the remote claimant or subcontractor would not file a notice of furnishing. If the materials are delivered after the filing, however, a notice of furnishing would need to be filed. If a remote claimant or subcontractor is required to file a notice of furnishing, only one notice is required per project.

If any original contractor has filed a notice of commencement concerning a project for which a subcontractor or remote claimant has furnished labor, equipment, materials, or supplies, no subcontractor or remote claimant could file a claim under a public works bond or a payment bond, unless the subcontractor or remote claimant has filed a notice of furnishing.

The Registry would go into effect on and after July 1, 2011.

Background

The provisions of SB 377 were deleted, and the provisions of Sub. HB 2238 were inserted.

Proponents of Sub. HB 2238 included representatives of the Associated General Contractors of Kansas, the American Sub-Contractors Association, and the Western Extralite Company.

Opponents of the bill included representatives of the Johnson County Government, the Unified Government of Wyandotte County, the Blue Valley School District, the Kansas Association of School Districts, the City of Lenexa, the Wichita Public Schools, Water District No. 1 of Johnson County, the American Institute of Architects, the Kansas Association of Counties, the City of Wichita, the League of Kansas Municipalities, the City of Overland Park, the Kansas Association of Counties, and Westar Energy.

The House Committee removed the contents of SB 377 and inserted the contents of Sub. HB 2238 as a House substitute bill for SB 377.

The House Committee of the Whole amended the bill to include the contents of SB 469 into SB 377. The amendment would establish the State Construction Registry and would amend language relating to remote claim liens on commercial property.

The Division of Budget's fiscal note was unavailable on the House Sub. For SB 377 when it passed out of the House Committee on Commerce and Labor. Further, the fiscal note for the amended contents of SB 469 would increase the Secretary of State's expenditures by approximately \$83,700 in FY 2011 to build a new filing system for notifications by contractors, subcontractors and remote claimants. The agency indicates that the costs could be absorbed within existing resources. The Secretary of State indicates that the increase in fee revenue cannot be estimated.