Approved: March 23, 1995

MINUTES OF THE HOUSE COMMITTEE ON GOVERNMENTAL ORGANIZATION AND ELECTIONS.

The meeting was called to order by the Chair, Carol Dawson, at 9:00 a.m. on March 14, 1995 in

Room 521-S of the Capitol.

All members were present:

Committee staff present: Dennis Hodgins, Legislative Research Department
Carolyn Rampey, Legislative Research Department
Arden Ensley, Revisor of Statutes
Donna Luttjohann, Committee Secretary

Conferees appearing before the committee: Carol Williams, Governmental Standards & Conduct
Tom Slattery, Associated General Contractors
Chuck Grier, Utility Contractors, Wichita, KS
Dean Ferrell, Ferrell Construction, Topeka, KS
Will Larson, Associated General Contractors
Jim Reardon, KS Association of Counties
Robert Watson, City Attorney, Overland Park

Others attending: See attached list

Chairman Dawson opened the hearing on SB 74 regarding contracts involving state officers and employees.

Carol Williams was recognized by the Chair as a proponent of the bill. Ms. Williams testified that currently a state employee may contract with a business in which he or she holds a substantial interest. The current definition of substantial interest is if an individual received compensation in the preceding calendar year. See Attachment 1.

The Chairman closed the hearing on SB 74.

SB 115 was opened for public hearing by Chairman Dawson.

The Chairman requested Carolyn Rampey brief the Committee. She explained that SB 115 is a new law and that, currently, there is nothing in the law to correct an error when contractors bid for jobs. She explained that a judgmental error, as stated in the bill, is one that is made in regard to quoting a job would be completed in six months, yet it takes the contractor 10 months. A non-judgmental error is an error such as the transposition of figures, or leaving off a decimal point or omitting a decimal. This legislation would allow a change to be made to correct a judgmental error. A non-judgmental error would allow a contractor two days to withraw their bid. She added that an amendment from the Senate changed the word "shall" to "may" be able to re-submit the bid.

Chairman Dawson recognized Tom Slattery as a proponent of the bill. He testifed that a bid bond is a line of credit for the contractor. Written testimony for additional information is in Attachment 2.

The Chairman recognized Chuck Grier as a proponent of the bill. He testified that there is a need for this legislation in order to protect the contractor from human error. See Attachment 3.

Dean Ferrell was recognized by Chairman Dawson as a proponent of the bill. He testified that public agencies have no idea what a project will cost until the bids are received. See Attachment 4.

The Chairman recognized William Larson to testify as a proponent of the bill. Mr. Larson gave several legal case histories explaining what errors had been made and the impact the errors had on the financial status of the company. See Attachment 5.

Jim Reardon was recognized by the Chairman. He explained that no one gains from a "busted bid" and that his Organization was in support of the bill.

Robert Watson was recognized by Chairman Dawson as an opponent of the bill. He testified that this legislation infringes on the home rule powers. See Attachment 6 for further information.

The Chairman noted there was written testimony made available to the Committee from Harry Herington, KS League of Municipalities. Attachment 7.

MINUTES OF THE HOUSE COMMITTEE ON GOVERNMENTAL ORGANIZATION AND ELECTIONS, Room 521-S Statehouse, at 9:00 a.m. on March 14, 1995.

Chairman Dawson closed the public hearing on SB 115.

The Committee's attention was drawn to the minutes of March 9, 10 and 13, 1995. A motion was made by Rep. Benlon to approve the minutes as corrected. It was seconded by Rep. Gilbert. The minutes were approved as corrected.

The Chairman adjourned the meeting at 10:23 a.m.

The next meeting is scheduled for Wednesday, March 15, 1995, at 9:00 a.m. in Room 521-S of the Capitol.

GOVERNMENTAL ORGANIZATION AND ELECTIONS COMMITTEE GUEST LIST

DATE: March 14, 1995

NAME	REPRESENTING
[illegible]	City of Overland Park
Jim Vogel	Dept of Admin
George Barbee	Barbee & Assoc
Chuck Engler	Utility Contractors Inc
[illegible]	AGC
Tom Slattery	ABC of Ks
Dean Ferrell	Ferrell Construction
Charlie Smithson	KCCSC
Carol Williams	KCCI
Bill Curtis	Ks Assoc of School Bds
Jennifer Yackley	State Treasurer
Brad Bryant	Sec of State

STATE OF KANSAS

Adr ion of
Campaign Finance,
Conflict of Interest
& Lobbying Laws

109 West 9th Street
Suite 504
Topeka, Kansas 66612
(913) 296-4219

KANSAS COMMISSION ON GOVERNMENTAL STANDARDS AND CONDUCT

Testimony before House Governmental Organization and Elections
Senate Bill 74
March 14, 1995

Senate Bill 74, which is before you this morning, would amend K.S.A. 46-233, a provision of the State Conflict of Interest statutes. This bill is a recommendation made by the Kansas Commission on Governmental Standards and Conduct in its 1994 Annual Report and Recommendations.

Under current law, a state employee may contract with a business in which he or she actually holds a substantial interest. Due to the current definition of substantial interest, an individual holds a substantial interest only if he or she received compensation in the preceding calendar year. Therefore, if an individual, or individual's spouse, is receiving compensation during the current year from a business he or she contracts with as a state employee, but the individual did not receive compensation in the preceding calendar year, no substantial interest exists and the action would be permitted. For example, assume a state employee is responsible for purchasing office equipment for various state agencies. The state employee could help a friend set up a small company, with a minimal investment, to sell office equipment. He could arrange for this company to hire members of his family as employees. Once this corporation is established, the state employee could then contract with this corporation to provide office equipment to the state. The state employee would not hold a substantial interest in this corporation, because his spouse did not receive compensation from this corporation in the preceding calendar year. A recent Commission proceeding has brought this problem to light.

The Commission recommends K.S.A. 46-233 be amended to include the new language beginning of line 27 of SB74 which states "Substantial interest means 'substantial interest' as defined by K.S.A. 46-229, and amendments thereto, and any such interest held within the preceding twelve months of the act or event of participating in the preparation of making a contract."

The Commission urges your support of SB 74.

TESTIMONY BEFORE THE HOUSE GOVERNMENTAL ORGANIZATION COMMITTEE
SENATE BILL 115

Thomas E. Slattery, Executive Vice President
Associated General Contractors of Kansas

Senate Bill 115 is supported by the Kansas Contractors Association, The Builders Association/AGC of Kansas City and the Associated General Contractors of Kansas. These three trade associations combined represent the vast majority of highway, bridge, asphalt paving, municipal utility, and building contractors and subcontractors in the state of Kansas.

The scope of the bill covers all public works projects. It applies to non judgmental errors only. Most often this would be a mistake in mathematics or data input.

The bill would allow a contractor to notify the awarding authority within 48 hours of the bid that a non judgmental mistake had been made. The awarding authority would then permit the bidder to withdraw his or her bid without penalty if:

a. A mistake is evident of the face of the bid; or
b. The bidder establishes by clear and convincing evidence that a mistake was made.

Although in most cases this practice is followed as a matter of common sense, and is always practiced in federally funded projects, it is not specifically provided for by Kansas law.

Why have we asked for this legislation ? The competitive bid system in construction is unlike any other form of determining who will get to perform a job or service. This will be explained by other conferees. But, because of the unique nature of competitive bidding on construction projects most all states allow for some form of relief from non judgmental bidding errors. As a reference I offer the Construction Bidding Law, a Wiley Law publication, 1990 edition, Section 4.12, page 94. "A few states, however, have limited the relief for bid mistakes. The courts in Kansas, Ohio, Pennsylvania and Virginia narrowly restrict relief from bid mistakes." Also, I have attached information from Recommended Competitive Bidding Procedures for Construction Projects which supports the concept of Senate Bill 115.

The bill does not provide for any correction and resubmittal of bids after the bid opening, only withdrawal. We believe passage of this bill will be in the best interest of the tax payers, public entities and members of the construction industry.

Thank you for your consideration.

GOVERNMENTAL ORGANIZATION
AND ELECTIONS-HOUSE
March 14, 1995
Attachment 2-1

Recommended Competitive Bidding Procedures for Construction Projects

by

ROBERT J. SMITH, P.E., ESQUIRE

Prepared for
ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE

and
Issued and Published Jointly By

PROFESSIONAL ENGINEERS IN PRIVATE PRACTICE
A practice division of the
NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

AMERICAN CONSULTING ENGINEERS COUNCIL

AMERICAN SOCIETY OF CIVIL ENGINEERS

CONSTRUCTION SPECIFICATIONS INSTITUTE

This document has been prepared in cooperation with

The Associated General Contractors of America

GOVERNMENTAL ORGANIZATION

EJCDC No. 1910-9-D (1987 Edition)

Mistakes; Correction and Withdrawal of Bids

If, after bids are opened, the low bidder claims a serious and honest error in bid preparation, and can support such claim with evidence satisfactory to the owner and engineer, withdrawal of the bid should be permitted, subject to the requirements of applicable laws. Any bid guarantee should be returned. Action on remaining bids should proceed as though the withdrawn bid had not been received.

After bid opening, a bidder should not be permitted to alter a bid and resubmit it based on a claim of error, or otherwise. Court decisions in some states have permitted correction in certain circumstances.

Dealing With an Unusually Low Bid

If one bid seems unusually low, say more than ten to fifteen percent below the nearest competing bid, it is a good practice to ask the bidder to verify its bid. Many times the bidder will confirm that it is ready, willing and able to do the project for the bid price. However, a bidder may also sometimes find a mistake and be able to establish that it is entitled to withdrawal.

Awarding to an unusually low bidder without seeking verification is usually not the bargain it may initially appear to be. If the bidder does not have enough money in the bid to do the job properly, there may be incentive to skimp or otherwise cut corners. In some instances, the bidder may begin performance but end up defaulting. On occasion the courts have refused to enforce such contracts on the theory that the owner was taking advantage of an unconscionable or unfair situation.

STATEMENT BEFORE THE HOUSE GOVERNMENTAL ORGANIZATION AND ELECTIONS COMMITTEE CONCERNING SENATE BILL 115

March 13, 1995

by Charles F. Grier

Ms. Chairperson and Members of the Committee, my name is Chuck Grier. I appreciate the opportunity to speak to you concerning the merits of Senate Bill No. 115 which would provide relief from unilateral clerical bid mistakes. I am here today representing the public works construction industry as a member of the Board of Directors of the Kansas Contractors Association and also as a member of the AGC of Kansas.

I am also here to represent my personal concerns as President of Utility Contractors, Inc. in Wichita, Kansas. Utility employs approximately 175 people and has been in business 44 years. We engage primarily in public works projects for municipal, state, and some federal contracting authorities. In the process of obtaining work this past year, we assembled bids on over 200 individual projects. This is not uncommon in our industry. Very seldom do we encounter problems with errors in the bidding process. However, when a problem does occur and a mistake is made, current state law penalizes the contractor and can have the effect of unjustly enriching the contracting authority.

Currently, Kansas is one of a minority of states that does not have statutes in place granting bidders relief from clerical bidding error. The Federal Government also grants this form of relief. While some responsible public agencies in Kansas do not enforce the current Kansas law, others take advantage of their enviable position. If a public agency chooses to enforce current Kansas case law, the contractor is left with two negative choices:

- Accept the contract for the project and proceed knowing there was a substantial portion of the costs of the work left out of the bid, or

- Forfeit its bid security which in most cases amounts to 5% of the total bid price.

An example might be helpful to illustrate the need for Senate Bill 115. Assume a contractor submitted a bid for a project of $2,000,000.00. When the bids were opened and read in public, the next higher bid was $2,250,000.00. The size of discrepancy between the two low bids should indicate that a problem may exist. The low bidder reviews the bid work sheets and computer printouts and discovers that during the final assembly of the numbers someone has inserted $20,000 where $200,000 should have been inserted. At this point, the contractor must choose to either "eat" the $180,000 difference ("mistake") and proceed with the project or forfeit its bid security ($100,000 in this example) to admit a mistake was made and walk away from the project. Neither of these options are very attractive.

A typical argument for bid security forfeiture from the unresponsible owner's perspective is that they have somehow been damaged by not having the project completed for what was the initial low bid price as read. In other words, some public owners believe it is appropriate to take advantage of a financial windfall at the expense of a contractor who is laboring under a mistake in its bid. From the contractor's view point, this perspective is exceedingly unfair. Assembling a bid is an expensive process for the contractor and if he/she chooses to withdraw his bid due to an error, how can an owner be any more damaged than had they not had access to the faulty bid originally. If time allows at the conclusion of this statement and the committee wishes me to, I will speak about my personal experiences concerning mistakes.

As an industry, we are not asking for something that is untried. It is my understanding that at this time, only Kansas, Oklahoma, and Pennsylvania do not allow for some measure of relief from bid mistakes that can be proved to be of clerical origin. Forty seven states and the federal government already conduct bid procurement with the opportunity for relief from bidding mistakes. We are not asking for Kansas to jump into untested waters. We are requesting that the public works construction industry be afforded the opportunity to seek relief, through the courts if necessary, to prove that a clerical bid mistake has occurred in the bid process and prevent a governmental contracting authority from taking advantage of a legal but self serving position in order to enhance their financial situation.

This concludes my statement. I would be happy to answer any questions you might have.

Statement Supplement
Charles F. Grier
March 13, 1995

Personal Experience

This has personally happened to me and our company. Approximately three years ago, the argument that the owner would be damaged by not having access to the lowest bid was used to force UC into settlement of a lawsuit over a bid security for $85,000. The contracting agency was not interested in whether we had made a mistake in the bid. They were only interested in performing the work at the lowest quoted price. When we tried to tell them there was a mistake in our bid, they were only interested in receiving the bid security in order to mitigate the cost of awarding to the second bidder (next higher bidder). If the contracting agency had not been prejudiced by reading our bid with the mistake included, they would have been very satisfied to award to the apparent lowest bidder.

You might ask how those types of errors occur when there is so much money on the line. It is not uncommon to receive hundreds of thousands of dollars of final subcontract and material prices less than 30 minutes before the bid is due to be turned in. In the process of reading and recording these prices, mistakes can occur due to factors such as:

- Miscommunications
- Transposition errors
- Problems with computer spreadsheets
- Math errors, etc.

FERRELL

CONSTRUCTION
OF TOPEKA, INC.

Testimony Presented to the
House Governmental Organization Committee
March 14, 1995
By
Dean F. Ferrell

Madam Chairperson 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 at the present time our work load includes one project with the State of Kansas and one with a local school district, both publicly funded.

I am here today to encourage your approval of SB 115. Forcing contractors to honor bids that include bonafide, substantial errors is taking its toll on our industry.

The competitive bid process breeds mistakes. Bid days are extremely hectic and, in many cases, chaotic. For a 2:00 p.m. bid letting, we're still receiving sub-bids right up until bid time. All sub-bids must be analyzed, tabulated, and inserted into our estimate, with very little time to check or double check - or we'll miss our deadline.

The types of mistakes that cause us the most problems are not judgmental. They're simply called "busts". Mistakes like punching the wrong key on a calculator or computer. Mistakes like mental transpositions of numbers-like thinking $2,520,000 but writing down $2,250,000.

Another example would be failing to fill a blank in the estimate. Say there is a line item for paving actually worth $400,000, but the contractor fails to "plug" the number. These types of mistakes are easy to make when you're under the extreme pressure of bid day time restraint. And they're a contractor's worse nightmare.

In the past few years I have witnessed public agencies who force a contractor to take a contract, even though they knew the contractor had serious problems with its bid. There appears to be a growing lack of compassion by public boards when it comes to bid mistakes, and that's unfortunate.

GOVERNMENTAL ORGANIZATION
AND ELECTIONS-HOUSE
March 14, 1995
Attachment 4-1

P. O. Box 750107 • Topeka, Kansas 66675 • (913) 354-4309 • FAX 354-1549

What intrigues me most is that public agencies, until bids are received, have no real idea of what their project will cost - it's what the market will bear. If no mistakes are made, they will pay what the project is actually worth. Why should they and the taxpayers receive a "windfall" at the unfortunate contractor's expense?

A contractor forced to honor a "busted" bid will react accordingly. More than likely, he'll attempt to "poor boy" the project....meaning he'll underman it and be extremely frugal in the use of equipment. This could lead to potential delays and a reduction of quality - just good enough to get by. Also the funding agency can expect an inordinate number of claims and change order requests. The project will have potential to be in constant conflict. So who wins? No one really.

In my opinion SB 115 is right for our industry and it is right for the taxpayer. The Kansas legislature has an opportunity now to help preserve the quality standards of public funded projects, while at the same time ensure integrity in the competitive bid process.

I strongly urge you to recommend passage of SB 115.

TESTIMONY OF WILLIAM A. LARSON
LEGAL COUNSEL FOR
THE ASSOCIATED GENERAL CONTRACTORS OF KANSAS

SB 115
HOUSE COMMITTEE ON GOVERNMENTAL ORGANIZATIONS

March 14, 1995

Tom Slattery of the Associated General Contractors of Kansas has asked that I briefly discuss some of the legal aspects of SB 115.

SB 115 was introduced to alter the result of two Kansas Supreme Court cases which held that general contractors were not entitled to any legal relief in situations where they made purely clerical errors in bids submitted on public construction projects.

The first case was *Triple A Contractors, Inc. V. Rural Water District No. 4,* 226 Kan. 626. In the *Triple A Contractors* case, the contractor submitted a bid which was approximately $170,000 lower than the next lowest bid and considerably lower than the rural water district's consulting engineer's estimate. The contractor immediately suspected a mistake had been made. On reviewing the bid it was quickly determined that only 6,000 lineal feet of sheetrock had been figured into the bid when the actual figure was 36,000 lineal feet.

The rural water district refused to release the contractor from the bid and demanded that the contractor either forfeit its bid bond in the approximate amount of $40,000 or enter into a construction contract for the amount of its bid. The contractor brought suit seeking equitable relief from the court.

The district court ruled that the contractor was not entitled to relief and was absolutely bound by its bid. The Supreme Court affirmed the district court. Justice Praeger and Justice Miller dissented noting that the position of the court was inequitable and in fact a minority position among the other jurisdictions that had considered the issue.

The *Triple A Contractors* case was upheld in the 1983 case of *Anco Construction Co. V. City of Wichita,* 233 Kan. 132. In the *Anco* case, the contractor made a purely mathematical error of $95,794. The contractor in the *Anco* case was given the same choice as the contractor in the *Triple A* case. It could either forfeit its substantial bid bond or agree to perform the contract at an even more substantial loss.

Both the *Triple A* and *Anco* cases involved situations where there was no dispute that the error was a purely clerical error. Neither case involved an error of judgment. Both cases demonstrate the harsh and inequitable result of Kansas law. SB 115 would remedy this inequity.

It must be stressed that SB 115 does not provide relief from a bid mistake unless it can be shown that the mistake was a "nonjudgmental" mistake. In other words, it must be a mistake similar to that made in the *Triple A* and *Anco* cases. Furthermore, SB 115 allows a contractor to withdraw a bid only in situations where there is a clear clerical error made on the face of the bid document itself, or where a nonjudgmental mistake is proven by "clear and convincing" evidence. While the Kansas court has stated on many occasions that the exact standard of "clear and convincing" evidence varies with the factual situation of any

particular case, it is evident from the Court's decisions that the "clear and convincing" standard is significantly more stringent than what is required in the normal civil case.

I have been asked to comment specifically on section 7 of SB 115. Section 7 provides authority for a contractor to initiate a lawsuit to enjoin the enforcement of a contract based on a bid in which a nonjudgmental mistake has been made. The language of Section 7 comes from the Revisor of Statutes' office. It was added to the original draft of the bill to ensure that there would be an adequate and relatively quick means for determining whether a contractor should be allowed to withdraw a bid.

From both the contractor's and the bidding authority's point of view, it is important that they be able to resolve a dispute concerning whether there has been a nonjudgmental mistake as contemplated under SB 115 as rapidly as possible. I believe that Section 7 provides a procedural mechanism for doing just that.

Under Section 7, if a contractor believes he should be allowed to withdraw his bid on the basis of a nonjudgmental mistake, and the bidding authority disagrees, the contractor can request a temporary restraining order, restraining the bidding authority from attempting to enforce the contract based on the bid. If the court issues a restraining order the bidding authority is entitled to demand a hearing which under case law is to be held as soon as practical to determine whether the contractor is entitled to withdraw its bid.

Technically the hearing is a hearing on the temporary injunction, but as a practical matter, the hearing on the temporary injunction is usually combined with a hearing

on the request for a permanent injunction which allows the court to accelerate the determination as to whether the bid may be withdrawn.

There is a question of whether a contractor would have the right to pursue the procedure as outlined in section 7 even if section 7 was not in the bill. I think it is likely that a contractor would have the right to pursue this procedure absent section 7, but it's not absolutely certain. The reason it is questionable is that there are cases which suggest that an injunctive procedure is not available to a party which has an adequate remedy at law. (*See, City of Chanute, Kansas v. Williams Natural Gas Co.*, 678 F.Supp. 1517 (D.C.Kan. 1988) and *Cattle Finance Co. V. Boardee, Inc.*, 795 F.Supp 362 (D.C.Kan. 1992). A court could take the view that since a contractor would have the right to raise the provisions of SB 115 as a defense to an action against the contractor by the awarding authority for the bid security, the contractor would not have the right to seek an injunction because the contractor would have an "adequate remedy at law". If the injunctive procedure is part of the statute, I don't believe a court would take that view.

There has been concern that section 7 might be inviting litigation. I don't think it does. If a city or other public entity refused to release a contractor from a nonjudgmental mistake as contemplated under SB 115, the dispute would probably end up in litigation anyway. The city would undoubtedly make demand on the contractor's bonding company and the contractor for the bid security. The bonding company and contractor would refuse because of their belief the mistake was a nonjudgmental mistake and therefore the contractor had a right to withdraw its bid pursuant to SB 115. The city would then bring suit against

the bonding company and contractor to recover the bid security. This procedure would take substantially longer than the procedure outlined in section 7.

I believe the procedure outlined in Section 7 is the most efficient legal procedure for quickly determining whether a contractor has a right to withdraw its bid.

The City of Overland Park KANSAS

Law Department
Robert J. Watson, City Attorney

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STATEMENT IN OPPOSITION TO SENATE BILL NO. 115

TO: Representative Carol Dawson, Chairperson, and Members
House Governmental Organization and Elections Committee
Room 521 South
State Capitol
Topeka, KS 66612

DATE: March 14, 1995

RE: Senate Bill No. 115 -- Bid Mistakes

Ladies and Gentlemen:

Thank you for receiving this testimony in opposition to the above-referenced bill.

The City of Overland Park opposes Senate Bill No. 115 for the following reasons:

(1) because it interferes with the well considered and equitable practices and policies already established and used by some local jurisdictions on the subject of bid mistakes based upon the *Model Procurement Code for State and Local Governments* and its accompanying *Recommended Regulations*;

(2) because it infringes upon this city's and other cities' home rule powers and assumes that cities are incapable of fairly and competently procuring goods and services;

(3) because it is not as complete, precise or well-thought out as the corresponding provisions on the subject of bid mistakes contained in the *Model Procurement Code for State and Local Governments* and its accompanying *Recommended Regulations*;

(4) because it derives from the provisions on the subject prepared solely by special interest groups, rather than from the provisions on the subject prepared by a combination of special interest groups and governmental organizations and propounded as a model <u>specifically for state and local governments</u>;

(5) because it is a piecemeal approach to only one small aspect of the much larger subject of governmental procurement.

If the Kansas Legislature thinks it must pass legislation in the narrow area of bid mistakes without addressing other aspects of governmental procurement policy, the City of Overland Park recommends that it consider adopting the more thorough and well thought out provisions on the subject found in the *Model Procurement Code for State and Local Governments* and its accompanying *Recommended Regulations*, both of which were drafted by the American Bar Association in conjunction with some nineteen other national organizations, including the Association of General Contractors of America.[1] I am enclosing a copy of those provisions for your reference.

As of September 1, 1989, fifteen states and some twenty-seven local jurisdictions had enacted all or a part of the model code and regulations. A list of those enacting jurisdictions is also attached hereto. Furthermore, we have learned that since September 1, 1989, Hawaii has adopted them and Michigan, Pennsylvania and Illinois are considering their adoption.

Finally, a considerable body of case law has developed interpreting the language used in the various provisions of the model code and regulations which would be useful to local governments and to the state in applying its provisions.

With specific reference to Senate Bill No. 115, as amended by the Senate Governmental Organization Committee, the following are some of the particular problems that we foresee will end up causing confusion and ultimately litigation:

---

[1] The other national organizations which assisted in the drafting of the *Model Procurement Code for State and Local Governments* and its accompanying *Recommended Regulations* are: American Purchasing Society, The Associated General Contractors of America, Committee on Federal Procurement of Architect-Engineer Services, Computer and Business Equipment Manufacturers Association, Council of State Governments, International City Management Association, National Association of Attorneys General, National Association of Purchasing Management, National Association of State Purchasing Officials, National Association of Counties, National Association of Educational Buyers, National Audio-Visual Association, Inc., National Association of State Legislatures, National Contract Management Association, National Institute of Government Purchasing, National Institute of Municipal Law Officers, National Purchasing Institute, Southern Legislative Conference of the Council of State Governments, and the United States Conference of Mayors.

(1) It would allow a bidder to withdraw a bid after bid opening even if the bidder's non-judgmental mistake were a non-material mistake (minor informality), for example, an arithmetical mistake that results in a bid that is $1.00 lower than the intended bid.

(2) It does not require correction and does not forbid withdrawal of bids where mistakes discovered after bid opening are (a) non-material mistakes (minor informalities) or (b) mistakes where the intended correct bid is clearly evident on the face of the bid document, correction of which does not prejudice the other bidders. Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors. The awarding authority should be given the discretion to waive non-material mistakes and minor informalities and hold the bidder to the reformed bid.

(3) It does not allow withdrawal of bids discovered more than two business days after the bids have been opened when not to allow their withdrawal would be unconscionable.

(4) It does not address disposition of bid security when a bid is withdrawn prior to the opening of the bids.

(5) It does not give the awarding authority the discretion to allow withdrawal of a bid when there is reasonable proof that a mistake was made and the intended bid cannot be ascertained with reasonable certainty.

(6) It apparently permits a bidder, after bid opening, to delete exceptions to the bid conditions or specifications which affect price or substantive obligations.

(7) It does not address correction of bid mistakes discovered after award of the contract.

(8) It does not address the disposition of bid security when a bid is withdrawn prior to the opening of the bids.

(9) It does not clearly distinguish among the treatment to be given to bid mistakes discovered before bids are opened; those discovered after bids are opened but before a contract is awarded; and those discovered after award of the contract.

(10) There is no good reason for prohibiting a bidder who withdraws a bid from performing work as a subcontractor on the project.

(11) There is no good reason why the Kansas Turnpike Authority should be exempt from the provisions of the bill, but no other governmental entity is exempt. If the Kansas Turnpike Authority is to remain exempt, then we request that the City of Overland Park be exempted as well.

Yours very truly,

Robert J. Watson

Robert J. Watson
City Attorney

/rjw

Enclosures

cc: Johnson County Legislative Delegation
Governing Body
City Manager
Department Directors

(6) *Correction or Withdrawal of Bids; Cancellation of Awards.* Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes, shall be permitted in accordance with regulations promulgated by the Policy Office. After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the [State] or fair competition shall be permitted. Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the Chief Procurement Officer or head of a Purchasing Agency.

COMMENTARY:

(1) Correction or withdrawal of bids before or after contract award requires careful consideration to maintain the integrity of the competitive bidding system, to assure fairness, and to avoid delays or poor contract performance. While bidders should be expected to be bound by their bids, circumstances frequently arise where correction or withdrawal of bids is proper and should be permitted.

(2) To maintain the integrity of the competitive sealed bidding system, a bidder should not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition.

(3) An otherwise low bidder should be permitted to correct a material mistake of fact in its bid, including price, when the intended bid is obvious from the bid document or is otherwise supported by proof that has evidentiary value. A low bidder should not be permitted to correct a bid for mistakes or errors in judgment.

(4) In lieu of bid correction, the [State] should permit a low bidder alleging a material mistake of fact to withdraw its bid when there is reasonable proof that a mistake was made and the intended bid cannot be ascertained with reasonable certainty.

(5) After bid opening an otherwise low bidder should not be permitted to delete exceptions to the bid conditions or specifications which affect price or substantive obligations; however, such bidder should be permitted the opportunity to furnish other information called for by the Invitation for Bids and not supplied due to oversight, so long as it does not affect responsiveness.

(6) A suspected bid mistake can give rise to a duty on the part of the [State] to request confirmation of a bid, and failure to do so can result in a nonbinding award. Where there is an appearance of mistake, therefore, the bidder should be asked to reconfirm the bid before award. In such instance, a bidder should be permitted to correct the bid or to withdraw it when the bidder acknowledges that a mistake was made.

(7) Correction of bid mistakes after award should be subject to the same proof as corrections before award with a further requirement that no correction be permitted that would cause the contract price to exceed the next low bid.

(8) Nothing in this Section is intended to prohibit the [State] from accepting a voluntary reduction in price from a low bidder after bid opening; provided that such reduction is not conditioned on, or results in, the modification or deletion of any conditions contained in the Invitation for Bids.

R3-202.10 Pre-Opening Modification or Withdrawal of Bids.

R3-202.10.1 *Procedure*. Bids may be modified or withdrawn by written notice received in the office designated in the Invitation for Bids prior to the time and date set for bid opening. A telegraphic modification or withdrawal received by telephone from the receiving telegraph company office prior to the time and date set for bid opening will be effective if the telegraph company confirms the telephone message by sending a written copy of the telegram showing that the message was received at such office prior to the time and date set for bid opening.

R3-202.10.2 *Disposition of Bid Security*. If a bid is withdrawn in accordance with this Section, the bid security, if any, shall be returned to the bidder.

R3-202.10.3 *Records*. All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate procurement file.

R3-202.13 Mistakes in Bids.

R3-202.13.1 *General.* Correction or withdrawal of a bid because of an inadvertent, nonjudgmental mistake in the bid requires careful consideration to protect the integrity of the competitive bidding system, and to assure fairness. If the mistake is attributable to an error in judgment, the bid may not be corrected. Bid correction or withdrawal by reason of a nonjudgmental mistake is permissible but only to the extent it is not contrary to the interest of the [State] or the fair treatment of other bidders.

R3-202.13.2 *Mistakes Discovered Before Opening.* A bidder may correct mistakes discovered before the time and date set for bid opening by withdrawing or correcting the bid as provided in Section R3-202.10 (Pre-Opening Modification or Withdrawal of Bids).

R3-202.13.3 *Confirmation of Bid.* When the Procurement Officer knows or has reason to conclude that a mistake has been made, such officer should request the bidder to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn if the conditions set forth in Subsections R3-202.13.4 through R3-202.13.6 of this Section are met

R3-202.13.4 *Mistakes Discovered After Opening but Before Award.* This Subsection sets forth procedures to be applied in three situations described in Subsections R3-202.13.4(a) through R3-202.13.4(c) of this Subsection in which mistakes in bids are discovered after the time and date set for bid opening but before award.

(a) *Minor Informalities.* Minor informalities are matters of form rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible. The Procurement Officer shall waive such informalities or allow the bidder to correct them depending on which is in the best interest of the [State]. Examples include the failure of a bidder to:

(i) return the number of signed bids required by the Invitation for Bids;

(ii) sign the bid, but only if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound; or

(iii) acknowledge receipt of an amendment to the Invitation for Bids, but only if:

(A) it is clear from the bid that the bidder received the amendment and intended to be bound by its terms; or

(B) the amendment involved had a negligible effect on price, quantity, quality, or delivery.

(b) *Mistakes Where Intended Correct Bid is Evident.* If the mistake and the intended correct bid are clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.

(c) *Mistakes Where Intended Correct Bid is Not Evident.* A bidder may be permitted to withdraw a low bid if:

(i) a mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or

(ii) the bidder submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made.

R3-202.13.5 *Mistakes Discovered After Award.* Mistakes shall not be corrected after award of the contract except where the Chief Procurement Officer or the head of a Purchasing Agency makes a written determination that it would be unconscionable not to allow the mistake to be corrected.

R3-202.13.6 *Determinations Required.* When a bid is corrected or withdrawn, or correction or withdrawal is denied, under Subsections R3-202.13.4 or R3-202.13.5 of this Section, the Chief Procurement Officer or the head of a Purchasing Agency shall prepare a written determination showing that the relief was granted or denied in accordance with these regulations, except that the Procurement Officer shall prepare the determination required under Subsection R3-202.13.4(a) of this Section.

ENACTING JURISDICTIONS – MPC-BASED LEGISLATION
AS OF SEPTEMBER 1, 1989
STATES (in order of effective dates)

STATE	*EFFECTIVE DATE*	*PRESENT LOCATION*
1. Kentucky	Jan. 1, 1979	Ky. Rev. Stat. Ann. §§ 45A.005 to 45A.990 (Baldwin 1989)
2. Arkansas	July 1, 1979	Ark. Stat. Ann. §§ 14-113 to 14-358 (1979)
3. Louisiana	July 1, 1980	La. Rev. Stat. Ann. §§ 39:1551 to 39:1755 (West Supp. 1989)
4. Utah	July 1, 1980	Utah Code Ann. §§ 63-56-1 to 63-56-73 (1986) (Supp. 1989)
5. Maryland	July 1, 1981	Md. State Fin. & Proc. Code Ann. §§ 11-101 to 19-218 (1988)
6. South Carolina	July 30, 1981	S.C. Code Ann. §§ 11-35-10 to 11-35-5270 (Law. Coop. 1986) (Supp. 1988)
7. Colorado	Jan. 1, 1982	Colo. Rev. Stat. §§ 24-91-101 to 24-112-101 (1988)
8. Indiana	Jan. 1, 1982	Ind. Code Ann. §§ 4-13.4-1-1 to 4-13.4-8-1 (Burns 1986 and Supp. 1989)
9. Virginia	Jan. 1, 1983	Va. Code §§ 11-35 to 11-80 (1989)
10. Montana	Jan. 1, 1983	Mont. Code Ann. §§ 18-4-101 to -407, 18-5-201 to -308, 18-6-101 to -103 (1987)
11. Territory of Guam	Oct. 1, 1983	5 Guam Code Ann. chap. 5
12. New Mexico	Nov. 1, 1984	N.M. Stat. Ann. §§ 13-1-1 to 13-1-199 (1985) (Supp. 1988)
13. Arizona	Jan. 1, 1985	Ariz. Rev. Stat. Ann. §§ 41-2501 to 41-2652 (1985) (Supp. 1988)
14. Alaska	Jan. 1, 1988	Alaska Stat. §§ 36.30.005 to 36.30.995 (1987) (Supp. 1988)
15. Rhode Island	July 1, 1989	R.I. Gen. Laws §§ 37-1-1 to 37-10-11 (1991)

ENACTING JURISDICTIONS – MPC-BASED LEGISLATION
KNOWN LOCAL JURISDICTIONS (in order of effective dates)

Knoxville, TN	May	1977
Jefferson Cty., KY Bd. of Education	Jan.	1980
Anchorage, AK	Jan.	1980
Eau Claire, WI	Feb. 27	1980
Rome, GA	Oct. 1	1980
Davenport, IA	Oct.	1980
Louisville, KY	Jan.	1981
Michigan Public Transit Assoc.	June 1	1981
*South Carolina	July	1982
Lansing, MI	Sept. 23	1982
Greeley, CO	Jan. 1	1983
Seminole County, FL	Jan. 11	1983
Alexandria, VA	Jan. 22	1983
Rockville, MD	Mar. 23	1983
Kansas City, KS	June 27	1983
Kansas City, MO	June 27	1983
†Virginia	July 1	1983
Atlanta, GA	Nov. 1	1983
Marathon County, WI	Dec. 20	1983
‡New Mexico	Nov. 1	1984
Boca Raton, FL	Jan. 10	1984
Richmond, VA	May 20	1985
District of Columbia	Feb. 20	1986
Lake County, IL	April 8	1986
New York, NY	Nov. 7	1989
**Massachusetts	May 1	1990
Scottsdale, AZ	April 2	1990

*As part of the state enactment of the MPC, the South Carolina Consolidated Procurement Code Annotated § 11-35-50 provides that political subdivisions of the state shall "adopt ordinances or procedures embodying sound principles of appropriately competitive procurement. The Budget and Control Board, in cooperation with the Procurement Policy Committee and subdivisions concerned, shall create a task force to draft model ordinances, regulations and manuals for consideration by political subdivisions." As of September 5, 1985, all ninety-two school districts and the majority of larger cities and counties in South Carolina complied with this statute by substantial enactment of the Model Procurement Ordinance for Local Governments.

†The Virginia enactment, in Virginia Code §§ 11-35C, 11-35E (1985), requires that certain MPC provisions, §§ 11-41.1, 11-49, 11-51, 11-54, 11-56 through 11-61, and 11-72 through 11-80, be enacted by local jurisdictions. These provisions pertain respectively to competitive bidding on state aid projects, brand name specifications, discrimination in purchasing, bid withdrawal, security posting for construction contracts, and public contracting ethics. In addition, towns over 3,500 in population, counties, cities, and school divisions must, by VA. CODE § 11-35E (Supp. 1986), adopt § 11-41C which requires competitive negotiation whenever competitive sealed bidding is deemed not practicable or not fiscally advantageous.

By § 11-35C, towns having populations under 3,500 are not required to adopt the other MPC provisions contained in VA. CODE §§ 11-35 to 11-80 (1985). Towns having populations over 3,500, counties, cities and school divisions must adopt the other MPC provisions in §§ 11-35 through § 11-80 or adopt comparable forms thereof, by § 11-35D.

‡The New Mexico enactment of the MPC applies to "every expenditure by state agencies and local public bodies for the procurement of items of tangible personal property, services and construction," N.M. STAT. ANN. § 13-1-30 (1985), excepting activities by "home rule" municipalities. A home rule municipality, formed pursuant to N.M. CONST. art X, § 6, "may exercise all legislative powers and perform all functions not expressly denied by general law or charter." N.M. CONST. art. X, § 6D. A "liberal construction" is given to these powers. N.M. CONST. art X, § 6E. Therefore, when the home rule jurisdiction performs activities of a local, not general nature (as determined by the test in *City of Albuquerque v. New Mexico State Corp. Commission*, 93 N.M. 719, 605 P.2d 227 [1979], wherein a proprietary activity is local and private, and a governmental activity is general and public), such as procurement, it performs within its home rule authority and outside of the requirements of § 13-1-30.

**The Massachusetts legislature has enacted the Uniform Procurement Act which took effect on May 1, 1990 and represents a sweeping reform of local public procurement in Massachusetts. The new Procurement Act covers procurement by all 351 cities and towns, 14 counties, more than 180 dstricts (sewer, water, fire and road districts), 84 regional school districts, 241 housing authorities, 31 redevelopment authorities and various other local authorities, constituting more than 900 independent jurisdictions in all. It does not apply to state agencies. The legislation is patterned after the ABA Model Procurement Code, tailored to meet local government practices in Massachusetts. The Uniform Procurement Act is found at chapter 30B of the Massachusetts General Laws. The act covers contracts to acquire goods, supplies, services, disposal of surplus supplies, and acquisition and disposition of interests in real property. The Act contains informal procedures for contracts under $1,000, slightly more formal procedures for contracts from $1,000-$10,000, and formal competitive bidding for contracts of $10,000 or more. These higher value contracts require formal competition, specific steps to be followed in the award process, public advertisement, and award to the bidder offering the best (usually the lowest) price, although the awarding authority may take into account evaluation criteria in addition to price, provided they are identified in the solicitation and applied in a manner consistent with the statute.

THE LEAGUE
OF KANSAS
MUNICIPALITIES

Municipal Legislative Testimony

AN INSTRUMENTALITY OF KANSAS CITIES • 300 SW 8TH • TOPEKA, KS 66603 • (913) 354-9565 • FAX (913) 354-4186

TO: **House Governmental Organization and Elections**

FROM: Harry Herington, Associate General Counsel

DATE: March 14, 1995

RE: Senate Bill No. 115 - Opponent

On behalf of the League of Kansas Municipalities and their 543 member cities, I would like to thank the committee for the opportunity to offer written testimony in opposition to Senate Bill No. 115. Due to a conflict with testimony I am giving to the Senate Local Government Committee on several bills, I am unable to appear in person to offer the League of Kansas Municipalities position on this important bill.

SB 115, in its original form, had been reviewed by the League's Legislative Committee, comprised of municipal officials who are involved in the day-to-day governance and administration of municipal governments. The committee raised several concerns which were not addressed in the amended version of this bill. Those concerns are as follows:

1. Section 7 provides an unnecessary cause of action that may be used to sue city governments. There are already ample procedures set out in the Kansas Code of Civil Procedures to address the concerns listed within this section. The amount of municipal funds currently being devoted to litigation against cities is already significant without adding yet another opportunity.

2. Locally elected officials should not have their discretion removed when dealing with bidders of a project of local concern. The city's governing body is in the best position to determine what procedures should be followed in their community and serious consideration must be given before their home rule authority in this issue is limited or removed.

RECOMMENDATION: The League respectfully recommends that the Committee not endorse SB 115. In the alternative, the League would request that cities be specifically be removed from the scope of this proposed legislation and that the language in section 7 be stricken. *(Please see the attached bill revisions concerning the League's recommendation.)*

GOVERNMENTAL ORGANIZATION
AND ELECTIONS-HOUSE
March 14, 1995
Attachment 7-1

As Amended by Senate Committee

SENATE BILL No. 115

By Committee on Governmental Organization

1-25

AN ACT relating to bids and bidding for certain contracts made by the state of Kansas and its political and taxing subdivisions; concerning mistakes made in bids; prescribing procedures for correction of mistakes; prescribing certain rights and responsibilities of parties to such contracts and certain remedies therefor.

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

Section 1. (a) The provisions of this act shall govern all contracts entered into by agencies of the state of Kansas and all political and taxing subdivisions of this state for the construction, reconstruction, alteration, repair, dismantling or demolition of buildings, streets, roads, highways, bridges, water and sewer and gas mains, plants and facilities,airports, dams and levies and every other type of structure or improvement.

(b) For the purposes of this act ``awarding authority'' shall mean the agency of the state or the political or taxing subdivision requesting bids and awarding contracts governed by this act.

Sec. 2. Any bidder submitting bids upon any contract governed by this act may correct ***any*** mistakes in its bid before the time and date set ***by the awarding authority*** for bid opening by withdrawing or correcting its bid.

Sec. 3. A bid mistake based upon an error in judgment may not be withdrawn ***after the time and date set by the awarding authority for bid opening***.

Sec. 4. In cases where a representative of the awarding authority has reason to believe that nonjudgmental mistakes~~, hereafter referred to as a mistake, has~~ ***have*** been made, the representative of the awarding authority may request from the bidder a verification of the bid calling attention to the suspected ***nonjudgmental*** mistake. A bidder may either verify the bid as submitted or withdraw it if a request for verification has been made. If the bidder does not respond within two business days after the bidder receives a request for verification it shall be considered verified. Once a bid has been verified it shall be considered submitted as verified.

Sec. 5. The bidder must notify the awarding authority within two business days after the bids have been opened that there is a nonjudg-

ıental mistake in its bid. The awarding authority shall permit a bidder to withdraw its bid without penalty or forfeiture of bid security if:

(a) A ***nonjudgmental*** mistake is evident on the face of the bid; or

(b) the bidder establishes by clear and convincing evidence that a ***nonjudgmental*** mistake was made.

Sec. 6. If a bidder withdraws a bid, ***as authorized in section 5, the awarding authority may require that*** such bidder shall not be allowed to perform any work on the project through subcontract agreements or by any other means including rebids.

~~Sec. 7. Whenever it appears that an awarding authority is attempting to enforce any contract based upon a bid in which a mistake has been made contrary to the provisions of this act, an action may be brought in the district court of the county in which the contract was awarded to enjoin such enforcement and, upon a proper showing, a permanent or temporary injunction, restraining order or other equitable relief shall be granted in an action brought by the bidder, the attorney general or any county or district attorney.~~

Sec. 8. Section 1 to 7, inclusive, shall not apply to [cities or ***the Kansas turnpike authority.***

Sec. ~~8~~ ***9.*** This act shall take effect and be in force from and after its publication in the statute book.