

HOUSE BILL No. 2857

By Committee on Federal and State Affairs

2-12

9 AN ACT concerning certain contracts; relating to public construction
10 contracts; amending K.S.A. 75-6401, 75-6402 and 75-6403 and re-
11 pealing the existing sections.

12

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

14 Section 1. K.S.A. 75-6401 is hereby amended to read as follows: 75-
15 6401. (a) K.S.A. 75-6401 to 75-6407, inclusive through 75-6407 and sec-
16 tions 4 through 7, and amendments thereto, shall be known and may be
17 cited as the Kansas prompt payment fairness in public construction con-
18 tract act.

19 (b) *The rights and duties prescribed by this act shall not be waivable*
20 *or varied under the terms of a contract. The terms of any contract waiving*
21 *the rights and duties prescribed by this act shall be unenforceable.*

22 Sec. 2. K.S.A. 75-6402 is hereby amended to read as follows: 75-
23 6402. As used in the Kansas prompt payment fairness in public construc-
24 tion contract act, unless the context clearly requires otherwise, the fol-
25 lowing words and phrases shall have the meanings respectively ascribed
26 thereto:

27 (a) "State agency" means the state ~~and any state agency, department,~~
28 ~~division or authority~~ of Kansas and any department or branch of state
29 government or any agency, authority, institution or other instrumentality
30 thereof.

31 (b) "Government agency" means ~~any state agency, library, commu-~~
32 ~~nity college or unified school district~~ the state or any municipality.

33 (c) "Vendor" means any person, corporation, association or other
34 business concern engaged in a trade or business, either on a profit or not-
35 for-profit basis, and providing any goods or services to a government
36 agency.

37 (d) "Goods" means any goods, supplies, materials, equipment or
38 other personal property, but does not mean any real property.

39 (e) "Services" means any contractual services including architectural,
40 engineering, medical, financial, consulting or other professional services,
41 any construction services and any other personal services, but does not
42 mean any services performed as an officer or employee of any government
43 agency.

- 1 (f) "Bill" means a proper billing which requests payment and which
2 contains or is accompanied by such substantiating documentation as may
3 be required for payment for the goods or services.
- 4 ~~(g) "Community college" means any community college organized
5 and operating under the laws of this state.~~
- 6 ~~(h) "Library" means a library which serves the general public and is
7 supported in whole or in part with tax money.~~
- 8 (g) "Bank" means an institution the deposits of which are insured by
9 the federal deposit insurance corporation and which legally is doing busi-
10 ness in the state of Kansas.
- 11 (h) "Construction" means furnishing materials, equipment, labor,
12 supplies or services for the design, planning, construction, reconstruction,
13 installation, alteration, remodeling, repair, demolition or maintenance
14 work including, but not limited to, excavation, backfilling or grading on
15 any real property.
- 16 (i) "Contract" means a contract or agreement made and entered into
17 by a government agency, contractor or subcontractor concerning con-
18 struction on any real property.
- 19 (j) "Contractor" means a person performing construction and having
20 a contract directly with a government agency.
- 21 (k) "Person" means an individual, corporation, estate, trust, partner-
22 ship, limited liability company, association, joint venture or any other
23 legal entity.
- 24 (l) "Real property" means any building, road, bridge, tunnel, sewer,
25 water or other utility line.
- 26 (m) "Subcontractor" means any person providing materials, equip-
27 ment, labor, supplies or services for the design, planning, construction,
28 reconstruction, installation, alteration, remodeling, repair, demolition or
29 maintenance work including, but not limited to, excavation, backfilling or
30 grading on any real property covered by a contract between a government
31 agency and a contractor but not having a contract directly with the gov-
32 ernment agency.
- 33 (n) "Retainage" means money earned by a contractor or subcontrac-
34 tor but withheld to ensure proper performance by the contractor or
35 subcontractor.
- 36 (o) "Substantial completion" means sufficient completion so that the
37 improvement or portion of the improvement can be occupied or utilized
38 for its intended use.
- 39 (p) "United States government" means the federal government of the
40 United States of America, its departments, agencies and corporations
41 wholly owned by the United States.
- 42 (q) "Municipality" means any city, county, township, school district
43 or other political or taxing subdivision of the state or any agency, au-

1 *thority, institution or other instrumentality of a municipality.*

2 Sec. 3. K.S.A. 75-6403 is hereby amended to read as follows: 75-
3 6403. (a) Each government agency purchasing or contracting for goods
4 or services from a vendor shall make prompt payment therefor, including
5 payment of any interest penalties due, in accordance with this section.

6 (b) Each government agency which has received goods or services
7 from a vendor and which does not make payment therefor as prescribed
8 by this subsection shall be subject to an interest payment penalty if the
9 vendor makes a request for payment in accordance with subsection (c).
10 Each government agency shall make payment of the full amount due for
11 such goods or services on or before the 30th calendar day after the date
12 of receipt by the government agency of the goods and services or the
13 date of receipt by the government agency of the bill therefor, whichever
14 is later, unless other provisions for payment are agreed to in writing by
15 the vendor and the government agency. No goods or services shall be
16 deemed to be received by a government agency until all such goods or
17 services are completely delivered and finally accepted by the government
18 agency. For purposes of determining whether a payment was made in
19 accordance with this subsection, a payment by a government agency shall
20 be considered to be made on the date on which the warrant or check for
21 such payment is dated.

22 (c) (1) Any vendor to which payment has not been made within the
23 time prescribed by subsection (b) may make a written request for pay-
24 ment to the chief executive officer of the government agency obligated
25 to make the payment with interest thereon. Such request shall indicate
26 the government agency obligated to make the payment, the date of re-
27 ceipt of the goods or services by the government agency, the date the
28 vendor sent the government agency the bill for such goods or services
29 and, in the case of a state agency, such other information as may be
30 prescribed by rules and regulations adopted under K.S.A. 75-6407, *and*
31 *amendments thereto.*

32 (2) Each state agency shall forward a copy of each vendor's request
33 for payment to the director of accounts and reports along with the
34 voucher prepared by the state agency to make payment to the vendor,
35 including payment of the interest penalty prescribed by this subsection.
36 For purposes of computing the interest penalty due a vendor, the state
37 agency shall add seven days from the date the voucher is sent to the
38 director of accounts and reports for payment. Interest penalties on
39 amounts due to a vendor by a state agency shall be paid to the vendor
40 beginning on the day after the required payment date under subsection
41 (b) and ending seven days after the voucher for payment is sent to the
42 director of accounts and reports, except that no interest penalty shall be
43 paid if full payment of the amount due for such goods or services is made

1 on or before the 15th calendar day after the required payment date under
2 subsection (b).

3 (3) The chief executive officer of the unified school district shall for-
4 ward a copy of each vendor's request for payment to the governing body
5 thereof, if any, along with the documents prepared to make payment to
6 the vendor, including payment of the interest penalty prescribed by this
7 subsection. Interest penalties on amounts due to a vendor by a unified
8 school district shall be paid to the vendor beginning on the day after the
9 required payment date under subsection (b) and ending on the date on
10 which payment of the amount due is made, except that no interest penalty
11 shall be paid if full payment of the amount due for such goods or services
12 is made on or before the 15th calendar day after the required payment
13 date under subsection (b).

14 (d) The interest penalty under this section shall be computed at the
15 rate of 1.5% per month on the amount of the payment which is due in
16 accordance with this section. Any amount of an interest penalty which
17 remains unpaid at the end of any thirty-day period after the required
18 payment date under subsection (b) shall be added to the principal amount
19 of the debt and thereafter interest penalties shall accrue on such added
20 amount.

21 (e) ~~In the event~~ *If a state agency denies liability and alleges grounds*
22 *to not make payment after a vendor has requested payment therefor in*
23 *accordance with subsection (c), the state agency shall inform the vendor*
24 *in writing of the reasons therefor and that the vendor has the right to file*
25 *a claim on the dispute with the joint committee on special claims against*
26 *the state.*

27 (f) No interest penalty shall be payable if a vendor fails to request
28 payment in accordance with subsection (c) within four months after the
29 payment date prescribed by subsection (b).

30 (g) *If a subcontractor has provided a timely, properly completed un-*
31 *disputed request for payment to a vendor, the vendor shall pay the sub-*
32 *contractor any amounts due within seven days of receipt of payment from*
33 *the government agency.*

34 (h) *If a vendor fails to pay a subcontractor within the seven-day pe-*
35 *riod the vendor shall pay interest to the subcontractor, beginning on the*
36 *eighth day after receipt of payment by vendor, computed at 1.5% of the*
37 *undisputed amount per month or fraction of a month until the payment*
38 *is made.*

39 (i) *If a vendor receives an improperly completed request for payment*
40 *or in good faith disputes a request for payment from a subcontractor, the*
41 *vendor shall notify the subcontractor within five business days of receipt*
42 *of the improperly completed or disputed request for payment. No payment*
43 *shall become due on such a request until such request is properly com-*

1 *pleted or the dispute is resolved. If the vendor fails to notify the subcon-*
2 *tractor within the five-day period of any improper completion or dispute,*
3 *the request for payment shall be considered proper and the contractor*
4 *shall make payment thereon in accordance with subsection (g). Any un-*
5 *disputed portion of any request shall be paid in accordance with subsec-*
6 *tion (g).*

7 *(j) The provisions of subsections (g), (h) and (i) shall apply to all*
8 *payments from subcontractors to their subcontractors.*

9 *(k) In any action or arbitration to enforce this section, the court or*
10 *arbitrator shall award costs and reasonable attorney fees to the prevailing*
11 *party.*

12 New Sec. 4. (a) Except as provided by this act, retainage shall not be
13 withheld on any construction project for which a government agency has
14 entered a contract.

15 (b) A government agency may retain no more than 5% of the amount
16 of any payment otherwise due a contractor.

17 (c) A contractor shall not withhold from a subcontractor, and a sub-
18 contractor from a lower-tier subcontractor, more retainage than the gov-
19 ernment agency withholds from the contractor, or the contractor from
20 the subcontractor, for that party's work.

21 (d) Retainage may be withheld only until substantial completion of
22 each separate division of the contract for which a price is stated separately
23 in the contract or for which a separate price can be ascertained from the
24 contractor's schedule of values. Upon substantial completion, the retain-
25 age shall be paid by the owner to the contractor in the manner and within
26 the time set forth in K.S.A. 75-6403, and amendments thereto.

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

34 (f) If the tender described in subsection (e) is made after retainage
35 has been withheld, the government agency shall pay, within five business
36 days after receipt of the tender, to the tendering party the withheld re-
37 tainage to the extent of the substitute security. If the tender of substitute
38 security is made before retainage has been withheld, the government
39 agency, to the extent of the substitute security, shall refrain from with-
40 holding any retainage from all future payments properly due.

41 (g) A subcontractor may tender to a contractor acceptable substitute
42 security with a written request for release of retainage in the amount of
43 the substitute security. The contractor shall tender the subcontractor's

1 substitute security to the government agency with a like request, pursuant
2 to the provisions of subsections (e) and (f). If the subcontractor is not in
3 default of its subcontract with the contractor, the contractor shall pay to
4 the subcontractor, within five business days after receipt, any accumu-
5 lated retainage paid by the government agency to the contractor. The
6 contractor shall refrain from withholding retainage from payments to the
7 subcontractor to the extent that the government agency has refrained
8 from withholding retainage from payments to the contractor. The sub-
9 contractor shall be entitled to receive, upon receipt by the contractor, all
10 income received by the contractor from the government agency from
11 income-producing securities deposited by the subcontractor as substitute
12 security. Except as otherwise provided in this subsection, the contractor
13 shall have no obligation to collect or pay to a subcontractor retainage on
14 account of substitute security tendered by the subcontractor.

15 (h) The following shall constitute acceptable substitute security for
16 purposes of this section:

17 (1) Negotiable securities with a market value equal to or greater than
18 the amount of retainage, which are:

19 (A) Obligations of the United States government;

20 (B) obligations of the state of Kansas; and

21 (C) certificates of deposit issued by banks.

22 (2) A retainage bond naming the government agency as obligee, is-
23 sued by a surety company authorized to issue surety bonds in the state
24 of Kansas, in the amount of the retainage to be released and conditioned
25 upon substantial completion of the work of the party tendering the bond;
26 or

27 (3) an irrevocable and unconditional letter of credit in favor of the
28 government agency, issued by a bank, in the amount of the retainage to
29 be released.

30 (i) The party depositing the substitute security shall be entitled to all
31 interest or other income earned on any such substitute security deposited
32 by such party.

33 (j) Upon substantial completion of the work of the party tendering
34 the substitute security, such substitute security shall be returned to such
35 party.

36 (k) Upon final completion of the construction project, any amounts
37 remaining due shall be paid within the time prescribed in K.S.A. 75-6403,
38 and amendments thereto, conditioned upon the receipt of the following
39 by the party from whom payment is requested:

40 (1) A properly completed application for final payment;

41 (2) a release, if required, of all payment claims against the govern-
42 ment agency arising under, and by virtue of, the contract in question,
43 other than such claims, if any, as specifically excepted by the contractor

1 or subcontractor from the operation of the release.

2 (l) If a government agency fails to make payments as required by this
3 section, the government agency shall pay an interest penalty as provided
4 in K.S.A. 75-6403, and amendments thereto.

5 (m) If a contractor or subcontractor fails to make payments as re-
6 quired by this section, it shall pay an additional 1 1/2% of the amount not
7 paid for each month or fraction of month until payment is properly made.

8 (n) Within five business days after a government agency makes any
9 payment to a contractor, the government agency shall give notice of the
10 date and amount of the payment to any subcontractor who makes a writ-
11 ten request to the government agency for such notice.

12 (o) Retainage shall not be withheld from payment otherwise due for
13 work performed by a contractor or subcontractor that has provided pay-
14 ment and performance bonds naming the government agency as obligee,
15 issued by a surety company authorized to issue surety bonds in the state
16 of Kansas, in the full amount of the contract or subcontract of the con-
17 tractor or subcontractor.

18 New Sec. 5. If any payment properly due, including payment of re-
19 tainage, is not made in accordance with the provisions of K.S.A. 75-6403
20 or section 4, and amendments thereto, the contractor and any and all
21 subcontractors, regardless of tier, shall be entitled to suspend further
22 performance under any contract for construction until payment, including
23 applicable interest, is made. Any party to whom payment properly is due
24 shall be entitled to recover from the party obligated to make payment any
25 costs incurred due to such suspension.

26 New Sec. 6. (a) Any provision in a contract or subcontract for con-
27 struction for a government agency that purports to waive, release or ex-
28 tinguish the right of a contractor or subcontractor to recover costs or
29 damages, or obtain an equitable adjustment, for delay in performing the
30 contract or subcontract, if the delay is caused in whole or in part by acts
31 or omissions within the control of the other party to the contract or sub-
32 contract or persons acting on behalf of the other party, is against public
33 policy and void and unenforceable. This section shall not affect the validity
34 or enforceability of any contract provision that (1) precludes a contractor
35 or subcontractor from recovering the portion of any delay costs or dam-
36 ages that is caused by acts or omissions within the control of the party
37 claiming costs or damages for the delay or persons acting on behalf of
38 that party or (2) requires the party claiming costs or damages for the delay
39 to give notice of any delay.

40 (b) Any provision in a contract or subcontract for construction for a
41 government agency that requires a contractor or subcontractor or a con-
42 tractor's or subcontractor's surety or insurer to indemnify any party for
43 death or injury to persons or damage to property not caused by the con-

1 tractor or subcontractor or its employees, agents, subcontractors or sup-
2 pliers is against public policy and void and unenforceable.

3 New Sec. 7. In any action or arbitration to enforce sections 4 or 5,
4 and amendments thereto, the court or arbitrator shall award costs and
5 reasonable attorney fees to the prevailing party. Venue of such an action
6 shall be in the state or federal court for the district or county where the
7 real property is located. The hearing in such an arbitration shall be held
8 in the county where the real property is located.

9 Sec. 8. K.S.A. 75-6401, 75-6402 and 75-6403 are hereby repealed.

10 Sec. 9. This act shall take effect and be in force from and after its
11 publication in the statute book.