

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Senator Brownlee at 8:30 a.m. on March 07, 2002 in Room 123-S of the Capitol.

All members were present except:

Committee staff present:

Norman Furse, Revisor of Statutes
Sherman Parks, Revisor of Statutes
April Holman, Legislative Research
Debra Hollon, Legislative Research
Lea Gerard, Committee Secretary

Conferees appearing before the committee:

Dan Haake, Haake Foundation
Bill Miller, Building Erection, Olathe, KS.
Trudy Aaron, American Institute Architects
Bob Totten, KS Contractors Assoc., Inc.
Gary Hibbs, Dept. Of Admin., Div.
Facilities Management
Don Seifert, City Manager, Olathe, KS.
Dr. Gary George, Olathe School District
Dale Jost, Chief of Bureau Fiscal Services.,
KS Dept. of Transportation
Ron Appletoft, Water Dist. No.1
Johnson County
Kim Gulley, League of Municipalities
Erik Sartorius, City of Overland Park
Matt Goddard, Heartland Community Bankers
Association

Others attending:

See attached list.

In accordance with KSA 75-3715a, a fiscal note for **SB 616** was submitted to committee members.

Informational Hearings on **SB 616** Prompt Pay Construction.

Dan Haake, Haake Foundations, testified in support of **SB 616** with some proposed amendments (Attachment 1). Prompt payment allows the general contractors and subcontractors time to pay their subcontractors and suppliers before the end of the month. **SB 616** will help the construction industry by establishing a base line for owners, general contractors, and subcontractors to take care of the financial responsibilities on construction projects. The proposed bill would obligate an owner to make payments to their general contractors within 10 business days after receipt of an invoice, and compel general contractors and subcontractors to pay their subcontractors and suppliers within 5 business days from receipt of their payments.

Bill Miller, Building Erection, Olathe, Kansas, testified in support of **SB 616**. Building Erection employees 200 people from Missouri and Kansas and has offices in Olathe, Kansas, Topeka, Kansas and St. Joseph, Missouri. There has to be some criteria to require a person to make prompt payments. As a Union contractor, fringe benefit payments have to be paid to the holding companies on the Missouri side by the 29th or there will be a 10% penalty. Last month the fringe benefit payments for all employees, with overtime included, was \$290,000. If the company does not get paid for a job, money must be borrowed from the bank to make the fringe benefit payments; otherwise, liquidated damages are 10% and the interest rate will be the highest allowed by the State of Missouri.

Matt Goddard, Heartland Community Banks Association, testified as a neutral party for **SB 616** with some amendments (Attachment 2). The bill allows financial institutions to act as escrow agents, but the wording of the bill limits the escrow agents to only commercial banks. The amendment submitted replaces the single reference to "financial institutions" with "banks, savings and loans and savings banks."

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON COMMERCE at on March 07, 2002 in Room 123-S of the Capitol.

Paul Davis, Kansas Bar Association submitted written testimony as a neutral party for **SB 616** with some amendments (Attachment 3).

Trudy Aaron, Executive Director, American Institute of Architects, testified in opposition to **SB 616** (Attachment 4). The bill would limit the ability of owners, architects and general contractors to assure completion of construction projects. The contractor says the project is complete but when the owner and architect walk through the project, many items have not been completed. The withholding of funds becomes the owner's only leverage to get the contractor or subcontractors to finish the work. The bill also requires retainage to be placed in interest-bearing escrow accounts which would create a bookkeeping nightmare for contractors.

Chairperson Brownlee asked Trudy Aaron to comment on the idea of putting the payment schedule in the documents or contract as suggested by Mr. Haake. Trudy Aaron stated that is between the owner, the general contractor and the subcontractor because all of those are different contracts.

Bob Totten, Kansas Contractors Association, Inc., testified in opposition to **SB 616** (Attachment 5) stating members think the bill is unnecessary at least in regards to highway construction. Mr. Totten suggested that the bill be amended so that it would not apply to all contracts for construction in the state which infringes on the private sector.

Gary Hibbs, Design Supervisor, Division of Facilities Management, testified in opposition to **SB 616** (Attachment 6) stating that procedures are in place that recognize not only the construction industry but also the State of Kansas and the requirements the state is mandated to do. The bill addresses payment deadlines for services provided and sets up an escrow system for an owner's holding of retainage for construction projects. Provisions of this bill alter the manner in which the State does business on state funded projects.

Don Seifert, City of Olathe, testified in opposition to **SB 616** (Attachment 7) stating as a public entity, the goal of prompt payment must be balanced with the duty to protect the taxpayer's investment in the construction project.

Gary George, Assistant Superintendent with the Olathe School District, testified in opposition to **SB 616** (Attachment 8).

Dale Jost, Chief of Fiscal Services, Kansas Department of Transportation, testified in opposition to **SB 616** (Attachment 9). The State currently provides relief for late payment to vendors through the Kansas Prompt Payment Act. The 10-day time period for rejecting unsatisfactory work or making payment is too aggressive for validation of the payment request, performance of inspections and acceptance of work.

Ron Appletoft, Governmental Affairs Coordinator, Water District for Johnson County testified in opposition to **SB 616** (Attachment 10) stating the bill would require the retainage payout be done at the point of substantial completion. The water district currently pays the retainage amount at point of final completion.

Kim Gulley, Director of Policy Development & Communications, testified in opposition to **SB 616** (Attachment 11).

Erik Sartorius, City of Overland Park, testified in opposition to **SB 616** (Attachment 12). Section 16 of the bill would require the cities to notify subcontractors when a contractor is paid. The City of Overland Park does not want to be put in the position of notifying others when a contractor has been paid. Senator Brownlee pointed out the responsibility an owner has in this regard because a subcontractor can file a lien on the owner's property.

Ashley Sherard, Government Relations Manager, Johnson County, Kansas, presented written testimony in opposition to **SB 616** (Attachment 13).

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON COMMERCE at on March 07, 2002 in Room 123-S of the Capitol.

Bob Vancrum, Government Affairs Specialist for Blue Valley USD 229 and Johnson County Community College, presented written testimony in opposition to **SB 616 (Attachment 14)**.

Gary White, Kansas Trial Lawyers Association, presented written testimony in opposition to **SB 616 (Attachment 15)**.

Amy Brunner, Governmental Relations Specialist, Kansas Association of School Boards, presented written testimony in opposition to **SB 616 (Attachment 16)**.

Eric King, Director of Facilities for the Kansas Board of Regents, presented written testimony in opposition to **SB 616 (Attachment 17)**.

Mike Taylor, Governmental Relations Director, City of Wichita, presented written testimony in opposition to **SB 616 (Attachment 18)**.

Corey Peterson, Associated General Contractors of Kansas, Inc., presented written testimony in opposition to **SB 616 (Attachment 19)**.

There being no further conferees wishing to testify, the hearing for **SB 616** was closed.

Chairperson requested that the Revisor, Sherman Parks meet with Dan Haake on the prompt pay statute that currently exists and that may solve some of the issues the construction firm is facing. Chairperson Brownlee thanked Dan Haake for providing the statutes from Arizona, Colorado and New Mexico.

Meeting adjourned at 9:30 a.m.

The next meeting is scheduled for March 08, 2002 at 8:30 a.m.

**SENATE COMMERCE COMMITTEE
GUEST LIST**

DATE: March 07, 2002

NAME	REPRESENTING
Erik Sartorius	City of Overland Park
Ron Appletoft	Water DIST No 1 of JoCo
Bob VanCrum	USD 729 + JoCo Comm College
GARY Hibbs	DOA DIV of Fac Mngmnt
Dan Pfeiffer	City of Olathe
Mike Taylor	City of Wichita
Dan Pfeiffer	DOA A / DFM
Mike Leebert	ATEC
E. R. Mason	KAPA
Marcia Stambough	KDOT
Dale Jost	KDOT
Steve Woolington	KDOT
Kim Gulley	LKM
Jacqueline Baker	SQE
Amy Henry	Olathe School Dist
Ashley Shevard	Johnson County
Jane Stubbs	Ko. Bldg. Ind. Assn.
JOHN STROM	M. LA Western ASPN.
BB Totten	Ko. Construction Assoc.
Karen Engle	observer
Trudy ARON	AMINST of Architects/KS
Tom Slattery	AGC / KS
Corey Peterson	AGC / KS
Robert Young	USD 500
Connie Brand	USD 500

3-7-02

Name

Representing

Tiffany Cornejo
Mary Whitig
Nicholas Street
Lindy Brownback
Joy Kile
Andrea Luthi
Megan Ballard
Nora Ray
Roch Gessler
Alyson Williams
Matthew Goddard

Sen. Krungardt's Intern
KT LA
Osage county
Osage county
Greenwood Co.
Greenwood County
Greenwood County
Greenwood County
KOTK - BOW
Intern - Braunlee
Heartland Community Bankers Assoc.

DAN HAAKE



TESTIMONY ON SENATE BILL 616
CONCERNING PROMPT PAYMENTS ON CONSTRUCTION PROJECTS

Name: Dan M. Haake

Home Address: 18955 Quivira Road
Springhill, Kansas 66083
913-592-2631

Employer: Haake Foundations, Inc.
10029 E. 63rd Terrace
Raytown, Missouri 64133
816-737-2954

Kansas State Registration Number: 736 661 0

Board Member Of: American Subcontractors Association
Greater Kansas City Chapter
Post Office Box 6400
Kansas City, Kansas 66106
913-384-1255

Points Of Discussion

- A) Why we need legislative help to achieve Prompt Payments within the construction industry.
- B) How will this legislation help the industry.
- C) What other states have dealt with this issue.

Enclosures:

Arizona Bill AZ ST S 34-221
New Mexico Bill HB 320
Colorado Bill Pending HB 02-1062
Proposed Bill (2 Copies)
Prompt Pay Analysis Spreadsheet

10029 E. 63RD TERRACE

RAYTOWN, MISSOURI 64133

816 • 737 • 2954

Senate Commerce Committee
MARCH 7, 2002
Attachment 1-1

A) Why do we need legislative help.

I would like to share with you two situations I recently had to deal with concerning Prompt Payments. December 2001, I contracted to provide the foundation work for the new Natorium Facility for the Turner School District in Kansas City, Kansas. My portion of the job would cost a little under \$95,000.00. Construction began in early December and we completed roughly \$72,000.00 of our contract by mid December 2001. For this work we expected to be paid before the end of January 2002, however because of problems our of our control, we did not get paid until late February 2002. I can tell you that this put a tremendous hardship on my construction company finances as well as our relationship with our General Contractor and the Turner School District.

A second project was undertaken in February 2002 where I contracted the foundation work for a private sector project for an amount just under \$100,000.00. At a pre-construction meeting with the General Contractor, I asked when the Owner was to pay them for monthly progress payments. I was truly surprised when they did not know when payments were to be made.

These two situations are the most recent but are not isolated. It is common for me to call and inquire about the payment status of an invoice and the most common answer is, "we cannot pay your invoice because we have not been paid by the Owner, however we are expecting payment soon but cannot tell you when." In my way of thinking, this is no way to run a business, and it is good business to know when invoices will be paid.

It is my opinion that payments from the Owners need to start timely as to allow General Contractors and Subcontractors time to pay their Subcontractors and Suppliers before the end of the month. To achieve this, I need your help.

B) How will this legislation help the industry.

This bill will help the industry by establishing a base line for Owners, General Contractors, and Subcontractors to take care of the financial responsibilities on construction projects. Our proposed bill would compel an Owner to make payments to their General Contractors within 10 business days after receipt of an invoice, and further compel General Contractors and Subcontractors to pay their Subcontractors and Suppliers within 5 business days from receipt of their upstream payments. It would also requires that retained monies be deposited monthly with an escrow agent and finally, it would establish consequences for non performance of their responsibilities. We do understand that there could be Owners that cannot adhere to these terms and for those Owners, we only ask them to advise the Contractors in the bidding documents of their specific payment terms.

I have talked to scores of Contractors and Suppliers that believe reform needs to be made and I have included copies of some of their letters concerning these issues.

I have written letters to a few of you concerning reform of the Kansas Lien Law. This bill will greatly eliminate the need to file liens as invoices and retention monies should be paid in a manner and time frame that would eliminate the need to file many mechanic liens.

To help illustrate the cost impact of this legislation, I have prepared a sheet which compares the cost of a \$100,000.00 contract completed in 8 weeks with the job completed in 18 months. This Prompt Pay Bill would save Contractors nearly \$2,000.00 on this contract. The cost to other Contractors would be similar and if you consider the impact state wide, this bill will benefit all of Kansas.

C) If this Kansas Legislature would take action on this proposed bill, they would join other states such as:

Arizona	AZ ST S 34-221
New Mexico	HB 320
Colorado	Pending HB 02-1062

achieve the frame work necessary to assure that a team of Contractors can deliver a construction project to a Owner in a very professional like manner.

ARIZONA REVISED STATUTES ANNOTATED
TITLE 32. PROFESSIONS AND OCCUPATIONS
CHAPTER 10. CONTRACTORS
ARTICLE 2. LICENSING

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Current through End of 2000 2nd Regular Session and
the 5th Special Session and the Nov. 7, 2000 General Election.

§ 32-1129.01. Progress payments by owner; conditions; interest

A. By mutual agreement with a contractor, an owner may make progress payments on construction contracts of less than sixty days. An owner shall make progress payments to a contractor on all other construction contracts. Progress Payments shall be made on the basis of a duly certified and approved billing or estimate of the work performed and the materials supplied during the preceding thirty day billing cycle, or such other billing cycle as stated in the construction contract. If billings or estimates are to be submitted in other than thirty day billing cycles, the construction contract and each page of the plans, including bid plans and construction plans, shall specifically identify such other billing cycle in a clear and conspicuous manner as prescribed in subsection B. Except as provided in subsection C, the owner shall make progress payments to the contractor within seven days after the date the billing or estimate is certified and approved pursuant to subsection D.

B. A construction contract may provide for a billing cycle other than a thirty day billing cycle if the construction contract specifically sets forth such other billing cycle and either of the following applies:

1. The following legend or substantially similar language setting forth the other billing cycle appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

Notice of alternate billing cycle

This contract allows the owner to require the submission of billings or estimates in billing cycles other than thirty days. billings or estimates for this contract shall be submitted as follows:

2. The following legend or substantially similar language setting forth the other billing cycle appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

Notice of alternate billing cycle

This contract allows the owner to require the submission of billings or estimates in billing cycles other than thirty days. a written description of such other billing cycle applicable to the project is available from the owner or the owner's designated agent at (telephone number or address, or both), and the owner or its designated agent shall provide this written description on request.

C. An owner may make progress payments later than seven days after the date the billing or estimate is certified and approved if both:

1. The construction contract in a clear and conspicuous manner specifically provides for a later payment defined

by a specified number of days after certification and approval.

2. The following legend or substantially similar language setting forth the specified number of days appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

Notice of extended payment provision

This contract allows the owner to make payment within _____ days after certification and approval of billings and estimates.

D. A billing or estimate shall be deemed approved and certified fourteen days after the owner receives the billing or estimate, unless before that time the owner or the owner's agent prepares and issues a written statement detailing those items in the billing or estimate that are not approved and certified. An owner may decline to approve and certify a billing or estimate or portion of a billing or estimate for unsatisfactory job progress, defective construction work or materials not remedied, disputed work or materials, failure to comply with other material provisions of the construction contract, third party claims filed or reasonable evidence that a claim will be filed, failure of the contractor or a subcontractor to make timely payments for labor, equipment and materials, damage to the owner, reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum or a reasonable amount for retention. The owner is deemed to have received the billing or estimate when the billing or estimate is submitted to any person designated by the owner for the receipt of these submissions or for review or approval of the billing or estimate.

E. An owner may withhold from a progress payment only an amount that is sufficient to pay the direct expenses the owner reasonably expects to incur to correct any items set forth in writing pursuant to subsection D.

F. An owner may extend the period within which the billing or estimate is certified and approved if both:

1. The construction contract in a clear and conspicuous manner specifically provides for an extended time period within which a billing or estimate shall be certified and approved defined by a specified number of days after the owner has received the billing or estimate.

2. The following legend or substantially similar language, setting forth the specified number of days, appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

Notice of extended certification and approval period provision

This contract allows the owner to certify and approve billings and estimates within _____ days after the billings and estimates are received from the contractor.

G. After the effective date of a construction contract, an owner and contractor may change the number of specified days after certification and approval for the owner to make payment to the contractor or within which a billing or estimate must be certified and approved. any contractor or subcontractor that does not provide written consent to the change will continue to be paid as previously agreed.

H. When a contractor completes and an owner approves and certifies all work under a construction contract, the owner shall make payment in full on the construction contract within seven days. When a contractor completes and an owner approves and certifies all work under a portion of a construction contract for which the contract states a separate price, the owner shall make payment in full on that portion of the construction contract within seven days. On projects that require a federal agency's final approval or certification, the owner shall make payment in full on the construction contract within seven days of the federal agency's final approval or certification.

I. Payment shall not be required pursuant to this section unless the contractor provides the owner with a billing or

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estimate for the work performed or the material supplied in accordance with the terms of the construction contract between the parties.

J. A **construction** contract shall not alter the rights of any **contractor, subcontractor** or material supplier to receive **prompt** and timely progress **payments** as provided under this article.

K. If an owner or a third party designated by an owner as the person responsible for making progress payments on a construction contract does not make a timely payment pursuant to this section, the owner shall pay the contractor interest at the rate of one and one-half per cent a month or fraction of a month on the unpaid balance, or at a higher rate as the parties to the construction contract agree.

L. On the written request of a subcontractor, the owner shall notify the subcontractor within five days after the issuance of a progress payment to the contractor. On the written request of a subcontractor, the owner shall notify the subcontractor within five days after the owner makes the final payment to the contractor on the construction contract.

M. In any action or arbitration brought to collect payments or interest pursuant to this section, the successful party shall be awarded costs and attorney fees in a reasonable amount.

N. If the owner and contractor are a single entity, that entity shall pay its subcontractors or material suppliers within fourteen days after the billing or estimate is certified and approved unless the deadlines for approval and certification or for payment have been modified pursuant to subsection C or F.

CREDIT(S)

2001 Electronic Update

Added by Laws 2000, Ch. 233, § 4.

<General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

For applicability provision of Laws 2000, Ch. 233, see Historical and Statutory Notes following § 32-1129.

Former § 32-1129.01 was renumbered as § 32-1129.03.

A. R. S. § 32-1129.01

AZ ST § 32-1129.01

END OF DOCUMENT

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ARIZONA REVISED STATUTES ANNOTATED
TITLE 34. PUBLIC BUILDINGS AND IMPROVEMENTS
CHAPTER 2. EMPLOYMENT OF CONTRACTORS
ARTICLE 2. CONTRACT

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Current through End of 2000 2nd Regular Session and
the 5th Special Session and the Nov. 7, 2000 General Election.

§ 34-221. Contract with successful bidder; payments to contractor; security; recovery of damages by contractor for delay; progress payments

A. The agent shall enter into a contract with the lowest responsible bidder whose proposal is satisfactory, except that in counties with a population of more than one million persons according to the most recent United States decennial census, in determining the lowest responsible bidder under this section, the board of supervisors may consider, for no more than five projects, the time of completion proposed by the bidder, the value over time of completed services and facilities and the value over time of interrupted services if the board determines that this procedure will serve the public interest by providing a substantial fiscal benefit or that the use of the traditional awarding of contracts is not practicable for meeting desired construction standards or delivery schedules and if the formula for considering the time of completion is specifically stated in the bidding information.

b. The terms of a contract entered into pursuant to subsection A shall include the following items:

1. A surety company bond or bonds as required under the provisions of this article.

2. The owner by mutual agreement may make progress payments on contracts of less than ninety days and shall make monthly progress payments on all other contracts as provided for in this paragraph. Payment to the contractor on the basis of a duly certified and approved estimate of the work performed during the preceding calendar month under such contract may include payment for material and equipment, but to insure the proper performance of such contract, the owner shall retain ten per cent of the amount of each estimate until final completion and acceptance of all material, equipment and work covered by the contract. An estimate of the work submitted shall be deemed approved and certified for payment after seven days from the date of submission unless before that time the owner or owner's agent prepares and issues a specific written finding setting forth those items in detail in the estimate of the work that are not approved for payment under the contract. The owner may withhold an amount from the progress payment sufficient to pay the expenses the owner reasonably expects to incur in correcting the deficiency set forth in the written finding. The progress payments shall be paid on or before fourteen days after the estimate of the work is certified and approved. The estimate of the work shall be deemed received by the owner on submission to any person designated by the owner for the submission, review or approval of the estimate of the work.

3. When the contract is fifty per cent completed, one-half of the amount retained including any securities substituted under paragraph 5 shall be paid to the contractor upon the contractor's request provided the contractor is making satisfactory progress on the contract and there is no specific cause or claim requiring a greater amount to be retained. After the contract is fifty per cent completed, no more than five per cent of the amount of any subsequent progress payments made under the contract may be retained providing the contractor is making satisfactory progress on the project, except that if at any time the owner determines satisfactory progress is not being made ten per cent retention shall be reinstated for all progress payments made under the contract subsequent to the determination.

4. Upon completion and acceptance of each separate building, public work or other division of the contract on which the price is stated separately in the contract, except as qualified in paragraph 5, payment may be made in

full, including retained percentages thereon, less authorized deductions. In preparing estimates, the material and equipment delivered on the site to be incorporated in the job shall be taken into consideration in determining the estimated value by the architect or engineer.

5. Ten per cent of all estimates shall be retained by the agent as a guarantee for complete performance of the contract, to be paid to the contractor within sixty days after completion or filing notice of completion of the contract. Retention of payments by a purchasing agency longer than sixty days after final completion and acceptance requires a specific written finding by the purchasing agency of the reasons justifying the delay in payment. No purchasing agency may retain any monies after sixty days which are in excess of the amount necessary to pay the expenses the purchasing agency reasonably expects to incur in order to pay or discharge the expenses determined by the purchasing agency in the finding justifying the retention of monies. In lieu of the retention provided in this section, the agent shall, at the option of the contractor, accept as a substitute an assignment of time certificates of deposit of banks licensed by this state, securities of or guaranteed by the United States of America, securities of this state, securities of counties, municipalities and school districts within this state or shares of savings and loan institutions authorized to transact business in this state, in an amount equal to ten per cent of all estimates which shall be retained by the agent as a guarantee for complete performance of the contract. In the event the agent accepts substitute security as described in this paragraph for the ten per cent retention, the contractor shall be entitled to receive all interest or income earned by such security as it accrues and all such security in lieu of retention shall be returned to the contractor by the agent within sixty days after final completion and acceptance of all material, equipment and work covered by the contract if the contractor has furnished the agent satisfactory receipts for all labor and material billed and waivers of liens from any and all persons holding claims against the work. In no event shall the agent accept a time certificate of deposit of a bank or shares of a savings and loan institution in lieu of the retention specified unless accompanied by a signed and acknowledged waiver of the bank or savings and loan association of any right or power to setoff against either the agent or the contractor in relationship to the certificates or shares assigned.

6. In any instance where the agent has accepted substitute security as provided in paragraph 5, any subcontractor undertaking to perform any part of such public work shall be entitled to provide substitute security to the contractor upon terms and conditions similar to those described in paragraph 5, and such security shall be in lieu of any retention under the subcontract.

C. No contract for **construction** may materially alter the rights of any **contractor, subcontractor** or material supplier to receive **prompt** and timely **payment** required to be included in the contract under subsection B.

D. The contract shall be signed by the agent and the contractor.

E. A contract for the procurement of construction shall include a provision which provides for negotiations between the agent and the contractor for the recovery of damages related to expenses incurred by the contractor for a delay for which the agent is responsible, which is unreasonable under the circumstances and which was not within the contemplation of the parties to the contract. This section shall not be construed to void any provision in the contract which requires notice of delays, provides for arbitration or other procedure for settlement or provides for liquidated damages.

F. The **contractor** shall pay to the **contractor's subcontractors** or material suppliers and each **subcontractor** shall pay to the **subcontractor's subcontractor** or material supplier, within seven days of receipt of each progress **payment**, unless otherwise agreed in writing by the parties, the respective amounts allowed the **contractor** or **subcontractor** on account of the work performed by subordinate **subcontractors**, to the extent of each such **subcontractor's** interest therein, except that no contract for **construction** may materially alter the rights of any **contractor, subcontractor** or material supplier to receive **prompt** and timely **payment** as provided under this section. Such payments to subcontractors or material suppliers shall be based on payments received pursuant to this section. Any diversion by the contractor or subcontractor of payments received for work performed on a contract, or failure to reasonably account for the application or use of such payments, constitutes grounds for disciplinary action by the registrar of contractors. The subcontractor or material supplier shall notify the

registrar of contractors and the purchasing agency in writing of any payment less than the amount or percentage approved for the class or item of work as set forth in this section.

G. A subcontractor may notify the purchasing agency in writing requesting that the subcontractor be notified by the purchasing agency in writing within five days from payment of each progress payment made to the contractor. The subcontractor's request remains in effect for the duration of the subcontractor's work on the project.

H. Nothing in this chapter prevents the contractor or subcontractor, at the time of application and certification to the owner or contractor, from withholding such application and certification to the owner or contractor for payment to the subcontractor or material supplier for unsatisfactory job progress, defective construction work or materials not remedied, disputed work or materials, third party claims filed or reasonable evidence that a claim will be filed, failure of a subcontractor to make timely payments for labor, equipment and materials, damage to the contractor or another subcontractor, reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum or a reasonable amount for retention that does not exceed the actual percentage retained by the owner.

I. If any payment to a contractor is delayed after the date due interest shall be paid at the rate of one per cent per month or fraction of a month on such unpaid balance as may be due.

J. If any periodic or final payment to a subcontractor is delayed by more than seven days after receipt of the periodic or final payment by the contractor or subcontractor, the contractor or subcontractor shall pay a subordinate subcontractor or material supplier interest, beginning on the eighth day, at the rate of one per cent per month or a fraction of a month on such unpaid balance as may be due.

CREDIT(S)

2000 Main Volume

Amended by Laws 1965, Ch. 94, § 1; Laws 1969, Ch. 52, § 10; Laws 1974, Ch. 132, § 1; Laws 1979, Ch. 53, § 1; Laws 1987, Ch. 266, § 2; Laws 1989, Ch. 301, § 2; Laws 1991, Ch. 164, § 1; Laws 1999, Ch. 101, § 2.

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Source:

Laws 1919, Ch. 51, § 8.
 Rev.Code 1928, § 2605.
 Laws 1949, Ch. 114, § 3.
 Laws 1950, 1st S.S., Ch. 22, § 1.
 Code 1939, Supp.1952, § 9-106.

Reviser's Notes:

In the section heading "; security" was added pursuant to authority of § 41- 1304.02.

FORMS

See West's Arizona Legal Forms, Civil Procedure.
 See West's Arizona Legal Forms, Debtor-Creditor.

CROSS REFERENCES

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Agreement to use arbitration, inclusion in public works contracts, see § 12- 1518.

Arizona power authority, construction work and purchases by bid only, see § 30-128.

Construction of industrial plant, see § 11-282.

County highway bonds, contracts for proposed work, see § 28-6748.

County highways, bids for construction, equipment or supplies, see § 28- 6713.

County improvement districts, bonds required from contractor, see § 48-925.

Drainage district, plan for construction of works, see § 48-2665.

Erection of buildings, call for bids, see § 35-460.

Irrigation districts, award of contract, see § 48-2986.

Power districts, plans and specifications for construction, see § 48-1554.


Public improvements, bonds required from contractor, see § 48-587.

LAW REVIEW AND JOURNAL COMMENTARIES

Little Miller Act. William F. Haug, 5 Ariz.B.J. No. 2, p. 13 (1969).

Miller bond surety entitled to all earned but unpaid contract proceeds over equitable pleas of untimely supplier-claimant. 23 Ariz.L.Rev. 1326 (1982).

LIBRARY REFERENCES

Municipal Corporations  336(1).

WESTLAW Topic No. 268.

C.J.S. Municipal Corporations §§ 1041, 1042.

NOTES OF DECISIONS

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Construction and application 1

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1. Construction and application

Little Miller Act is remedial statute that must be liberally construed to protect subcontractors providing labor and materials for public construction project; such construction must not, however,

simply disregard limitations legislature imposed, but give effect to purpose of the limitations. *R.E. Monks Const. Co. v. Aetna Cas. & Sur. Co.* (App. Div.1 1997) 189 Ariz. 575, 944 P.2d 517.

Arizona statute requiring municipality to award public contract to lowest responsible bidder whose proposal is satisfactory is intended only to protect public, and does not create any private rights in bidder. *Grand Canyon Pipelines, Inc. v. City of Tempe* (App. Div.1 1991) 168 Ariz. 590, 816 P.2d 247, review denied.

Although statute governing contracts for public buildings and improvements (§ 34-221 et seq.) is to be liberally construed, such construction cannot disregard limitations imposed by the legislature. *Coast to Coast Mfg. v. Carnes Const., Inc.* (App. 1985) 145 Ariz. 112, 700 P.2d 499.

A statute requiring that municipal corporations accept bids is restrictive and should not be extended beyond language used in it. *Hertz Drive-Ur-Self System, Inc. v. Tucson Airport Authority* (1956) 81 Ariz. 80, 299 P.2d 1071.

Provisions of Title 34 relating to construction of public buildings, are applicable statewide to all levels of government, including school districts. Op. Atty. Gen. No. I83-016.

Provisions of Title 34 apply only to construction of public buildings and not to contracts let by highway commission for road and bridge construction and repair. Op. Atty. Gen. No. 58-90.

2. Discretion of public body

Public body's discretion to make determinations regarding responsibility of particular bidder on public construction project is not unlimited, and must not be arbitrary. *Grand Canyon Pipelines, Inc. v. City of Tempe* (App. Div.1 1991) 168 Ariz. 590, 816 P.2d 247, review denied.

3. Regulatory authority

The legislature has right to regulate letting of contracts for public works to be constructed by state or its political subdivisions. *Schrey v. Allison Steel Mfg. Co.* (1953) 75 Ariz. 282, 255 P.2d 604.

4. Due process

Low bidder on public construction project did not have "protected property interest" in being awarded contract, and had no due process right to adequate hearing, before city rejected bid on ground that it was not responsible bidder. *Grand Canyon Pipelines, Inc. v. City of Tempe* (App. Div.1 1991) 168 Ariz. 590, 816 P.2d 247, review denied.

5. Bidding requirement

In absence of some controlling, constitutional or statutory provision, municipal ordinance, or other legislative requirement, competitive bidding is not an essential prerequisite to validity of contracts for public works, contracts to furnish materials to public bodies, or other contracts by and with public bodies. *Hertz Drive-Ur-Self System, Inc. v. Tucson Airport Authority* (1956) 81 Ariz. 80, 299 P.2d 1071.

6. Completion date as affecting award of contract

Where call for bids for public work requires contractors to state proposed completion date and bid specifications including penalty clause prescribing a penalty for each day of delay beyond proposed completion date, and agency calling for bids does not set a completion date, penalty clause would have no application in determining who had the lowest bid. Op. Atty. Gen. No. 62-36.

Where all contractors submitting bids on public work have agreed to complete structure within time specified by public body calling for bids, fact that one contractor agrees to complete structure in shorter period than another is not proper matter to be considered in awarding contract to the "lowest responsible bidder"; if a longer or shorter period of time is desired, such should be stated in the call for bids. Op. Atty. Gen. No. 62-36.

7. General contractor

School district entering into a contract with an architect and multiple contractors under which the architect would administer contracts with all the several specialty contractors would contravene requirements of statutes governing construction of public buildings, which require that a single general contractor must be contracted with to be responsible for construction of an entire project. Op. Atty. Gen. No. I83-016.

School district's proposal to use a construction management, rather than a general contractor, plan in the construction of school buildings would not comply with statutory requirements that there be a single responsible contractor and performance and payment bonds in amounts equal to the full contract amount, where the school district board of trustees would, after the request and evaluation of bids, contract directly for the services which would be subcontracted under a general contractor, and board would hire a management consultant to control the project and keep board informed as to when bids should be requested. Op.Atty.Gen. No. 77-192.

8. Effect of contract

Where general contractor signed construction contract after city orally denied its request to substitute subcontractors, signature was evidence of general contractor's assent to terms of contract, including subcontractor list as submitted, and general contractor could not subsequently seek to substitute different subcontractor from one approved in the contract to which general contractor agreed. Ruck Const. Co., Inc. v. City of Tucson (App. 1977) 116 Ariz. 533, 570 P.2d 220.

9. Subcontractors

City was only party which had legal duty to evaluate competency of subcontractors listed in bid submitted by general contractor, and such evaluation had to be made prior to, not after, award of contract. Ruck Const. Co., Inc. v. City of Tucson (App. 1977) 116 Ariz. 533, 570 P.2d 220.

Where agent in charge of awarding a public works contract requires general contractor to submit a list of subcontractors as a part of his bid, neither general contractor awarded the construction contract nor the state or a political subdivision thereof is bound by the submitted list of subcontractors; general contractor could obtain a substitute subcontractor if necessary or do work himself. Op.Atty.Gen. No. 61-9.

Agent in charge of awarding a public works contract may require general contractor to submit a list of subcontractors as a separate part of his bid in order to determine questions of eligibility or preference. Op.Atty.Gen. No. 61-9.

10. Status of claim of contractor or subcontractor

Trial court should not have granted summary judgment to general contractor in supplier's action against general contractor for balance due for materials it supplied to subcontractor which had replaced original subcontractor; supplier, as functionally equivalent subcontractor of subcontractor, was entitled to same bond protection it was entitled to as subcontractor of original subcontractor. Trio Forest Products, Inc. v. FNF Const., Inc. (App. Div.2 1994) 182 Ariz. 1, 893 P.2d 1, reconsideration denied, review denied.

By failing to file timely claim against performance and payment bonds which were executed in connection with contract with school district and which were sufficient to pay subcontractor's claim in whole, unpaid subcontractor lost any equitable lien it might have in earned, but unpaid, proceeds interpleaded by the district; thus subcontractor was reduced to status of general creditor of contractor and, as between subcontractor as general creditor and surety company as surety subrogee of materialman who made timely claim against the payment bond, surety company was entitled to the unpaid proceeds. General Acrylics v. U. S. Fidelity and Guaranty Co. (App. 1980) 128 Ariz. 50, 623 P.2d 839.

11. Laborers and materialmen

Laborers and materialmen who do not timely avail themselves of remedy against performance agreement bond executed in connection with public contract fall into category of general creditors of contractor. General Acrylics v. U. S. Fidelity and Guaranty Co. (App. 1980) 128 Ariz. 50, 623 P.2d 839.

The fact that the contractor for the construction of a public building executed a labor bond expressly giving laborers direct right of action thereon did not affect right of materialman to sue on performance bond conditioned on payment of laborers, mechanics, subcontractors, and materialmen which did not expressly confer right on such persons to sue on bond. Webb v. Crane Co. (1938) 52 Ariz. 299, 80 P.2d 698.

Under provision of contractor's bond for performance of contract for construction of public building conditioned on payment of all laborers, mechanics, subcontractors, and materialmen,

obligation of contractor was as broad as that of subcontractor to whom material was furnished, and hence materialman was entitled to recover on bond for interest from date account with subcontractor became due on amount unpaid, notwithstanding that the subcontractor was the primary debtor. *Webb v. Crane Co.* (1938) 52 Ariz. 299, 80 P.2d 698.

Laborers and materialmen may recover on a bond executed in connection with public works or improvements where the bond contains a condition for their benefit intended for their protection, notwithstanding that a public body is the only obligee named therein, and there is no express provision that such third parties shall have any rights thereunder. *Webb v. Crane Co.* (1938) 52 Ariz. 299, 80 P.2d 698.

A bond given by the contractor for the construction of a public building conditioned on payment of materialman took the place of a lien in favor of the materialman, and materialman could hold contractor responsible on bond to same extent that he could hold owner of building on which he had lien. *Webb v. Crane Co.* (1938) 52 Ariz. 299, 80 P.2d 698.

Where a materialman credited payments received from subcontractor, without designation of application to be made thereof, on subcontractor's open account with knowledge that funds from which payment was made were received from contractor for work on a particular project, the materialman forfeited its right to enforce payment from the contractor on his bond for materials furnished subcontractor to extent of the payments made. *Webb v. Crane Co.* (1938) 52 Ariz. 299, 80 P.2d 698.

12. Withheld funds

This section relating to retention of 10% of all estimates in public improvement contract means that state is under no obligation to pay over withheld funds until all laborers and materialmen have been paid. *Butler v. Pacific Nat. Ins. Co., C.A.9 (Ariz.)*1967, 375 F.2d 518.

Arizona legislature has commanded that funds be retained on public contracts until laborers and materialmen have been paid for the clear purpose of protecting these persons from insolvent contractors, and only way to effectuate purpose of this section is to recognize a priority in such persons to funds

withheld. *Butler v. Pacific Nat. Ins. Co., C.A.9 (Ariz.)*1967, 375 F.2d 518.

Until all laborers and materialmen had been paid there was no right in bankrupt estate of highway contractor to the funds withheld by state pursuant to this section. *Butler v. Pacific Nat. Ins. Co., C.A.9 (Ariz.)*1967, 375 F.2d 518.

13. Substitute security

Tucson airport authority, as agent of city of Tucson, was required to accept substituted security in lieu of retentions from contractor constructing improvements at city-owned, Tucson international airport. *L.G. Lefler, Inc. v. Tucson Airport Authority, Inc.* (App. 1984) 141 Ariz. 23, 684 P.2d 904.

Right conferred by provision of this section allowing contractor on public work project to offer substitute security in lieu of retention of portion of contract price to assure completion of contract is not merely a right bestowed upon contractor which may be bargained away by failure to include same within contract documents. *Central Arizona Water & Ditching Co. v. City of Tempe* (App. 1984) 140 Ariz. 119, 680 P.2d 829.

This section allowing a contractor on a public work project to offer substitute security in lieu of retention of portion of contract price to assure completion of contract applied, even though "owner" of property was a private nonprofit corporation rather than a governmental entity, since sole purpose of using a private corporation to construct the public project was merely a financial vehicle to channel public funds. *Central Arizona Water & Ditching Co. v. City of Tempe* (App. 1984) 140 Ariz. 119, 680 P.2d 829.

Under A.R.S. § 34-221(A)(3), contractor electing to post securities in lieu of retention may deposit securities in amount of 10% of each progress payment, rather than 10% of the full amount of the contract before work begins. *Op.Atty.Gen. No. I86-013.*

14. Public funds

Watershed project federal grant loans are "public funds", and, therefore, construction work must be done by a licensed contractor. *Op.Atty.Gen. No.*

63- 17-L.

15. Waivers of liens

The provision of this section that before state agency pays amount retained contractor shall furnish waivers of liens from all persons holding claims against the work does not bring public buildings within the operation of the mechanic's lien law. *Webb v. Crane Co.* (1938) 52 Ariz. 299, 80 P.2d 698.

16. Mandamus

Where general contractor cited no statutory authority imposing affirmative duty upon city purchasing agent to reevaluate proposed subcontractors after contract award merely because of general contractor's clerical mistake in listing wrong subcontractor in bid, general contractor was not entitled to mandamus relief with respect to its challenge to city's refusal to permit general contractor to substitute different subcontractor from the one approved by the city. *Ruck Const. Co., Inc. v. City of Tucson* (App. 1977) 116 Ariz. 533, 570 P.2d 220.

17. Standing

Correct test to determine whether parties are too remote to allow recovery under Little Miller Act, which requires general contractor on public project to post bond to insure that all who supply labor or materials on project are paid, is functional relationship test which examines nature of dealings between the parties. *Trio Forest Products, Inc. v. FNF Const., Inc.* (App. Div.2 1994) 182 Ariz. 1, 893 P.2d 1, reconsideration denied, review denied.

18. Subrogation

Surety on highway contractor's bond, which settled claim of another contractor which completed job pursuant to an agreement with principal contractor which was later adjudicated a bankrupt, was subrogated to claim of contractor completing job together with its priority, if any. *Butler v. Pacific Nat. Ins. Co.*, C.A.9 (Ariz.)1967, 375 F.2d 518.

19. Review

In materialman's action on contractor's bond, surety on bond was not "necessary party" to contractor's appeal on which judgment against contractor was modified, since surety was liable only in case of and to the extent that contractor was liable, and hence modification of judgment as to contractor was modification as to the surety, notwithstanding that the surety was not a party to the appeal. *Webb v. Crane Co.* (1938) 52 Ariz. 299, 80 P.2d 698.

In materialman's action on contractor's bond for materials furnished subcontractor, the subcontractor was not a "necessary party" to contractor's appeal on which judgment against contractor was modified to extent of payment made by subcontractor to materialman from funds received by contractor and which had been credited by materialman on subcontractor's open account, since subcontractor received benefit of payments, and his account with materialman remained satisfied to such extent, and modification of judgment as to contractor did not affect liability of subcontractor to materialman for balance of his accounts. *Webb v. Crane Co.* (1938) 52 Ariz. 299, 80 P.2d 698.

A. R. S. § 34-221

AZ ST § 34-221

END OF DOCUMENT

ARIZONA REVISED STATUTES ANNOTATED
TITLE 34. PUBLIC BUILDINGS AND IMPROVEMENTS
CHAPTER 6. ARCHITECT SERVICES, CONSTRUCTION SERVICES, ENGINEER SERVICES AND
LANDSCAPE ARCHITECT SERVICES
ARTICLE 1. GENERAL PROVISIONS

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Current through End of 2000 2nd Regular Session and
the 5th Special Session and the Nov. 7, 2000 General Election.

§ 34-607. Contracts for construction-manager-at-risk, design-build and job- order-contracting construction services; payments to contractor; security; recovery of damages by contractor for delay; progress payments

A. an agent shall enter into a contract with the selected person or firm for construction-manager-at-risk construction services, design-build construction services or job-order-contracting construction services.

B. The terms of a contract entered into pursuant to subsection A shall include the following items:

1. A surety company bond or bonds as required by this chapter.

2. The owner by mutual agreement may make progress payments on contracts of less than ninety days and shall make monthly progress payments on all other contracts as provided for in this paragraph. Payment to the contractor on the basis of a duly certified and approved estimate of the work performed during the preceding calendar month under the contract may include payment for material and equipment, but to ensure the proper performance of the contract, the owner shall retain ten per cent of the amount of each estimate until final completion and acceptance of all material, equipment and work covered by the contract. An estimate of the work submitted shall be deemed approved and certified for payment after seven days from the date of submission unless before that time the owner or owner's agent prepares and issues a specific written finding setting forth those items in detail in the estimate of the work that are not approved for payment under the contract. The owner may withhold an amount from the progress payment sufficient to pay the expenses the owner reasonably expects to incur in correcting the deficiency set forth in the written finding. The progress payments shall be paid on or before fourteen days after the estimate of the work is certified and approved. The estimate of the work shall be deemed received by the owner on submission to any person designated by the owner for the submission, review or approval of the estimate of the work.

3. When the contract is fifty per cent completed, one-half of the amount retained including any securities substituted under paragraph 5 shall be paid to the contractor on the contractor's request provided the contractor is making satisfactory progress on the contract and there is no specific cause or claim requiring a greater amount to be retained. After the contract is fifty per cent completed, no more than five per cent of the amount of any subsequent progress payments made under the contract may be retained providing the contractor is making satisfactory progress on the project, except that if at any time the owner determines satisfactory progress is not being made ten per cent retention shall be reinstated for all progress payments made under the contract after the determination.

4. On completion and acceptance of each separate building, public work or other division of the contract on which the price is stated separately in the contract, except as qualified in paragraph 5, payment may be made in full, including retained percentages, less authorized deductions. In preparing estimates, the material and equipment delivered on the site to be incorporated in the job shall be taken into consideration in determining the estimated value by the architect, engineer or other person, as specified in the contract.

5. Ten per cent of all estimates shall be retained by the agent as a guarantee for complete performance of the

contract, to be paid to the contractor within sixty days after completion or filing notice of completion of the contract. Retention of payments by an agent longer than sixty days after final completion and acceptance requires a specific written finding by the agent of the reasons justifying the delay in payment. No agent may retain any monies after sixty days that are in excess of the amount necessary to pay the expenses the agent reasonably expects to incur in order to pay or discharge the expenses determined by the agent in the finding justifying the retention of monies. In lieu of the retention provided in this section, the agent, at the option of the contractor, shall accept as a substitute an assignment of time certificates of deposit of banks licensed by this state, securities of or guaranteed by the United States of America, securities of this state, securities of counties, municipalities and school districts within this state or shares of savings and loan institutions authorized to transact business in this state, in an amount equal to ten per cent of all estimates that are retained by the agent as a guarantee for complete performance of the contract. If the agent accepts substitute security as described in this paragraph for the ten per cent retention, the contractor is entitled to receive all interest or income earned by this security as it accrues and all such security in lieu of retention shall be returned to the contractor by the agent within sixty days after final completion and acceptance of all material, equipment and work covered by the contract if the contractor has furnished the agent satisfactory receipts for all labor and material billed and waivers of liens from any and all persons holding claims against the work. In no event shall the agent accept a time certificate of deposit of a bank or shares of a savings and loan institution in lieu of the retention specified unless accompanied by a signed and acknowledged waiver of the bank or savings and loan association of any right or power to setoff against either the agent or the contractor in relationship to the certificates or shares assigned.

6. In any instance where the agent has accepted substitute security as provided in paragraph 5, any subcontractor undertaking to perform any part of this public work is entitled to provide substitute security to the contractor on terms and conditions similar to those described in paragraph, and this security is in lieu of any retention under the subcontract.

7. Notwithstanding paragraphs 1 through 6, retention is not required for job-order-contracting construction services contracts, except that the agent may elect to require retention for a job-order-contracting construction services contract. If the agent elects to require retention, paragraphs 1 through 6 apply to the job-order-contracting construction services contract, except that:

- (a) Retention shall be five per cent of each payment instead of ten per cent reducing to five per cent.
- (b) Retention applicable to each job order shall be released within sixty days after final completion of the job order and acceptance of the work under the job order.
- (c) No retention on the job order may be released until that time.
- (d) The retention percentage shall not be increased.

C. No contract for **construction** services may materially alter the rights of any **contractor, subcontractor** or material supplier to receive **prompt** and **timely payment** required to be included in the contract under subsection B.

D. The contract shall be signed by the agent and the contractor.

E. A contract for the procurement of construction services shall include a provision that provides for negotiations between the agent and the contractor for the recovery of damages related to expenses incurred by the contractor for a delay for which the agent is responsible, that is unreasonable under the circumstances and that was not within the contemplation of the parties to the contract. This section shall not be construed to void any provision in the contract that requires notice of delays, provides for arbitration or other procedures for settlement or provides for liquidated damages.

F. The **contractor** shall pay to the **contractor's subcontractors** or material suppliers and each **subcontractor**

shall pay to the subcontractor's subcontractor or material supplier, within seven days of receipt of each progress payment, unless otherwise agreed in writing by the parties, the respective amounts allowed the contractor or subcontractor on account of the work performed by the subcontractors, to the extent of each subcontractor's interest, except that no contract for construction services may materially alter the rights of any contractor, subcontractor or material supplier to receive prompt and timely payment as provided under this section. The payments to subcontractors or material suppliers shall be based on payments received pursuant to this section. Any diversion by the contractor or subcontractor of payments received for work performed on a contract, or failure to reasonably account for the application or use of those payments, constitutes grounds for disciplinary action by the registrar of contractors. The subcontractor or material supplier shall notify the registrar of contractors and the agent in writing of any payment less than the amount or percentage approved for the class or item of work as set forth in this section.

G. A subcontractor may notify the agent in writing requesting that the subcontractor be notified by the agent in writing within five days from payment of each progress payment made to the contractor. The subcontractor's request remains in effect for the duration of the subcontractor's work on the project.

H. Nothing in this chapter prevents the contractor or subcontractor, at the time of application and certification to the owner or contractor, from withholding the application and certification to the owner or contractor for payment to the subcontractor or material supplier for unsatisfactory job progress, defective construction work or materials not remedied, disputed work or materials, third party claims filed or reasonable evidence that a claim will be filed, failure of a subcontractor to make timely payments for labor, equipment and materials, damage to the contractor or another subcontractor, reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum or a reasonable amount for retention that does not exceed the actual percentage retained by the owner.

I. If any payment to a contractor is delayed after the date due interest shall be paid at the rate of one per cent per month or fraction of a month on the unpaid balance as may be due.

J. If any periodic or final payment to a subcontractor is delayed by more than seven days after receipt of the periodic or final payment by the contractor or subcontractor, the contractor or subcontractor shall pay the subcontractor or material supplier interest, beginning on the eighth day, at the rate of one per cent per month or fraction of a month on the unpaid balance as may be due.

K. Notwithstanding anything to the contrary in this section, this section applies only to amounts payable in a construction services contract for construction and does not apply to amounts payable in a construction services contract for design services, preconstruction services, finance services, maintenance services, operations services and other related services.

CREDIT(S)

2001 Electronic Update

Added by Laws 2000, Ch. 135, § 10, eff. Aug. 15, 2000.

<General Materials (GM) - References, Annotations, or Tables>

A. R. S. § 34-607

AZ ST § 34-607

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NM Statutes, Ch. 13, Art. 4

NEW MEXICO STATUTES 1978, ANNOTATED
CHAPTER 13. Public Purchases and Property
ARTICLE 4. Public Works Contracts

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 NM-LEGIS

NEW MEXICO 2001 SESSION LAWS
 FIRST REGULAR SESSION OF THE 45TH LEGISLATURE (2001)
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Additions and deletions are not identified in this document.
 Vetoed provisions within tabular material are not displayed.

Ch. 68

H.B. No. 320

CONSTRUCTION--CREATION OF RETAINAGE ACT--PAYMENT SCHEDULES, ESCROW ACCOUNTS,
 PARTIAL PAYMENTS

Ch. 68

AN ACT RELATING TO CONSTRUCTION; ENACTING THE RETAINAGE ACT; APPLYING
 RETAINAGE PROVISIONS TO PUBLIC AND PRIVATE OWNERS; REQUIRING SPECIFIC
 PAYMENT SCHEDULES IN ALL CONSTRUCTION CONTRACTS; REQUIRING INTEREST ON LATE
 PAYMENTS; ESTABLISHING TRUST RELATIONSHIPS; REQUIRING ESCROW ACCOUNTS IF
 PARTIAL PAYMENTS ARE RETAINED; REPEALING SECTIONS OF THE NMSA 1978
 PERTAINING TO GOVERNMENT RETAINAGE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Ch. 68, § 1

§ . Short title

This act may be cited as the "Retainage Act".

Ch. 68, § 2

§ . Definitions

As used in the Retainage Act:

A. "construction" means building, altering, repairing, installing or
 demolishing in the ordinary course of business any:

- (1) road, highway, bridge, parking area or related project;
- (2) building, stadium or other structure;
- (3) airport, subway or similar facility;
- (4) park, trail, athletic field, golf course or similar facility;
- (5) dam, reservoir, canal, ditch or similar facility;
- (6) sewage or water treatment facility, power generating plant, pump
 station, natural gas compression station or similar facility;
- (7) sewage, water, gas or other pipeline;
- (8) transmission line;
- (9) radio, television or other tower;
- (10) water, oil or other storage tank;

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- (11) shaft, tunnel or other mining appurtenance;
- (12) electrical wiring, plumbing or plumbing fixture, gas piping, gas appliances or water conditions;
- (13) air conditioning conduit, heating or other similar mechanical work;
- (14) leveling or clearing land;
- (15) excavating earth;
- (16) drilling wells of any type, including seismographic shot holes or core drilling; and
- (17) similar work, structures or installations;

B. "contractor" means a person performing construction through a contract with an owner;

C. "owner" means a person, local public body or state agency other than the state highway and transportation department;

D. "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture or similar legal entity;

E. "retainage" means money payable to the contractor or subcontractor that has been withheld by the owner conditioned on substantial completion of all work in connection with a construction contract; and

F. "subcontractor" means a person performing construction for the owner not through a contract with the owner.

Ch. 68, § 3

§ . Applicability of act

The provisions of the Retainage Act do not apply to construction contracts for residential property containing four or fewer dwelling units.

Ch. 68, § 4

§ . Retainage in absence of escrow agreement

A. Except as otherwise provided in this section, retainage shall not be withheld on any construction contract within New Mexico unless an escrow arrangement is used. Securities may be offered by a contractor or subcontractor in lieu of retention.

B. A local public body may provide in its bidding documents the manner in which retainage is to be held. Retainage by a local public body shall be in an interest-bearing account. A local public body may combine retainage from more than one project into a single account, and the interest shall be allocated to the contractors and subcontractors pro rata to each project's retainage.

C. A manufacturing plant engaged in at least ten construction projects at the same time may serve as its own escrow agent; provided that all other conditions pertaining to escrow accounts shall apply.

Ch. 68, § 5

§ . Payments; prompt pay required; retainage

A. Except as provided in Subsection B of this section, all construction

Ch. 68, § 5

contracts shall provide that payment for amounts due, except for retainage, shall be paid within twenty-one days after the owner receives an undisputed request for payment. Payment by the owner to the contractor may be made by first-class mailing, electronic funds transfer or by hand delivery of the undisputed amount of a pay request based on work completed or service provided under the contract. If the owner fails to pay the contractor within twenty-one days after receipt of an undisputed request for payment, the owner shall pay interest to the contractor beginning on the twenty-second day after payment was due, computed at one and one-half percent of the undisputed amount per month or fraction of a month until the payment is issued. If an owner receives an improperly completed invoice, he shall notify the sender of the invoice within seven days of receipt in what way the invoice is improperly completed, and he has no further duty to pay on the improperly completed invoice until it is resubmitted as complete.

B. A local public body may make payment within forty-five days after submission of an undisputed request for payment when grant money is a source of funding, if:

- (1) the construction contract specifically provides in a clear and conspicuous manner for a payment later than twenty-one days after submission of an undisputed request for payment; and
- (2) the following legend or substantially similar language setting forth the specified number of days appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

Notice of Extended Payment Provision

This contract allows the owner to make payment within _____ days after submission of an undisputed request for payment."

C. All construction contracts shall provide that contractors and subcontractors make prompt payment to their subcontractors and suppliers for amounts owed for work performed on the construction project within seven days after receipt of payment from the owner, contractor or subcontractor. If the contractor or subcontractor fails to pay his subcontractor and suppliers by first-class mail or hand delivery within seven days of receipt of payment, the contractor or subcontractor shall pay interest to his subcontractors and suppliers beginning on the eighth day after payment was due, computed at one and one-half percent of the undisputed amount per month or fraction of a month until payment is issued. These payment provisions apply to all tiers of contractors, subcontractors and suppliers.

D. A creditor shall not collect, enforce a security interest against, garnish or levy execution on those retainage, progress payments or other payments that are owed by an owner, contractor or subcontractor to a person, or his surety, who has furnished labor or material pursuant to a construction contract.

E. When making payments, the owner shall retain no more than five percent of the cost of estimated work done and the value of materials stored on the site or suitably stored and insured off-site. When the project is substantially complete, no further retainage shall be withheld. A contractor shall retain no more than five percent retainage, regardless of whether retainage is withheld

Ch. 68, § 5

by the owner.

F. The retainage may be held until substantial completion of each separate building, public work or other division of the contract on which a price is stated separately in the contract or that can be separately ascertained from the contractor's schedule of values if the escrow arrangement described in Section 6 of the Retainage Act is used.

Ch. 68, § 6

§ . Escrow accounts

An escrow account, established pursuant to an escrow agreement, shall be entered into only on the following conditions:

A. only state or national banks chartered with the state or savings and loan associations domiciled in the state may serve as escrow agent;

B. the escrow agent shall limit the investment of funds held in escrow as retainage to certificates of deposit or similar time deposit investments, which may, at the election of the owner, be in excess of the maximum dollar amount of coverage by the federal deposit insurance corporation, the federal savings and loan insurance corporation or other similar agency; United States treasury bonds, United States treasurer notes, United States treasurer certificates of indebtedness and United States treasury bills; or bonds or notes of the state or political subdivision of the state;

C. as interest on all investments held in escrow becomes due, it shall be collected by the escrow agent and paid to the contractor. The contractor and his subcontractors shall pay interest as it is received pro rata to their subcontractors;

D. the escrow agent shall provide monthly reports to the owner, the contractor and the subcontractor as to the amount and value of the escrow account held by the escrow agent and any additions to the escrow account. Withdrawals from the escrow account shall be made only subject to approval of the owner;

E. if the owner has entered into more than one construction contract allowing for the maintenance of escrow accounts, the owner may elect to combine the amounts held as retainage under each contract into one or more escrow accounts or may establish a separate escrow account for each contract;

F. upon default or overpayment, as determined by a court of competent jurisdiction, the escrow agent shall deliver a cashier's check within ten days to the owner in the amount of the default or overpayment; provided, however, the amount is subject to the redemption value of the investments at the time of disbursement;

G. the escrow account may be terminated upon completion and acceptance of the contract as provided in the Retainage Act;

H. all fees and expenses of the escrow agent shall be paid by the owner;

I. the escrow account constitutes a specific pledge to the owner, and the contractor or subcontractor shall not, except to its surety, otherwise assign, pledge, discount, sell or transfer his interest in the escrow account, and money in the escrow account is not subject to levy, garnishment, attachment or other process;

Ch. 68, § 6

J. the form and provisions of the escrow agreement shall be included in all solicitations for construction services and shall be given to the contractor and subcontractors prior to entering into a contract;

K. the owner is not liable to the contractor, subcontractor or their sureties for the failure of the escrow agent to perform under the escrow agreement, or for the failure of a financial institution to honor investments issued by it that are held in the escrow account; and

L. an escrow agent is not liable to a party to the escrow agreement unless the escrow agent is found by a court of competent jurisdiction to have breached his fiduciary duty to a beneficiary of the escrow agreement.

Ch. 68, § 7**§ . Care and protection of work**

All material and work covered by partial payments become the property of the owner, but the contractor and subcontractor are not relieved from the sole responsibility for the care and protection of materials and work for which payments have been made; provided, however, the contractor and subcontractor have no duty for the care and protection of materials and work after the owner has assumed occupancy or use of the work.

Ch. 68, § 8**§ : Final payment**

Ten days after certification of completion, any amounts remaining due the contractor or subcontractor under the terms of the contract shall be paid upon the presentation of the following:

A. a properly executed release and duly certified voucher for payment;

B. a release, if required, of all claims and claims of lien against the owner arising under and by virtue of the contract other than such claims of the contractor, if any, as may be specifically excepted by the contractor or subcontractor from the operation of the release in stated amounts to be set forth in the release; and

C. proof of completion.

Ch. 68, § 9**§ . Disputes; effect on retainage**

If a dispute arises between the owner and the contractor or subcontractor as to work performed or materials supplied, the owner is only entitled to retain the amount that is reasonably calculated to cover the cost to correct a deficiency in the work or materials supplied. All other money due to the contractor or subcontractor pursuant to the Retainage Act shall be paid as provided in that act. The money retained by the owner as provided in this section shall be deposited in the escrow account for the benefit of the contractor or subcontractor, but shall not be paid to the contractor or subcontractor until the dispute has been resolved.

Ch. 68, § 10**§ . Failure to deposit or release retainage**

NM LEGIS 68 (2001)

Ch. 68, § 10

If an owner fails to deposit retainage that is withheld or to release retainage as required by the Retainage Act, the owner shall pay an additional one and one-half percent of the amount not deposited or released for each month or part of a month until retainage is paid.

Ch. 68, § 11

§ . Attorney fees

In an action to enforce the provisions of the Retainage Act, the court may award court costs and reasonable attorney fees.

Ch. 68, § 12

<< Repealed: NM ST §§ 13-4-27, **13-4-28**, 13-4-29, 13-4-30 >>

Section 12. REPEAL.--Sections 13-4-27 through 13-4-30 NMSA 1978 (being Laws 1985, Chapter 124, Sections 1 and 2, Laws 1989, Chapter 217, Section 1 and Laws 1985, Chapter 124, Section 4, as amended) are repealed.

Approved March 16, 2001.

NM LEGIS 68 (2001)

END OF DOCUMENT

INTRODUCED

LLS NO. 02-0177.02 Julie Hoerner

HOUSE BILL 02-1062

HOUSE SPONSORSHIP

Spence, Kester, Weddig, and White

SENATE SPONSORSHIP

(None)

House Committees
Business Affairs & Labor

Senate Committees

A BILL FOR AN ACT

101 **CONCERNING PAYMENTS FOR CONSTRUCTION CONTRACTS.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments that may be subsequently adopted.)

Requires an owner of a construction project to provide evidence to the contractor and any subcontractor of the availability of 100% of the moneys needed to complete the construction project, including change orders.

Requires contractors to submit monthly progress payment requests to the owner or architect of a construction project. Sets out time frames for receipt of payment for progress payment requests. Provides remedies available to a contractor in the event that the owner or the owner's designated representative does not pay the contractor. Allows for

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.

Capital letters indicate new material to be added to existing statute.

Dashes through the words indicate deletions from existing statute.

1 THE CONTRACTOR, SIGNED BY THE OWNER, THAT IS ISSUED AFTER THE
2 EXECUTION OF THE CONSTRUCTION CONTRACT AND ALLOWS CHANGES IN
3 WORK.

4 (2) "CHANGES IN WORK" MEANS WORK REQUESTS ORDERED BY THE
5 OWNER AND CONSISTING OF ADDITIONS, DELETIONS, OR OTHER REVISIONS
6 TO THE CONSTRUCTION CONTRACT, INCLUDING, BUT NOT LIMITED TO, THE
7 DOLLAR AMOUNT OF THE CONTRACT AND THE TIME FRAMES ORIGINALLY
8 NEGOTIATED.

9 (3) "CONSTRUCTION CONTRACT" MEANS ANY AGREEMENT TO
10 BUILD, ALTER, REPAIR, IMPROVE, OR DEMOLISH ANY CONSTRUCTION
11 PROJECT.

12 (4) "CONSTRUCTION PROJECT" MEANS ANY CONSTRUCTION,
13 ALTERATION, REPAIR, DEMOLITION, OR IMPROVEMENT OF ANY REAL
14 PROPERTY, BUILDING, STRUCTURE, FACILITY, TELECOMMUNICATION
15 FACILITY, OR OTHER IMPROVEMENT SUITABLE FOR AND INTENDED FOR USE
16 IN THE PROMOTION OF THE HEALTH, WELFARE, OR SAFETY OF PERSONS,
17 TOGETHER WITH MAINTENANCE PROGRAMS FOR THE UPKEEP OF SUCH
18 PROJECTS.

19 (5) "CONTRACTOR" MEANS ANY PERSON, COMPANY, FIRM, OR
20 CORPORATION THAT IS A PARTY TO A CONTRACT WITH AN OWNER OR A
21 PUBLIC ENTITY TO CONSTRUCT, ERECT, ALTER, INSTALL, OR REPAIR ANY
22 BUILDING, PUBLIC WORK, IMPROVEMENT, STRUCTURE, OR SYSTEM.

23 (6) "OWNER" MEANS:

24 (a) THE ARCHITECT'S OR ENGINEER'S CLIENT;

25 (b) THE LEGAL OWNER OF A PROJECT, WHICH MAY INCLUDE, BUT
26 IS NOT LIMITED TO, A GOVERNMENT AGENCY OR NATURAL PERSON; OR

27 (c) A FOREIGN OR DOMESTIC ENTITY WITH WHICH A CONSTRUCTION

1 CONTRACT HAS BEEN MADE AND THAT WILL BE RESPONSIBLE FOR
2 PAYMENT OF THE WORK PERFORMED UNDER THAT CONSTRUCTION
3 CONTRACT.

4 (7) "PROGRESS PAYMENT" MEANS A PAYMENT FOR WORK
5 COMPLETED, CALCULATED BY MEASURING THE WORK IN PLACE AND
6 APPLYING A PREVIOUSLY AGREED-UPON SCHEDULE OF VALUES TO THE
7 MEASURED AMOUNT TO DETERMINE THE TOTAL PAYMENT.

8 (8) "PUNCH LIST" MEANS AN ITEMIZATION, CREATED NEAR THE
9 END OF A CONSTRUCTION PROJECT, OF WORK TO BE PERFORMED OR ITEMS
10 TO BE FURNISHED BY A CONTRACTOR OR SUBCONTRACTOR IN ORDER TO
11 COMPLETE THE WORK AS SPECIFIED IN THE CONSTRUCTION CONTRACT.

12 (9) "RETAINAGE" MEANS A SUM THAT IS WITHHELD FROM
13 PROGRESS PAYMENTS TO THE CONTRACTOR AND SUBCONTRACTOR IN
14 ACCORDANCE WITH THE TERMS OF THE CONSTRUCTION CONTRACT AND
15 THAT IS PAID AFTER A SPECIFIED TIME ONCE A CONSTRUCTION PROJECT IS
16 COMPLETED.

17 (10) "SECOND-TIER SUBCONTRACTOR" MEANS ANY PERSON,
18 COMPANY, FIRM, OR CORPORATION THAT IS A PARTY TO A CONSTRUCTION
19 CONTRACT WITH A SUBCONTRACTOR ON A CONSTRUCTION PROJECT AND
20 FURNISHES OR PERFORMS ON-SITE LABOR, EITHER WITH OR WITHOUT
21 FURNISHING MATERIALS.

22 (11) "SUBCONTRACTOR" MEANS ANY PERSON, COMPANY, FIRM, OR
23 CORPORATION THAT IS A PARTY TO A CONTRACT WITH A CONTRACTOR ON
24 A CONSTRUCTION PROJECT AND FURNISHES AND PERFORMS ON-SITE LABOR,
25 EITHER WITH OR WITHOUT FURNISHING MATERIALS.

26 (12) "WRITTEN NOTICE" MEANS EITHER:

27 (a) WRITTEN NOTICE THAT IS DELIVERED IN PERSON TO AN

1 INDIVIDUAL, TO A MEMBER OR PARTNER OF A LEGAL ENTITY OTHER THAN
2 A CORPORATION, OR TO AN OFFICE OF A CORPORATION FOR WHICH THE
3 NOTICE WAS INTENDED; OR

4 (b) WRITTEN NOTICE THAT IS DELIVERED BY OR SENT BY ANY
5 MEANS THAT PROVIDES WRITTEN, THIRD-PARTY VERIFICATION OF
6 DELIVERY TO THE LAST-KNOWN BUSINESS ADDRESS OF THE PARTY FOR
7 WHICH THE NOTICE WAS INTENDED.

8 **8-10.5-103. Payment of contractors.** (1) BEFORE THE
9 COMMENCEMENT OF, AND AT ALL TIMES DURING, A CONSTRUCTION
10 PROJECT, AN OWNER SHALL PROVIDE EVIDENCE TO THE CONTRACTOR AND
11 SUBCONTRACTOR THAT AN AMOUNT SUFFICIENT TO SATISFY ALL KNOWN
12 EXPENDITURES, INCLUDING BUT NOT LIMITED TO CHANGE ORDERS, OF ALL
13 CONTRACTORS AND SUBCONTRACTORS IN CONNECTION WITH THE
14 COMPLETION OF THE OWNER'S CONSTRUCTION PROJECT IS SET ASIDE AND
15 AVAILABLE FOR PAYMENT TO THE CONTRACTOR AND SUBCONTRACTOR.
16 IF THE OWNER'S EVIDENCE OF THE ABILITY TO PAY THE CONTRACTOR AND
17 SUBCONTRACTOR IS DETERMINED BY THE CONTRACTOR OR
18 SUBCONTRACTOR TO BE INSUFFICIENT TO PAY THE TOTAL AMOUNT OF THE
19 CONSTRUCTION CONTRACT, THE CONTRACTOR OR THE SUBCONTRACTOR
20 MAY DELAY OR SUSPEND CONSTRUCTION UNTIL THE OWNER PRODUCES
21 EVIDENCE THAT THE OWNER IS ABLE TO PAY FOR THE TOTAL COSTS OF THE
22 CONSTRUCTION PROJECT. ANY SUCH SUSPENSION SHALL NOT BE
23 CONSIDERED A MATERIAL BREACH OF THE CONSTRUCTION CONTRACT.

24 (2) **Payment to the contractor.** (a) ON OR BEFORE THE FIRST
25 BUSINESS DAY OF EACH MONTH, THE CONTRACTOR SHALL SUBMIT
26 MONTHLY PROGRESS PAYMENT REQUESTS TO THE ARCHITECT FOR A
27 CONSTRUCTION PROJECT, THE OWNER, OR THE OWNER'S DESIGNATED

1 REPRESENTATIVE. SUCH PROGRESS PAYMENT REQUESTS SHALL
2 INCORPORATE ALL WORK THAT WAS PERFORMED ON THE PROJECT DURING
3 THE PREVIOUS MONTH. ALL PROGRESS PAYMENT REQUESTS SHALL BE
4 DEEMED APPROVED UNLESS, WITHIN SEVEN DAYS AFTER THE PROGRESS
5 PAYMENT REQUEST IS ACTUALLY RECEIVED OR PRESUMED BY LAW TO
6 HAVE BEEN RECEIVED, THE ARCHITECT, OWNER, OR THE OWNER'S
7 DESIGNATED REPRESENTATIVE ISSUES A WRITTEN STATEMENT CONTESTING
8 THE PROGRESS PAYMENT REQUEST AND STATING IN DETAIL THE SPECIFIC
9 WORK THAT IS NOT APPROVED, THE REASONS WHY SUCH WORK IS NOT
10 APPROVED, AND THE REASONS ALL OR PART OF THE PROGRESS PAYMENT
11 IS WITHHELD. THE SPECIFIC WORK THAT IS NOT APPROVED SHALL BE
12 CORRECTED AND INCLUDED IN THE PROGRESS PAYMENT REQUEST FOR THE
13 NEXT MONTH AFTER THE SPECIFIC WORK IS CORRECTED. ALL ITEMS NOT
14 CONTAINED IN THE WRITTEN STATEMENT CONTESTING THE PROGRESS
15 PAYMENT REQUEST SHALL BE DEEMED APPROVED. PAYMENT FOR SUCH
16 ITEMS SHALL BE DUE WITHIN TWENTY-ONE DAYS AFTER THE DATE OF THE
17 PROGRESS PAYMENT REQUEST.

18 (b) IF THE OWNER FAILS TO MAKE PAYMENT WITHIN THE PERIOD
19 PRESCRIBED PURSUANT TO PARAGRAPH (a) OF THIS SUBSECTION (2), THE
20 CONTRACTOR MAY SUBMIT TO THE OWNER OR THE OWNER'S DESIGNATED
21 REPRESENTATIVE A WRITTEN NOTICE WITHIN SEVEN DAYS AFTER PAYMENT
22 IS DUE PURSUANT TO PARAGRAPH (a) OF THIS SUBSECTION (2), STATING
23 THAT PAYMENT PURSUANT TO THE PROGRESS PAYMENT REQUEST IS PAST
24 DUE AND THAT THE CONTRACTOR, IN ADDITION TO PAYMENT, MAY BE
25 ENTITLED TO ANY OF THE FOLLOWING REMEDIES:

26 (I) SUSPENSION OF PERFORMANCE, WHICH UNDER THE
27 CIRCUMSTANCES SHALL NOT BE DEEMED A MATERIAL BREACH OF THE

1 CONTRACT;

2 (II) REASONABLE AND NECESSARY DEMOBILIZATION AND
3 REMOBILIZATION COSTS;

4 (III) INTEREST AT THE RATE OF FIFTEEN PERCENT PER ANNUM FOR
5 ALL LATE PAYMENTS; AND

6 (IV) REASONABLE ATTORNEY FEES INCURRED TO SECURE
7 PAYMENT FROM THE OWNER.

8 (3) **Payment to the subcontractor by the contractor.**

9 (a) PAYMENT FROM A CONTRACTOR TO A SUBCONTRACTOR FOR WORK
10 COMPLETED BY A SUBCONTRACTOR SHALL BE MADE BY THE CONTRACTOR
11 WITHIN SEVEN DAYS AFTER THE CONTRACTOR RECEIVES PAYMENT
12 PURSUANT TO SUBSECTION (2) OF THIS SECTION. THE SUBCONTRACTOR'S
13 WORK SHALL BE DEEMED APPROVED BY THE CONTRACTOR UNLESS THE
14 CONTRACTOR HAS NOTIFIED THE SUBCONTRACTOR IN WRITING PRIOR TO
15 THE SUBMISSION OF THE PROGRESS PAYMENT REQUEST BY THE
16 CONTRACTOR OR THREE DAYS AFTER THE CONTRACTOR RECEIVES NOTICE
17 THAT THE SUBCONTRACTOR'S WORK IS CONTESTED BY THE OWNER
18 PURSUANT TO SUBSECTION (2) OF THIS SECTION. SUCH NOTICE TO THE
19 SUBCONTRACTOR SHALL STATE IN DETAIL THE ITEMS THAT ARE NOT
20 APPROVED AND REASONS WHY SUCH ITEMS ARE NOT APPROVED. SPECIFIC
21 WORK NOT APPROVED SHALL BE CORRECTED AND INCLUDED IN THE
22 PROGRESS PAYMENT REQUEST FOR THE NEXT MONTH AFTER THE SPECIFIC
23 WORK IS CORRECTED. ALL ITEMS NOT CONTAINED IN THE WRITTEN
24 STATEMENT CONTESTING THE PROGRESS PAYMENT REQUEST SHALL BE
25 DEEMED APPROVED, AND PAYMENT FOR SUCH ITEMS SHALL BE DUE WITHIN
26 TWENTY-ONE DAYS AFTER THE DATE OF THE PROGRESS PAYMENT
27 REQUEST.

1 (b) (I) IF THE CONTRACTOR FAILS TO MAKE PAYMENT WITHIN THE
2 PERIOD PRESCRIBED PURSUANT TO PARAGRAPH (a) OF THIS SUBSECTION
3 (3), THE SUBCONTRACTOR MAY SUBMIT TO THE CONTRACTOR A WRITTEN
4 NOTICE WITHIN SEVEN DAYS AFTER PAYMENT IS DUE PURSUANT TO
5 PARAGRAPH (a) OF THIS SUBSECTION (3), STATING THAT PAYMENT IS PAST
6 DUE AND THAT THE SUBCONTRACTOR, IN ADDITION TO PAYMENT, MAY BE
7 ENTITLED TO ANY OF THE FOLLOWING REMEDIES:

8 (A) SUSPENSION OF PERFORMANCE, WHICH UNDER THE
9 CIRCUMSTANCES SHALL NOT BE DEEMED A MATERIAL BREACH OF THE
10 SUBCONTRACT;

11 (B) REASONABLE AND NECESSARY DEMOBILIZATION AND
12 REMOBILIZATION COSTS;

13 (C) INTEREST AT THE RATE OF FIFTEEN PERCENT PER ANNUM FOR
14 ALL LATE PAYMENTS; AND

15 (D) REASONABLE ATTORNEY FEES INCURRED TO SECURE PAYMENT
16 FROM THE CONTRACTOR.

17 (II) IF THE OWNER FAILS TO MAKE PAYMENT TO THE CONTRACTOR
18 WITHIN THE PERIOD PRESCRIBED PURSUANT TO PARAGRAPH (a) OF
19 SUBSECTION (2) OF THIS SECTION AND AS A RESULT THE CONTRACTOR IS
20 UNABLE TO MAKE PAYMENT TO THE SUBCONTRACTOR, THE
21 SUBCONTRACTOR MAY SUBMIT TO THE OWNER A WRITTEN NOTICE WITHIN
22 SEVEN DAYS AFTER PAYMENT IS DUE PURSUANT TO PARAGRAPH (a) OF THIS
23 SUBSECTION (3), STATING THAT PAYMENT IS PAST DUE AND THAT THE
24 SUBCONTRACTOR, IN ADDITION TO PAYMENT, MAY BE ENTITLED TO ANY
25 OF THE FOLLOWING REMEDIES:

26 (A) REASONABLE AND NECESSARY DEMOBILIZATION AND
27 REMOBILIZATION COSTS;

1 (B) INTEREST AT THE RATE OF FIFTEEN PERCENT PER ANNUM FOR
2 ALL LATE PAYMENTS; AND

3 (C) REASONABLE ATTORNEY FEES INCURRED TO SECURE PAYMENT
4 FROM THE OWNER.

5 (c) THE SUBCONTRACTOR MAY REQUEST FROM THE CONTRACTOR
6 OR THE OWNER A LIST OF THE DATES ON WHICH THE OWNER MADE
7 PAYMENT TO THE CONTRACTOR. IF THE CONTRACTOR FAILS TO PROVIDE
8 SUCH LIST, THE CONTRACTOR SHALL BE DEEMED TO HAVE COMMITTED A
9 MATERIAL BREACH OF THE SUBCONTRACT, AND THE SUBCONTRACTOR MAY
10 EXERCISE ALL REMEDIES AS PROVIDED BY LAW AGAINST THE CONTRACTOR
11 FOR SUCH MATERIAL BREACH.

12 (4) **Payment to suppliers or second-tier subcontractors.**

13 (a) PAYMENT FROM A SUBCONTRACTOR TO A SUPPLIER OR SECOND-TIER
14 SUBCONTRACTOR FOR WORK THAT HAS BEEN COMPLETED OR MATERIALS
15 THAT HAVE BEEN DELIVERED SHALL BE MADE NO LATER THAN SEVEN DAYS
16 AFTER THE CONTRACTOR MAKES PAYMENT TO THE SUBCONTRACTOR. THE
17 SUPPLIER'S MATERIALS OR SECOND-TIER SUBCONTRACTOR'S WORK SHALL
18 BE DEEMED APPROVED BY THE SUBCONTRACTOR AND CONTRACTOR
19 UNLESS THE SUBCONTRACTOR HAS NOTIFIED THE SECOND-TIER
20 SUBCONTRACTOR IN WRITING PRIOR TO THE SUBMISSION OF THE PROGRESS
21 PAYMENT REQUEST BY THE CONTRACTOR OR THREE DAYS AFTER THE
22 CONTRACTOR RECEIVES NOTICE THAT THE SUPPLIER'S MATERIALS OR
23 SECOND-TIER SUBCONTRACTOR'S WORK IS CONTESTED BY THE OWNER
24 PURSUANT TO SUBSECTION (2) OF THIS SECTION. SUCH NOTICE TO THE
25 SUPPLIER OR SECOND-TIER SUBCONTRACTOR SHALL STATE IN DETAIL THE
26 ITEMS THAT ARE NOT APPROVED AND THE REASONS WHY SUCH ITEMS ARE
27 NOT APPROVED. SPECIFIC MATERIALS OR WORK NOT APPROVED SHALL BE

1 CORRECTED BY THE SUPPLIER OR SECOND-TIER SUBCONTRACTOR AND
2 INCLUDED IN THE NEXT PROGRESS PAYMENT AFTER THE CORRECTION IS
3 MADE.

4 (b) IF THE SUBCONTRACTOR FAILS TO MAKE PAYMENT WITHIN THE
5 PERIOD PRESCRIBED PURSUANT TO PARAGRAPH (a) OF THIS SUBSECTION
6 (4), THE SUPPLIER OR SECOND-TIER SUBCONTRACTOR MAY SUBMIT TO THE
7 SUBCONTRACTOR A WRITTEN NOTICE WITHIN SEVEN DAYS AFTER PAYMENT
8 IS DUE PURSUANT TO PARAGRAPH (a) OF THIS SUBSECTION (4), STATING
9 THAT PAYMENT IS PAST DUE AND THAT THE SUPPLIER OR SECOND-TIER
10 SUBCONTRACTOR, IN ADDITION TO PAYMENT, MAY BE ENTITLED TO ANY OF
11 THE FOLLOWING REMEDIES:

12 (I) SUSPENSION OF PERFORMANCE, WHICH UNDER THE
13 CIRCUMSTANCES SHALL NOT BE DEEMED A MATERIAL BREACH OF THE
14 SUBCONTRACT;

15 (II) REASONABLE AND NECESSARY DEMOBILIZATION AND
16 REMOBILIZATION COSTS;

17 (III) INTEREST AT THE RATE OF FIFTEEN PERCENT PER ANNUM FOR
18 ALL LATE PAYMENTS; AND

19 (IV) REASONABLE ATTORNEY FEES INCURRED TO SECURE
20 PAYMENT FROM THE SUBCONTRACTOR.

21 **8-10.5-104. Retainage.** (1) THE PERCENTAGE OF RETAINAGE
22 WITHHELD FROM A CONTRACTOR BY THE OWNER ON PROGRESS PAYMENTS
23 SHALL NOT EXCEED FIVE PERCENT OF THE APPROVED AMOUNT AS
24 CERTIFIED BY THE OWNER, THE OWNER'S DESIGNATED REPRESENTATIVE,
25 OR THE ARCHITECT.

26 (2) (a) UPON ISSUANCE OF A CERTIFICATE OF OCCUPANCY OR THE
27 CERTIFICATION OF SUBSTANTIAL COMPLETION BY THE OWNER, THE

1 OWNER'S DESIGNATED REPRESENTATIVE, OR THE ARCHITECT, WHICHEVER
2 OCCURS FIRST, FINAL PAYMENT TO THE CONTRACTOR INCLUDING ALL
3 AMOUNTS PREVIOUSLY WITHHELD AS RETAINAGE SHALL BECOME DUE AND
4 PAYABLE WITHIN THIRTY DAYS. THE FINAL BILLING TO THE OWNER SHALL
5 BE DEEMED APPROVED UNLESS THE OWNER, THE OWNER'S DESIGNATED
6 REPRESENTATIVE, OR THE ARCHITECT ISSUES A WRITTEN STATEMENT
7 DISPUTING ITEMS NO LATER THAN SEVEN DAYS AFTER RECEIPT OF THE
8 FINAL BILLING. THE DISPUTE STATEMENT SHALL INCLUDE A DETAILED
9 DESCRIPTION OF THE ITEMS THAT THE OWNER, THE OWNER'S DESIGNATED
10 REPRESENTATIVE, OR THE ARCHITECT DISAPPROVES AND THE REASONS FOR
11 SUCH DISAPPROVAL. THE SPECIFIC WORK NOT APPROVED SHALL BE
12 CORRECTED BY THE CONTRACTOR, SUBCONTRACTOR, SUPPLIER, OR
13 SECOND-TIER SUBCONTRACTOR AND UPON COMPLETION OF SUCH WORK
14 SHALL BE SUBMITTED TO THE OWNER, THE OWNER'S DESIGNATED
15 REPRESENTATIVE, OR THE ARCHITECT FOR PAYMENT. ALL OTHER ITEMS
16 NOT DISPUTED SHALL BE DEEMED APPROVED AND SHALL BE PAID NO LATER
17 THAN FOURTEEN DAYS AFTER THE RECEIPT OF THE BILLING.

18 (b) THE PREPARATION OF THE FINAL PUNCH LIST BY THE OWNER,
19 THE OWNER'S DESIGNATED REPRESENTATIVE, OR THE ARCHITECT SHALL BE
20 DELIVERED TO THE CONTRACTOR NO LATER THAN TEN DAYS AFTER THE
21 DATE OF ISSUANCE OF THE CERTIFICATE OF OCCUPANCY OR THE
22 CERTIFICATION OF SUBSTANTIAL COMPLETION BY THE OWNER, THE
23 OWNER'S DESIGNATED REPRESENTATIVE, OR THE ARCHITECT, WHICHEVER
24 OCCURS FIRST. IF THERE IS A DISPUTE AS TO COMPLETED WORK, THE
25 OWNER MAY WITHHOLD NO MORE THAN ONE AND ONE-HALF TIMES THE
26 REASONABLE AMOUNT OF THE DISPUTED WORK. UPON COMPLETION OF
27 THE FINAL PUNCH LIST, THE FINAL BALANCE OWED SHALL BE DUE AND

1 PAYABLE FROM THE OWNER TO THE CONTRACTOR NO LATER THAN
2 FOURTEEN DAYS AFTER THE RECEIPT OF THE BILLING.

3 (3) THE PERCENTAGE OF RETAINAGE WITHHELD FROM A
4 SUBCONTRACTOR BY THE CONTRACTOR ON PROGRESS PAYMENTS SHALL
5 NOT EXCEED FIVE PERCENT OF THE APPROVED AMOUNT AS CERTIFIED BY
6 THE OWNER, THE OWNER'S DESIGNATED REPRESENTATIVE, OR THE
7 ARCHITECT. AT ALL TIMES DURING THE CONSTRUCTION PROJECT, THE
8 RATE OF RETAINAGE WITHHELD FROM THE SUBCONTRACTOR'S PAYMENT
9 SHALL BE EQUAL TO THE RETAINAGE FROM THE CONTRACTOR'S PAYMENT
10 BY THE OWNER FOR THE SUBCONTRACT WORK.

11 (4) (a) UPON ISSUANCE OF A CERTIFICATE OF OCCUPANCY OR THE
12 CERTIFICATION OF SUBSTANTIAL COMPLETION BY THE OWNER, THE
13 OWNER'S DESIGNATED REPRESENTATIVE, OR THE ARCHITECT, WHICHEVER
14 OCCURS FIRST, FINAL PAYMENT TO THE SUBCONTRACTOR, INCLUDING ALL
15 AMOUNTS PREVIOUSLY WITHHELD AS RETAINAGE, SHALL BECOME DUE AND
16 PAYABLE WITHIN SEVEN DAYS. THE SUBCONTRACTOR'S WORK SHALL BE
17 DEEMED APPROVED UNLESS THE CONTRACTOR ISSUES A WRITTEN
18 STATEMENT DISPUTING THE WORK OF THE SUBCONTRACTOR PRIOR TO THE
19 SUBMISSION OF THE CONTRACTOR'S FINAL BILLING TO THE OWNER, THE
20 OWNER'S DESIGNATED REPRESENTATIVE, OR THE ARCHITECT. THE DISPUTE
21 STATEMENT SHALL INCLUDE A DETAILED DESCRIPTION OF THE WORK THAT
22 THE CONTRACTOR DISAPPROVES OF AND THE REASONS FOR SUCH
23 DISAPPROVAL. THE SPECIFIC WORK NOT APPROVED SHALL BE CORRECTED
24 BY THE SUBCONTRACTOR AND AFTER COMPLETION OF THE CORRECTION,
25 THE SUBCONTRACTOR MAY REBILL FOR THE SPECIFIC ITEMS. ALL ITEMS
26 NOT DISPUTED SHALL BE DEEMED APPROVED AND SHALL BE PAID
27 PURSUANT TO THIS SUBSECTION (4).

1 (b) THE CONTRACTOR SHALL PROMPTLY DELIVER THE FINAL PUNCH
2 LIST TO THE SUBCONTRACTOR. UPON COMPLETION OF THE FINAL PUNCH
3 LIST, THE FINAL REMAINING RETAINAGE SHALL BE DUE AND PAYABLE
4 FROM THE CONTRACTOR WITHIN SEVEN DAYS.

5 (5) (a) UPON ISSUANCE OF A CERTIFICATE OF OCCUPANCY OR THE
6 CERTIFICATION OF SUBSTANTIAL COMPLETION BY THE OWNER, THE
7 OWNER'S DESIGNATED REPRESENTATIVE, OR THE ARCHITECT, WHICHEVER
8 OCCURS FIRST, FINAL PAYMENT TO THE SECOND-TIER SUBCONTRACTOR OR
9 SUPPLIER, INCLUDING ALL AMOUNTS PREVIOUSLY WITHHELD AS
10 RETAINAGE, SHALL BECOME DUE AND PAYABLE WITHIN SEVEN DAYS AFTER
11 THE DATE THE SUBCONTRACTOR RECEIVES FINAL PAYMENT FROM THE
12 CONTRACTOR FOR THE SECOND-TIER SUBCONTRACTOR PURSUANT TO
13 SUBSECTIONS (3) AND (4) OF THIS SECTION. THE SECOND-TIER
14 SUBCONTRACTOR'S WORK SHALL BE DEEMED APPROVED UNLESS THE
15 SUBCONTRACTOR ISSUES A WRITTEN STATEMENT DISPUTING WORK OF THE
16 SECOND-TIER SUBCONTRACTOR PRIOR TO THE SUBMISSION OF THE
17 CONTRACTOR'S FINAL BILLING TO THE OWNER, THE OWNER'S DESIGNATED
18 REPRESENTATIVE, OR THE ARCHITECT. THE DISPUTE STATEMENT SHALL
19 INCLUDE A DETAILED DESCRIPTION OF THE WORK THAT THE
20 SUBCONTRACTOR DISAPPROVES OF AND THE REASONS FOR SUCH
21 DISAPPROVAL. THE SPECIFIC WORK NOT APPROVED SHALL BE CORRECTED
22 BY THE SUPPLIER OR SECOND-TIER SUBCONTRACTOR AND MAY BE
23 REBILLED. ALL ITEMS NOT DISPUTED SHALL BE DEEMED APPROVED AND
24 SHALL BE PAID PURSUANT TO THIS SUBSECTION (5).

25 (b) ALL PROVISIONS OF THIS ARTICLE GOVERNING PAYMENTS BY
26 THE CONTRACTOR TO A SUBCONTRACTOR SHALL ALSO APPLY TO
27 PAYMENTS BY A SUBCONTRACTOR TO A SECOND-TIER SUBCONTRACTOR OR

1-39

1 SUPPLIER.

2 **8-10.5-105. Choice of law - venue.** NOTWITHSTANDING ANY
3 CONTRACTUAL PROVISION TO THE CONTRARY, CONSTRUCTION CONTRACTS
4 FOR IMPROVEMENTS TO REAL PROPERTY LOCATED IN COLORADO THAT
5 PROVIDE FOR THE RESOLUTION OF DISPUTES BY SUIT, ARBITRATION, OR
6 OTHER PROCEEDING SHALL REQUIRE ANY SUIT, ARBITRATION, OR OTHER
7 PROCEEDING TO BE BROUGHT IN COLORADO AND GOVERNED BY THE LAWS
8 OF COLORADO.

9 **8-10.5-106. Limitations of this article.** THIS ARTICLE SHALL NOT
10 APPLY TO ANY CONSTRUCTION OR IMPROVEMENT TO A SINGLE- OR
11 DOUBLE-FAMILY DWELLING.

12 **8-10.5-107. Freedom to contract.** (1) SUBJECT ONLY TO THE
13 LATEST TIME ALLOWED FOR PAYMENT UNDER THIS ACT, WHICH CANNOT BE
14 EXTENDED OR MODIFIED BY CONTRACT OR OTHERWISE, THE PARTIES TO A
15 CONSTRUCTION CONTRACT MAY ENTER INTO SUCH TERMS AND
16 CONDITIONS AS THEY MUTUALLY AGREE UPON; EXCEPT THAT THE
17 OBLIGATIONS OF GOOD FAITH AND FAIR DEALING MAY NOT BE DISCLAIMED
18 BY AGREEMENT.

19 (2) NOTHING IN THIS SECTION SHALL ALTER OR AMEND ANY TERMS
20 OR CONDITIONS OF A SUPPLIER'S PURCHASE ORDER OR PAYMENT
21 PROVISIONS TO WHICH THE SUPPLIER AND THE SUPPLIER'S CUSTOMER
22 ENTER.

23 **8-10.5-108. Void contracts.** A PROVISION, COVENANT, CLAUSE,
24 OR UNDERSTANDING IN, COLLATERAL TO, OR AFFECTING A CONSTRUCTION
25 CONTRACT OR SUBCONTRACT STATING THAT A PARTY TO A CONSTRUCTION
26 CONTRACT CANNOT SUSPEND PERFORMANCE UNDER THE CONTRACT IF
27 ANOTHER PARTY FAILS TO MAKE PROMPT PAYMENTS UNDER THE

1 CONTRACT PURSUANT TO THIS ARTICLE IS HEREBY DECLARED CONTRARY
2 TO PUBLIC POLICY AND THEREFORE SHALL BE VOID AND UNENFORCEABLE.

3 **SECTION 2. Effective date - applicability.** (1) This act shall
4 take effect at 12:01 a.m. on the day following the expiration of the
5 ninety-day period after final adjournment of the general assembly that is
6 allowed for submitting a referendum petition pursuant to article V,
7 section 1 (3) of the state constitution; except that, if a referendum petition
8 is filed against this act or an item, section, or part of this act within such
9 period, then the act, item, section, or part, if approved by the people, shall
10 take effect on the date of the official declaration of the vote thereon by
11 proclamation of the governor.

12 (2) The provisions of this act shall apply to construction contracts
13 entered into on or after the applicable effective date of this act.

Summarized History for Bill Number HB02-1062

(The date the bill passed to the committee of the whole reflects the date the bill passed out of committee.)

01/09/2002 Introduced In House - Assigned to Business Affairs & Labor
01/29/2002 House Committee on Business Affairs & Labor Lay Over Unamended
01/31/2002 House Committee on Business Affairs & Labor Postpone Indefinitely

This information is prepared as an informational service only and should not be relied upon as an official record of action taken by the Colorado General Assembly.

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Bill	History	Fiscal Note	JBC Analysis	Pre-Amended	Committee Reports
Votes					



wptemp.txt

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Colorado Legislative Council Staff

**STATE
FISCAL IMPACT**

Drafting Number: LLS 02-0177
Prime Sponsor(s): Rep. Spence

Date: January 26, 2002
Bill Status: House Business Affairs
Fiscal Analyst: Melodie Jones (303-866-4976)

TITLE: CONCERNING PAYMENTS FOR CONSTRUCTION CONTRACTS.

Fiscal Impact Summary	FY 2002/2003	FY 2003/2004
State Revenues General Fund	\$0	\$0
State Expenditures General Fund*	\$70,116	\$70,116
FTE Position Change	0.8 FTE	0.8 FTE
Other State Impact: None		
Effective Date: 90 days after final adjournment of the General Assembly, unless a referendum petition is filed		
Appropriation Summary for FY 2002/2003: Department of Law -- \$70,116 General Fund and 0.8 FTE		
Local Government Impact: See Local Government section		

*See State Expenditure section

Summary of Legislation

This bill creates a method to assure payment to contractors, subcontractors and sub-subcontractors on work completed on construction projects. The bill requires the owner, including government agencies, of the construction project to provide evidence that 100 percent of the moneys needed to complete the project, including change orders, are available before the commencement of, and at all times during, a construction project. The bill requires monthly progress reports to be delivered to the owner or architect and establishes statutory time limits for payment.

The bill establishes remedies if payments are not made in a timely manner including allowing the contractor or subcontractor to: 1) suspend work on the project without it being deemed a material breach of contract; 2) receive reasonable and necessary demobilization and remobilization costs; 3) receive interest at a rate of 15 percent per annum for all late payments; and 4) receive reasonable attorney fees incurred to secure payment from the owner. The bill allows the owner, contractor or subcontractor to retain five percent of the contract amount until the contract is complete. The bill establishes time frames for the retainage fee to be paid.

1-44

In addition, the bill is applicable to all construction contracts where the property is located in Colorado. Any contracts entered into after the bill's effective date are void and unenforceable if the contract contains a clause prohibiting suspending work for failure to make prompt payments. The bill does not apply to construction contracts for single- or double-family dwellings.

State Expenditures

Department of Law: The bill will have a state expenditure impact of *at least* \$70,116 and 0.8 FTE for additional Attorney General legal services to represent state agencies in construction contract disputes.

Judiciary: While civil litigation for construction contracts already exists to some degree on the courts' civil dockets, the Judicial Branch estimates that the provisions in the bill may result in additional caseload. However, the Branch is unable to estimate the potential increase in cases at this time.

State Construction Contracts: Currently, public entity construction contracts are governed under Title 24, Article 91, *Colorado Revised Statutes*. The bill does not amend these statutes. Rather, the bill adds an additional statutory framework for government contracts. It is unclear which statute would govern public entity construction contracts. **Therefore, the costs cannot be quantified.** However, areas for *potential* expenditure impact include:

- **Multi-phase contracts and federal grants:** The bill requires the government to prove to the satisfaction of the contractor or subcontractor that sufficient funds are available to complete the project including all change orders. This provision conflicts with existing statute. Government agencies receive annual appropriations for construction projects but are allowed to enter into phased-construction contracts and bond-financed construction contracts as long as the contracts inform parties that the contract is contingent upon future appropriations. Furthermore, some federal grant projects require work to be completed before funds can be drawn down. Current law provides that if federal funds are financing a part or all of a project, the payment terms in the federal grant take precedence over the state statute. Because of the effective date of the bill, there will be no impact to current contracts. However, future contracting costs may increase if multi-phase contracts are prohibited. The increase in costs would result from rebidding projects and potential project delays.
- **Remedies:** The bill allows for additional remedies if prompt payments are not made. These remedies include suspending work on the project and recovering the costs for demobilization and remobilization, interest on late payments and attorney fees. The state has increased expenditure exposure from being liable for additional remedies and from the subcontractors or sub-subcontractors suspending work because of actions from the contractor or subcontractor.

- *Retainage:* The bill establishes different retainage percentages and practices than the current law.
- *Payment to contractor time frames:* The bill establishes different payment time frames to the contractor.
- *Payment from contractor to subcontractor and from subcontractor to sub-subcontractor:* Both current law and the bill require contractors to pay subcontractors within seven days of receiving payment from the government entity and for subcontractors to pay sub-subcontractors and supplies in a similar fashion. However, the bill allows suspension for work when the contractor fails to timely pay the subcontractor (subcontractor to the sub-subcontractor). This could create potential project delay costs for the state, even when the state has made prompt payment to the contractor.

Note: The analysis is based on input from the departments contacted and listed below. At the time this note was written, the Department of Higher Education was not contacted. The Department of Higher Education may also have expenditure impacts not covered in the above analysis.

Local Government Impact

Local governments, including cities, counties, school districts and special districts, will face the same potential expenditure impacts as the state as discussed above.

State Appropriations

The fiscal note indicates the Department of Law should receive a FY 2002-03 General Fund appropriation of \$70,116 and 0.8 FTE.

Departments Contacted

Personnel	Transportation	Local Affairs
Education	Labor	Judicial
Law		

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HOUSE COMMITTEE OF REFERENCE REPORT

Chairman of Committee

January 31, 2002

Date

Committee on Business Affairs & Labor.

After consideration on the merits, the Committee recommends the following:

HB02-1062 be postponed indefinitely.

** ** ** ** **

HB1062_C.001

Bill	History	Fiscal Note	JBC Analysis	Pre-Amended	Committee Reports
			Votes		



wptemp.txt

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LCS Bill Summaries & Votes for - HB02-1062

<u>Committee</u>	<u>Date</u>
<u>House Business Affairs & Labor - Bill Summary</u>	<u>01/31/2002</u>
.. <u>HB02-1062 FINAL VOTE - PI</u>	
<u>House Business Affairs & Labor - Bill Summary</u>	<u>01/29/2002</u>

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Return to Committee Summaries and Votes for HB02-1062

Return to All Bill Summaries By Bill #

BILL:	HB02-1062	
TIME:	02:45:30 PM	
MOVED:	Larson	
MOTION:	PI	
SECONDED:	Harvey	
	NAME	VOTE
	Borodkin	Excused
	Harvey	Yes
	Jameson	No
	Kester	No
	Larson	Yes
	Marshall	No
	Miller	Yes
	Paschall	Yes
	Rhodes	Yes
	White	Yes
	Williams T.	Yes
Final YES: 7 NO: 3 EXC: 1 ABS: 0 FINAL ACTION: PASS		

1.50

December 18, 2001

The Honorable Karin Brownlee
Kansas Senate
Capitol Building
Topeka, Kansas 66212

Re: Kansas Prompt Pay Bill

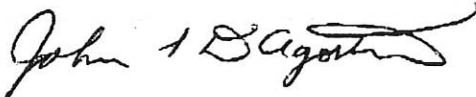
Dear Senator Brownlee,

I am the Owner of a mechanical contracting business located in Kansas City, Kansas. We are either the Prime Contractor or a subcontractor on construction projects.

We have been more affected when working as a subcontractor with regard to delayed payment from the General or Prime Contractor. It is common to wait 60 or more days from our invoice date until payment is received. Presently, our 60 day receivables total over \$165,000.00. We often know that the General Contractor has received payment from the Owner for our work, but the General Contractor does not provide payment to us for 45 days or more following his receipt of payment. Obviously, this provides a heavy financial burden on us. I don't know of many individuals who could survive long without receiving a paycheck for 30 days, let alone 60 days. I request your support of this prompt pay legislation.

This proposed bill would ensure payment to contractors and subcontractors within reasonable time periods, as well as the release of retention monies upon completion of the work by the contractor or each subcontractor. Please consider supporting this bill.

Sincerely,



John L. D'Agostino, P.E.

AMERICAN RIGGER SUPPLY, INC.
1010 KANSAS AVE., KANSAS CITY, KANSAS 66105

December 14, 2001

The Honorable Karin Brownlee
Kansas Senate
Capitol Building
Topeka, KS 66212

Re: Kansas Prompt Pay and Retention Bill

Dear Senator Brownlee:

I am President of American Riggers Supply, Inc., a Kansas Corporation that I founded in 1970. I am also serving my second term on the Board of the Greater Kansas City Chapter of the American Subcontractors Association.

The construction industry represents about 40 percent of my gross sales. As a supplier, I must maintain an inventory as well as manage receivables. Slow payment from project owners and the retention money that is held for extensive periods impact my customers' ability to pay me. If I can't put money back to work because it's tied up in receivables, then I can't grow my business, my Kansas business, as effectively as I might if payment were received promptly.

Prompt payment and a system for releasing retention money would increase cash flow in the construction industry and favorably impact many others that enjoy business relationships with this industry. I hope the proposed bill will merit your support.

Respectfully,



Chris Hughes, President
American Rigger's Supply, Inc.



Pro Electric Services, L.L.C.
CONTRACTORS - ENGINEERS
DESIGN BUILD

5320 SPEAKER RD. - KANSAS CITY, KS 66106
(913) 621-6611 FAX (913) 621-0843

12/05/01

The Honorable Karin Brownlee
Kansas Senate
Capitol Building
Topeka, Kansas 66212

RE: Kansas Prompt Pay Bill

Dear Senator Brownlee,

I am one of the owners of Pro Electric Inc., which operates as a subcontractor in the state of Kansas. I am writing this letter to ask for your help and support in passing the Prompt Pay Bill that has been proposed by the American Subcontractors Association.

At this time I have receivables in the 60 day column owed to me from several different General Contractors which totals to \$200,000.00 and the amount in retention is \$400,000.00. Retention monies I may not see until six or twelve months after the completion of a project.

The proposed bill would require that amounts due, except retention, would be made within 10 business days after the owner receives a request for payment. It would also require that the contractors and subcontractors make payment to their subcontractors within 5 business days after receipt of payment from the owner. Payment of monies held for retention would be paid when the scope of work for each contractor or subcontractor is complete.

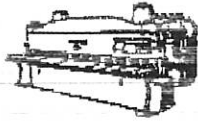
The passage of this bill would have a "Domino Effect" on the construction industry. If all involved could get paid on a timely and coordinated basis, it would increase cashflows and definitely decrease bankruptcies in this industry.

I strongly support the Prompt Pay Bill and ask that you consider supporting it.

Sincerely,

Larry McKinney
Vice President

Cc: american subcontractors association

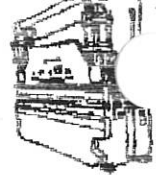


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January 9, 2002

The Honorable Karen Brownlee
Kansas Senate
Capitol Building
Topeka, KS 66212

RE: Kansas Prompt Pay Bill

Dear Senator Brownlee,

I am an owner of a corporation that operates as a Subcontractor within the building trades arena in the state of Kansas. I am writing to you to ask your support of the Prompt Pay Bill as proposed by the American Subcontractors Association.

- ⓐ As a Subcontractor under the existing laws now in effect, it has been very difficult to protect our payment rights. As a Subcontractor we are not paid until the General
- ⓑ Contractor has been paid sometimes 60 to 90 days and longer from our invoice date.
- ⓒ Retention amounts vary up to 10% of the contract price and sometimes we won't receive
- ⓓ our retention monies until months even years after our work has been complete.

Reform of the law needs to be addressed so as all Contractors are paid and treated fairly. I hope you can see the need for this bill and support the efforts of the American Subcontractors Association.

Sincerely,

G. G. Ryder

Cc: American Subcontractors Association

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Matthew S. Goddard, Vice President

700 S. Kansas Ave., Suite 512
Topeka, Kansas 66603
Office (785) 232-8215 • Fax (785) 232-9320
mgoddard@hcbankers.com

To: Senate Committee on Commerce

From: Matt Goddard

Date: March 7, 2002

Re: Senate Bill 616

The Heartland Community Bankers Association appreciates the opportunity to appear before the Senate Commerce Committee to suggest the attached amendments to **Senate Bill 616**.

The Heartland Community Bankers Association represents thrifts in Kansas, Colorado, Nebraska and Oklahoma. Our members specialize in residential mortgage lending and are generally referred to as savings and loans or savings banks.

Senate Bill 616 codifies procedures for prompt payment on construction contracts. The bill allows for retainage if such retainage is deposited into an escrow account. Section 7, paragraph (a) provides that "only financial institutions legally doing business in Kansas may serve as escrow agent." However, in further detailing the conditions required for an escrow account, Section 7 requires that funds be deposited in "banks legally doing business in Kansas" or in government obligations. Similar use of the phrase "banks legally doing business in Kansas" can be found in Section 12(a)(iii) and Section 12(c).

HCBA's concern with SB 616 is that although the bill allows "financial institutions" to act as escrow agents, the specific wording of the bill has the effect of limiting possible escrow agents to only commercial banks. We do not believe this was the intent of SB 616. The attached balloon amendments resolve this by adding savings and loans and savings banks to the bill where only "banks" appears now. In addition, our balloon replaces the single reference to "financial institutions" with "banks, savings and loans and savings banks." This removes any ambiguity as to what the bill means by "financial institutions."

HCBA does not take a position on the whole of SB 616. Should this Committee find that this is a prudent public policy, HCBA would respectfully request that the Committee adopt the attached amendatory language to ensure that savings and loans and savings banks are allowed to serve as escrow agents.

Thank you for your consideration of our comments regarding Senate Bill 616.

enclosures

Senate Commerce Committee
March 7, 2002
Attachment 2-1

22

payment otherwise due a contractor. Any such retainage shall be deposited into an escrow account complying with this act not later than the time when the payment from which the retainage is withheld is due to the contractor. A contractor or subcontractor shall not withhold more retainage from a subcontractor than is withheld from the contractor by the owner for the subcontractor's work.

Sec. 6. Retainage may be withheld only until substantial completion of each separate division of the contract for which a price is stated separately in the contract or for which a separate price can be ascertained from the contractor's schedule of values. Upon such substantial completion, such retainage shall be paid to the contractor within 30 business days after presentation of a written application for payment of the retention.

Sec. 7. An escrow account, established pursuant to an escrow agreement, shall be entered into only on the following conditions:

(a) Only ~~financial institutions~~ legally doing business in Kansas may serve as escrow agent;

banks, savings and loans, and savings banks

(b) the investment of funds held in escrow shall be limited to deposits in banks, ~~legally doing business in Kansas and obligations of the United States, its agencies, corporations wholly owned by the United States, the State of Kansas, and political subdivisions of the State of Kansas;~~

, savings and loans, and savings banks

(c) as interest or other income on investments held in escrow becomes due, it shall be collected by the escrow agent and paid to the contractor. The contractor and subcontractors shall pay interest or other income as it is received pro rata to the subcontractors;

(d) the escrow agent shall provide monthly reports to the owner, the contractor, and the subcontractors of the nature and amounts of the investments in the escrow account and any additions to and payments from the escrow account. Except for interest or other income, payments from the escrow account shall be made only at the direction of the owner;

(e) if an owner has entered into more than one construction contract providing for an escrow account, the owner may elect to combine the amounts held as retainage under each contract into one or more escrow accounts or may establish a separate escrow account for each contract;

(f) upon default by or overpayment to the contractor, as determined by a court of competent jurisdiction or an arbitrator, the escrow agent shall pay the owner the amount determined to be due the owner on account of the default or overpayment; provided, however, the amount is subject to the redemption value of the investments in the escrow account at the time of disbursement;

(g) the escrow account may be terminated upon completion and acceptance of the contract as provided in this act;

(h) all fees and expenses of the escrow agent shall be paid by the owner;

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from withholding retainage from payments to the contractor on account of the subcontractor's substituted security. The subcontractor shall be entitled to receive, upon receipt by the contractor, all income received by the contractor from the owner on account of income-producing securities deposited by the subcontractor as substitute security. Except as otherwise provided in this section 11, and amendments thereto, the contractor shall have no obligation to collect or pay to a subcontractor retainage on account of substitute security tendered by the subcontractor.

Sec. 12. The following shall constitute acceptable substitute security purposes of sections 9 and 11, and amendments thereto.

(a) Securities in form negotiable by the owner, of market value equal to or greater than the amount of retainage released, which are:

(i) Obligations of the United States, its agencies, or corporations wholly owned by the United States;

(ii) obligations of the State of Kansas or political subdivisions of the State of Kansas; or

(iii) certificates of deposit issued by banks legally doing business in Kansas;

(b) A retainage bond naming the owner as obligee issued by a surety company authorized to issue surety bonds in Kansas in the amount of the retainage released and conditioned upon substantial completion of the work of the contractor or subcontractor that tendered the bond; or

(c) an irrevocable and unconditional letter of credit in favor of the owner, issued by a bank legally doing business in Kansas, in the amount of the retainage released.

, savings and loans, and savings banks

, savings and loan, or savings bank

Sec. 13. A contractor or subcontractor shall be entitled to all interest or other income earned on any securities deposited by the contractor or subcontractor in substitution for retainage.

Sec. 14. Upon substantial completion of the work of the contractor or subcontractor that tendered the substitute security, the security shall be returned to the contractor or subcontractor that tendered the security.

Sec. 15. Upon final completion, any amounts remaining due the contractor shall be paid within ten business days after presentation of the following:

(a) A properly completed application for final payment; and

(b) a release, if required, of all payment claims and claims of lien against the owner arising under and by virtue of the contract, other than such claims, if any, as may be specifically excepted by the contractor or a subcontractor from the operation of the release.

Sec. 16. Within five business days after an owner makes a payment to a contractor or directs an escrow agent to make a payment to a contractor, the owner shall give written notice of the date and amount of the payment to any subcontractor who has made a written request to the owner for such notice.



**KANSAS BAR
ASSOCIATION**

1200 SW Harrison St.
P.O. Box 1037
Topeka, Kansas 66601-1037
Telephone (785) 234-5696
FAX (785) 234-3813
www.ksbar.org

LEGISLATIVE TESTIMONY

March 7, 2002

TO: Members of the Senate Commerce Committee

FROM: Paul Davis, Legislative Counsel for Kansas Bar Association

RE: Senate Bill 616

My name is Paul Davis, and I am representing the Kansas Bar Association. The KBA is a diverse organization with 6,000 members, including judges, prosecutors, plaintiffs' attorneys, defense attorneys, etc. We have no position on Senate Bill 616 as a whole, however, we would like to voice our opposition to a provision contained in this bill.

In Section 18, line 11, the bill calls for a "loser pays" rule in which the losing party pays for the winning party's attorney fees. This is contrary to the general rule of awarding attorney fees in Kansas.

The Kansas Bar Association has traditionally opposed provisions that call for a "loser pays" rule. Such a provision could chill plaintiffs who have no access to justice without contingent fee availability and attorneys willing to accept this risk.

The Kansas Bar Association would like to suggest an amendment to Senate Bill 616 that removes the "loser pays" provision, which the following attachment illustrates.

I thank you for your time and consideration on this issue and ask that you embrace the Kansas Bar Association's amendment to Senate Bill 616.

Senate Commerce Committee
March 7, 2002
Attachment 3.1

1 Sec. 17. If payment (including payment of retainage) is not made to
2 a contractor or subcontractor as required by this act or if retainage is not
3 deposited in an escrow account as required by this act, the contractor and
4 subcontractors shall be entitled to suspend further performance of con-
5 struction until payment (including applicable interest) is made or retain-
6 age is deposited. The contractor and subcontractors shall be entitled to
7 recover from the owner, contractor, or subcontractor, as the case may be,
8 any costs incurred by the contractor or subcontractors on account of the
9 suspension.

10 Sec. 18. In an action or arbitration to enforce the provisions of this
11 act, ~~the court or an arbitrator shall award costs and reasonable attorney~~
12 ~~fees to the prevailing party. Venue of such an action shall be in the state~~
13 or federal court for the district where the real property is located. The
14 hearing in such an arbitration shall be held in the county where the real
15 property is located.

venue

16 Sec. 19. The provisions of this act do not apply to improvement of
17 owner-occupied residential property consisting of not more than two
18 dwelling units.

19 Sec. 20. This act shall take effect and be in force from and after its
20 publication in the statute book.

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TO: Members of the Senate Commerce Committee

FROM: Trudy Aron, Executive Director

RE: **OPPOSITION TO SB 616**

President
Nancy L. Steele, AIA
Wichita

President Elect
Robert D. Fincham, AIA
Topeka

Secretary
Matthew D. Werner, AIA
Topeka

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Richard Bartholomew, AIA
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Dale Glenn, AIA
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James Jones, Assoc. AIA
Manhattan

Eric Linebarger, AIAS
Manhattan

Peter Maass, AIAS
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Julia Mathias, Assoc. AIA
Lawrence

Torgier Norheim, AIA
Manhattan

Wendy Ornelas, AIA
Manhattan

Katie Perkins, AIAS
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Michael M. Seiwert, AIA
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Scott A. Stauffer, AIA
Andover

Richard K. Tilghman, AIA
Topeka

Bruce Wrightsman, AIA
Manhattan

E. Eugene Young, AIA
Shawnee Mission

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

Good Morning, Madam Chair, and members of the Committee, I am Trudy Aron, executive director, of the American Institute of Architects in Kansas (AIA Kansas.) Thank you for the opportunity to address your committee today regarding our opposition to SB 616.

AIA Kansas is a statewide association of architects and intern architects. Most of our 700 members work in over 100 private practice architectural firms designing a variety of project types for both public and private clients including justice facilities, schools, hospitals and other health facilities, industrial buildings, offices, recreational facilities, housing, and much more. The rest of our members work in industry, government and education where many manage the facilities of their employers and hire private practice firms to design new buildings and to renovate or remodel existing buildings.

SB 616 would severely limit the ability of owners, architects and general contractors to assure completion of construction projects. The construction of a building involves many trades and, often, dozens of workers. While the general contractor holds the contract with the owner and is responsible for delivering a completed project at a specified price and time, this firm often does not actually perform all the work, but subcontracts it out to other firms. For example, different subcontractors will provide excavating, structural steel, concrete work, electrical, mechanical, interior framing, drywall, painting, etc.

One of the most frustrating times for owners and architects is at the end of a construction project when most, but not all, of the work has been done. The owner is anxious to occupy or use the project and the contractor is anxious to move on to with other work. The contractor says the project is complete but when the owner and architect walk through the project, many items have not been completed. The withholding of funds, in many cases, becomes the owner's only leverage to get the contractor or subcontractors to finish the work. We believe the decision on what percentage of funds is retained and when it should be released should remain with the owner and the general contractor. The owner should retain the option to reduce the amount withheld depending on many factors, including the type of project and the performance relationship the contractor has with the owner. In addition, the owner may, at any time during the project, reduce the amount withheld or return the retained funds before completion of the project.

In addition, SB 616 requires retainage to be placed in interest-bearing escrow accounts. This would create a bookkeeping nightmare for contractors and would, undoubtedly, place architects, as the owner's representative, in the impossible position of trying to mediate conflicts between the various parties.

We urge you to continue to allow owners to make decisions regarding retainage based on the appropriate need of their construction projects. Thank you.

THE KANSAS CONTRACTORS ASSOCIATION, INC.

316 SW 33RD ST PO BOX 5061
TOPEKA KS 66605-0061



TEL (785) 266-4152
FAX (785) 266-6191
kca@ink.org
www.ink.org/public/kca

Testimony

By the Kansas Contractors Association

before the Senate Commerce Committee regarding

SB 616

March 7, 2002

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

Today, I want to thank you for allowing me to testify in opposition to Senate Bill 616. We oppose this bill for many reasons including that fact that it infringes on the private sector in making its own contracts, it creates a time schedule that most companies can not accomplish and creates more paperwork which will be costly in the long run to the owner.

In essence, we have some other concerns but basically we find this bill unnecessary. We don't believe at least in the highway construction business, the

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system is broken and so it doesn't need to be fixed.

Reviewing the bill we find it is too restrictive. In Section 2

Line 34, it says all **contracts for construction**. This addresses every contract for construction in the state and that encompasses so many we feel it infringes on the private sector. Our members deal mostly with public owners but what about the local parking lot project or little sewer line, will it dictate how those contractors are written. Will this include the Corps of Engineers? We believe the federal government may have a problem with this measure since their contracts are not the same as what we see in other arenas of business. Can you force them to comply with this legislation?

In other sections, the time frames appear to be too stringent. Some of our contractors can turn around a payment within 10 business days once they are notified but that is the not the norm and such a requirement could cause a lot of problems. Especially for a small company that in a good year takes a lot more work than normal and hasn't geared up for the office staff to conduct business that quickly.

It seems this requirement would always be in jeopardy and something along 30 days days may be more practical. If the intent of this legislation is to get paid in a reasonable amount of time, ten days is just too short.

We are also concerned about the paper work that is required with monthly reports which is mentioned in Section 7, paragraph d. It appears that there will be additional notification letters and paperwork associated with this process. To comply with this measure, our contractors may have to add people to just push the paper around and make sure everything is done right... and that cost will be passed on to the owner.

More paperwork, unrealistic time requirements and the intrusion of the government

into the private sector are concerns of ours. We oppose this issue and would be glad to stand for questions.

**TESTIMONY TO
SENATE COMMITTEE ON COMMERCE
BY GARY HIBBS
DESIGN SUPERVISOR
DIVISION OF FACILITIES MANAGEMENT
March 7, 2002**

Madam Chair and Members of the Committee,

Thank you for the opportunity for the Department of Administration to discuss SB 616. My name is Gary Hibbs, and I am the design supervisor in the Division of Facilities Management. Our division is responsible for design; operations and maintenance of facilities in the Capitol Complex; and administrative oversight of all state funded building construction projects in the State of Kansas.

The Department of Administration is against this bill for reasons I will address in a moment.

SB 616 concerns contracts for public and private construction. The bill addresses payment deadlines for services provided, and sets up an escrow system for an owner's holding of retainage for construction projects. Some provisos of this bill significantly alter the manner in which the State does business on state funded projects.

Section 2 of the bill requires payments of amounts due within 10 business days after the owner receives a timely, properly completed, undisputed request for payment. With approximately 300 building construction projects ongoing in any given year, and given the nature of construction work and necessary attention given to approvals of payment, payment within 10 business days will be difficult at best. Attempting to meet this bill's deadline will be a burden to the payment process. Our current construction specification, which is included in the contract documents, calls for payment within 30 days after receipt of certified request for payment from the project architect or engineer. Payments after the 30-day period are subject to the Kansas Prompt Payment Act, K.S.A. 75-6401 et seq.

Section 6 calls for payment of retainage at substantial completion. Retainage is the portion of a payment due a contractor that is withheld until the end of the project to ensure proper performance by the contractor. Substantial completion is the point at which the project is sufficiently complete so the owner may occupy or use the premises for its intended purpose. The State's current practice is to pay retainage at final completion, the point at which all work is completed. With retainage paid at substantial completion, there may not be enough incentive for the contractor to fully complete the project. The State would lose time gaining the full use of the building and incur additional costs contracting with another company to complete the project. Section 5 of this bill would set the retainage at 5% of the contract work instead of our current practice of 10%. Even if the 5% were held to final completion, in some cases it would not be enough to complete the project should the original contractor not perform.

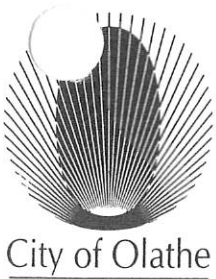
Section 7 of the bill involves establishing an escrow account for deposit of the retainage amounts being held. If the owner fails to deposit the retainage into the escrow account, they will be charged an additional 1½% per month of the amount not deposited. The escrow agent will pay interest earnings on the escrow account to the contractor, who in turn will distribute the earnings pro rata to the subcontractors. All fees and expenses of the escrow agent are to be paid by the state agency that owns the building where the project is located, adding additional costs to construction projects. This is not the current state practice and it seems to be unduly burdensome to all owners for construction projects.

Section 16 calls for the owner to notify the subcontractors who wish to be notified of a payment made to the general contractor. On a large project there could be 20 to 30 subcontractors performing work. Again, this comes with more cost and is unduly burdensome to the owner.

The changes requested in SB 616 are not practical and will add costs to the overall construction process if special allowances are incorporated into the current practice. Retainage should be paid at final completion of the project to ensure work is completed. Retainage of 10% is necessary to ensure funds will be available to complete the project if the contractor does not perform. Escrow accounts and subcontractor notifications carry with them an administrative expense that will add to the total cost of each project.

The Department of Administration asks your help in rejecting this bill.

Madam Chair, I stand for questions.



MEMORANDUM

TO: Members of the Senate Commerce Committee
FROM: Donald R. Seifert, Policy Development Leader *DRS*
SUBJECT: Senate Bill 616; Construction Contracts
DATE: March 7, 2002

On behalf of the city of Olathe, thank you for the opportunity to appear today to express opposition to this bill. Aimed at insuring faster payments to construction contractors, SB 616 would mandate changes in the owner/contractor relationship for construction work. As written, the bill would apply to cities and other public entities that contract for public improvements. Payment for completed work is certainly at the heart of the free enterprise system. However, as a public entity, the goal of prompt payment must be balanced with the duty to protect the taxpayer's investment in the construction project.

The need for this bill is unclear. Fundamentally, we see no reason for the legislature to dictate the terms of construction contracts. As a growing, full service city, Olathe contracts with small and large contractors for literally tens of millions of dollars annually in construction work. To our knowledge, there are no widespread concerns about how we do business with construction firms. There is rarely a shortage of bidders on our public works projects. Prospective bidders know all the terms and conditions of the contract before deciding whether or not to pursue a city project. If problems arise, there are usually adequate remedies in the contract for dispute resolution, arbitration, or, if all else fails, litigation. It stands to reason that if a contractor or subcontractor has payment problems with an owner, they may choose to simply not do business with that owner.

On a technical note, the ten-day payment window in the bill is too short. Both our governing body meetings and accounts payable process follow a bi-weekly cycle. Allowing proper inspection, evaluation, and processing of payment requests within that time period is not reasonable. In addition, the bill would cap retainage payments at 5%, and require establishment of cumbersome third party escrow arrangements to handle payments. In public construction work, 10% is the more common retainage percentage. With dozens of projects in progress at any time, the escrow requirements in the bill would cause a significant administrative burden.

Thank you again for the opportunity to comment on this bill. We believe this bill is unneeded and would hinder public construction activity.

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**Olathe District Schools
Testimony
Senate 616
March 6, 2002**

My name is Gary George and I am an assistant superintendent with the Olathe School District. The Olathe School District is a rapidly growing district. We grew by more than 600 students last year. This growth has caused us to be heavily involved in constructing schools or adding major additions to existing facilities. In addition, you can imagine the challenge of maintaining our current 27 elementary buildings, seven junior high schools and three high schools.

The Olathe School District is opposed to Senate Bill 616. This bill requires payment except for retainage, within ten business days after an owner receives a timely, undisputed, properly completed pay request. Our current practice is to pay such bills within 45 days.

The process of getting the work inspected by an architect, perhaps a city building inspector, takes time. In cases where there is a dispute about the quality of work, it is often difficult to get contractors and subcontractors to complete the work. The one leverage we have is to withhold payment. The bid document and the contract we use explain to the bidder how our process works and that they will receive payment within 45 days of the District receiving a bill. They are well aware of our construction payment practice.

Our Board takes very seriously its role to be good stewards of the public's money. They review and approve all bill payments. Our board meets once a month. Complying with the ten-business day requirement is not feasible for us and would create a hardship.

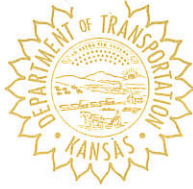
The bill also creates a limit on retainage of no more than 5 percent. Such retainage may only be withheld until substantial completion of each separate division of the contract for which a price can be ascertained from the contractor's schedule of values. We currently use the industry standard of 10% retainage. Reducing this to 5 percent especially on small projects reduces our leverage to get projects completed on time and without a dispute over workmanship.

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Senate Bill 616 further provides that any retainage shall be placed in an escrow account and that all the interest earned by the escrow account is paid to the contractor. The bill makes the owner, our school district, responsible for all escrow fees and expenses. This places an extra burden on us for being a good steward of public funds.

In summary, Senate Bill 616 will create a hardship on our school district and add to administrative costs because of the procedures required in the bill. We urge you to not approve Senate Bill 616.



KANSAS DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY OF TRANSPORTATION

E. Dean Carlson
Secretary of Transportation

Docking State Office Building
915 SW Harrison Street, Rm. 730
Topeka, Kansas 66612-1568
Ph. (785) 296-3461 FAX (785) 296-1095
TTY (785) 296-3585

Bill Graves
Governor

TESTIMONY BEFORE
SENATE COMMITTEE ON COMMERCE

REGARDING SENATE BILL 616
PROMPT PAYMENT OF CONSTRUCTION CONTRACTS
March 7, 2002

Madame Chairperson and Members of the Committee,

I am Dale Jost, Chief of Fiscal Services, Kansas Department of Transportation. On behalf of the Department, I am testifying on Senate Bill 616 that pertains to the prompt payment of contractors constructing or improving real property. In the opinion of the Department's Chief Counsel, this bill does not apply to highway construction but pertains to construction or improvements to buildings and grounds. The Department has been and continues to be sensitive to promptly paying contractors and other vendors for work accepted.

SB 616 applies to all construction contracts, both private and public. The bill requires either payment or a dispute of the payment within 10 business days of receiving the request. It calls for the creation of an escrow account in a financial institution if retainage is withheld. SB 616 allows securities to be substituted for releasing retainage from escrow. Retainage is limited to five percent and may apply to each component of a contract with an identifiable cost. The bill requires payment of all escrow agent fees and expenses by the owner, establishes a penalty based upon insufficient retainage in the escrow account and creates a penalty for failure to pay the contractor within specified time periods. Additionally, SB 616 requires the owner to notify subcontractors of payments to contractors when requested.

Annually KDOT has approximately 40 projects for buildings and grounds that are impacted by this bill. The Department works with the Division of Facilities Management on such projects. The current State practice is to hold 10% retainage of such projects.

KDOT is opposing the bill for the following reasons. The State currently provides relief for late payment to vendors through the Kansas Prompt Payment Act, K.S.A. 75-6401 *et seq.* The 10-day time period for rejecting unsatisfactory work or making payment is too aggressive for validation of the payment request, performance of inspections and acceptance of work. When

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retainage is utilized, the required escrow account in the bill would create additional administrative costs, fees and expenses to the Department. Furthermore, KDOT will be required to expend additional resources to qualify securities substituted for the release of retainage. The overall cost of the project very likely will increase with the implementation of these provisions.

Thank you for this opportunity and I welcome your questions.

S.B. 616 – Prompt Payment of Construction Contracts

Testimony Presented at the
Senate Commerce Committee

On March 7, 2002

By Ron Appletoft, Governmental Affairs Coordinator

Water District No. 1 of Johnson County appears in opposition to S.B. 616, which would impose unreasonable and unnecessary restrictions on public construction contracts in Kansas.

Water District No. 1 is organized as a regional public water utility and serves over 330,000 consumers in and around Johnson County. The Water District is operated as a quasi-municipal corporation pursuant to K.S.A. 19-3501 et seq.

Our Water District has not received any complaints from construction contractors that a problem exists. All of the construction contracts in excess of \$25,000 at the Water District are required by statute to go through a public bidding process. The contract and job specifications are a public record and available to contractors prior to submitting their bid. This bill would infringe upon the contractual relationship between the Water District and our contractors. The Water District models its construction contracts after standard documents created by the Engineering Joint Contract Documents Committee (EJCDC) which are similar to the American Institute of Architects (AIA) documents. EJCDC is a nationally recognized organization that develops standard documents for construction contracts. The proposed legislation is more restrictive than the national standards.

S.B. 616 requires that retainage amounts be limited to 5% of the value of the work performed. The Water District currently uses 10% in our contracts until 50% of the work has been completed. If the project has progressed satisfactorily the retainage may be reduced to 5%. In addition, S.B. 616 requires retainage be placed in an escrow account. Creation of escrow accounts for each construction contract increases the amount of work, the complexity, the potential for unnecessary litigation and thus the cost of each project.

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Senate Commerce Committee

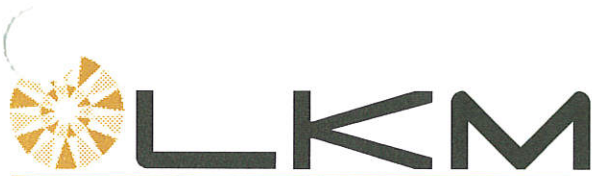
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S.B. 616 requires that retainage be paid out at point of substantial completion. There is a big difference between substantial completion and final completion. The purpose of retainage is to make sure the project has reached final completion before all monies are paid out and to hold enough money in reserve to cover potential liquidated damages. The time period between substantial completion and final completion is when retainage is needed the most to make sure that all aspects of the job are completed.

Section 2 of the bill defines the timeframe in which payment is due on a properly presented request for payment. Current prompt payment statutes already exist. K.S.A 75-6402 and 75-6403 were enacted in 1984. S.B. 616 also includes language dealing with subcontractor payments. Subcontractors are already afforded protection under public works bonds that are required by K.S.A 60-1111.

The Water District already follows statutory bidding processes, utilizes national standards that cover construction contracts and is unaware of any complaints we therefore urge your no vote on S.B. 616.



League of Kansas Municipalities

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

To: Senate Commerce Committee
From: Kim Gulley, Director of Policy Development & Communications
Date: March 7, 2002
Re: Opposition to SB 616

Thank you for the opportunity to offer comments on behalf of the League of Kansas Municipalities and our member cities. We appear today in opposition to SB 616 and offer the following concerns for your consideration:

- **Broad Application.** Although residential owner construction projects are ultimately exempted from this legislation, all other construction contracts in Kansas would be affected by SB 616. This would include all public construction contracts as well as contracts between two private individuals.
- **Time Frames.** SB 616 sets up a 10-day window in which to remit payment once a final statement is received. This time frame is simply impossible. Public entities at all levels of government require certain steps to be followed in order to assure that governmental accounting standards are met. In most cities in Kansas, claims are processed by the city clerk or treasurer and then presented to the entire council for their approval. Many of those same cities meet only once or twice a month.
- **Attorneys Fees.** Section 18 of the bill provides for attorneys fees to be paid in enforcement actions. Statutory attorneys fees are unusual in Kansas and enforcement provisions are usually negotiated and set out in the contract itself.
- **Existing Contracts.** The bill does not address the issue of existing contracts. If SB 616 becomes law, it could be argued that any provisions within existing, ongoing contracts are void as a matter of public policy.

While cities work diligently to ensure prompt payment of claims, it is also very important that governmental accounting standards are not compromised. We believe that such timing concerns should be negotiated between the parties to the contract and not set out in state statute. For these reasons, we respectfully request that you do not take favorable action on SB 616. Thank you and I would be happy to answer questions.

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City Hall • 8500 Santa Fe Drive
Overland Park, Kansas 66212-2899
TEL 913.895.6080/6086 • FAX 913.895.5095
E-MAIL jsneffbr@opkansas.org

TESTIMONY IN OPPOSITION TO SENATE BILL NO. 616

TO: The Honorable Karen Brownlee, Chairperson
Members of the Senate Committee on Commerce
Room 123-S

DATE: March 7, 2001

RE: Senate Bill No. 616--Proposed legislation pertaining to contracts
for construction

Ladies and Gentlemen:

The City of Overland Park opposes Senate Bill No. 616 for the following reasons:

1. Senate Bill No. 616 is an attempt to limit the home rule power of cities by placing unworkable parameters on the ministerial act of processing payment to contractors, and the contractual freedom to require a percentage of cash retainage appropriate for a particular project.
2. The majority of City of Overland Park construction contracts allow the City up to thirty days to process and pay invoices. Although the City pays these types of bills weekly, all invoices must be reviewed and processed through the City's Public Works Department prior to being forwarded to Finance for payment. If the City is to do an adequate job of performing its review task, ten days is an inappropriately short time for the entire process to be performed.
3. In addition to the mechanics of payment, there are cash flow issues to be considered. No fiscally responsible City would allow money to remain uninvested, awaiting an invoice. Cash is invested in order to maximize funds for improvement projects, and a ten-day payment-to-contractor window is not long enough when attempting to best time investments.
4. Overland Park uses ten percent as its standard percentage of retainage, although this amount is negotiable under certain circumstances. As projects advance, if work is progressing according to plans and schedules, Overland Park does reduce retainage. The City feels strongly that, with its knowledge of the local market, it is in the best position to determine the percentage of retainage needed for a particular project. The

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construction contract spells out both contractor and owner responsibility, and if a City inappropriately withholds the contractually agreed upon retainage, the contractor has remedies under that contract.

5. Escrowing retainage would be both onerous and expensive. Given the number of capital projects being handled by the City at any time (25 to 30 projects), a retainage clerk would have to be hired to manage the escrow accounts, as well as to track all of the other types of acceptable substitute security allowed under Senate Bill No. 616. Construction costs are high enough without adding the cost of escrowing retainage and hiring a person to manage the various forms of that retainage.
6. This bill also requires the City to notify any subcontractor who has requested notification when the City pays a contractor. This requirement additionally burdens a City, when payment to subcontractors is specifically dealt with by the requirement of a statutory bond per K.S.A. 60-1111.

Senate Bill No. 616 diminishes a City's right to freely contract and adds significantly to its financial and personnel burden in administering a construction contract. The City is obligated to protect the taxpayer's dollars, while assuring a well-constructed product for those dollars. Senate Bill No. 616 negatively affects the City's ability to perform this obligation. For these reasons, the City of Overland Park strongly opposes Senate Bill No. 616.

Thank you for your consideration.



Robert J. Watson
City Attorney



Jane Neff-Brain
Senior Assistant City Attorney



Johnson County, Kansas

OFFICE OF THE COUNTY MANAGER

To: The Honorable Karin Brownlee, Chairman
The Honorable Nick Jordan, Vice-Chairman
Members, Senate Commerce Committee

From: Ashley Sherard, Government Relations Manager

Date: March 7, 2002

Subject: **SB 616 – Prompt Payment of Construction Contracts**

On behalf of the Johnson County Commission, I would like to express our opposition to SB 616, which, among other provisions, requires “prompt payment” of construction contracts.

First, SB 616 unnecessarily legislates key elements of construction contracts that should continue to be determined by a project’s owner and contractor. As a matter of public policy, we believe the voluntary parties to a contractual relationship should be allowed to determine the provisions under which they will operate, rather than the state.

Second, we are concerned that SB 616 logistically does not allow adequate time for a fiscally responsible payment process. To make payment, both a project’s architect/engineer and owner must review the invoice in detail, resolve any questions, visit the site to compare progress against the bill, and submit the bill through the accounts payable process before mailing the check to a contractor. For a project of any complexity, this entire process often takes more time than SB 616 provides. If the process is rushed, we are concerned these safeguards may be compromised and the likelihood of incorrect invoices and payments would be substantially increased – errors that would ultimately be borne by taxpayers.

Lastly, Johnson County has certain specific concerns about the bill. In particular, we are very concerned about provisions setting authorized retainage at 5%, to be paid after “substantial completion” of the project. We believe these retainage provisions may not be sufficient, particularly on large projects, to protect an owner’s ability to ensure proper completion of the work. We are also concerned about the requirement that these retainages be maintained in an escrow account -- a new mandate on governments that seems time-consuming and cumbersome.

Again, because we believe the increased costs and risks associated with SB 616 would ultimately be borne by taxpayers, the Johnson County Commission urges you to recommend the bill unfavorable for passage. Thank you for your time and consideration.

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TESTIMONY OF BOB VANCNUM TO SENATE COMMERCE COMMITTEE
MARCH 7, 2002

TO: HONORABLE CHAIRMAN BROWNLEE AND HONORABLE SENATORS
FROM: BOB VANCNUM, GOVERNMENT AFFAIRS SPECIALIST FOR BLUE VALLEY USD # 229 AND JOHNSON COUNTY COMMUNITY COLLEGE
SUBJECT: TESTIMONY IN OPPOSITION TO SB616
DATE: MARCH 7, 2002

I am testifying on behalf of the two above-captioned local government entities in Johnson County, Kansas, in opposition to the requirement in such bill that all construction contracts must contain provisions for payment within ten business days of a request for payment. This is simply an unworkable standard with regard to school districts and others that are required to submit all claims for payment to their board, which only meets once a month. Special meetings would have to be called to deal with this issue alone.

Secondly, this bill, although clearly well intentioned, would have a drastic impact upon investing of public funds and cash flow within public entities. For instance, Blue Valley USD currently has a policy that they pay all claims on the 15th day of every month. This allows proper financial planning and investments to be timed to minimize reserves that must be held to meet contingencies. With a total budget in excess of \$187 million, Blue Valley USD would have to increase its emergency cash reserve by millions of dollars if it could not plan for one coordinated payment date per month. This would cause a substantial loss in interest earnings and substantial increase in staff time needed to process claims. This is certainly not promoting efficiency in government.

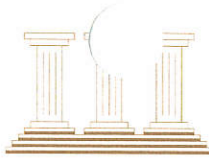
Lastly, both our construction contracts and the method used for the financing of them would be drastically altered if this bill were to become law. Current language in the investment repurchase agreements requires a one time per month draw payment. In our rapidly growing district, this would add even further to construction costs..

In conclusion, in these days of severe financial shortfalls at all levels of government, it is the wrong time to be imposing these no doubt well - intentioned, but ill-conceived changes

I would be happy to answer any questions.

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KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the Senate Commerce Committee

FROM: Gary White
Kansas Trial Lawyers Association

RE: SB 616

DATE: March 7, 2002

Senator Brownlee and members of the committee, thank you for the opportunity to submit comments on SB 616. My name is Gary White, I am a Topeka attorney and a member of the Executive Committee of the Kansas Trial Lawyers Association.

KTLA opposes SB 616 because the bill improperly invades the province of a Kansas consumer to negotiate with a contractor for a construction project, unfairly shifts the burden to Kansas consumers to dispute bills from contractors in writing within 10 days or suffer the consequence of having to pay an improper bill, and unjustly shifts the costs and attorney fees to the prevailing party.

Under current law and the free enterprise system, Kansas consumers and contractors have the opportunity to negotiate a contract that is agreeable to both parties to the transaction. SB 616 changes the current system and mandates contract terms that are favorable to the contractor so that the terms are no longer subject to negotiation by the parties.

Sec. 2 provides that the owner is required to notify the contractor in writing within 10 days regarding how the request for payment is improperly completed or disputed. Interestingly, the bill requires owners to dispute the bill in writing but places no such requirement on contractors to submit their requests for payment in writing. This disparity is clearly designed to benefit contractors even where their work has been shoddy or is otherwise unworkmanlike.

This section further provides that if the "owner does not timely [within 10 days] notify the contractor in writing that a request for payment is . . . disputed" the owner is required to pay the request in accordance with the act. This section would require payment even where the consumer has orally disputed the request for payment or where the request for payment is made while the consumer is out of town on vacation because the consumer had not made a written dispute made to the contractor. If such egregious terms are to be contained within a construction contract they should be the subject of negotiation between the parties and not due to the mandates of the law.

Terry Humphrey, Executive Director

Jayhawk Tower • 700 SW Jackson, Suite 706 • Topeka, Kansas 66603-3758 • 78

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March 7, 2002

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E-Mail: triallaw@ink.org

Sec. 7(1) provides that an escrow agent, who is being paid for his services by the owner, is not liable to a party to the transaction unless the agent has breached his fiduciary duty to a beneficiary of the escrow agreement. This provision potentially limits the liability of an escrow agent who has negligently performed his duties. Such limitations of liability only result in protecting escrow agents who have negligently performed their duties at the expense of Kansas consumers and governmental agencies.

Sec. 18 of the bill provides that the court or an arbitrator “shall award costs and reasonable attorney fees to the prevailing party.” This provision is known as a “loser pay” or “English” rule and requires the losing side in a trial to pay the winning side’s legal costs and attorney fees. Since the average American family does not have the money to risk the financial hardship and probable bankruptcy if it loses the case, the “English” rule discourages injured persons from holding wrongdoers accountable.

The “loser pay” or “English” rule is directly contrary to longstanding principles of American law regarding payment of attorney fees and costs in litigation. The “American” rule provides that each party is responsible for the payment of their own costs and attorney fees, and protects everyone’s access to the courts and justice.

The American rule regarding attorney fees is a longstanding principle of American law, as demonstrated by the United States Supreme Court’s rejection of the “English” rule in the 1796 decision in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796), where the Court stated that “the general practice of the United States is in opposition to the [English Rule].” More recently, in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-18 (1967), the Supreme Court indicated:

[A]lthough some American commentators have urged adoption of the English practice in this country, our courts have generally resisted any movement in that direction. . . . In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that *the poor might be unjustly discouraged from instituting actions to vindicate their rights* if the penalty for losing included the fees of their opponents counsel. [Emphasis added].

The “loser pay” or “English” rule deters access to the courts and disproportionately affects poor families. This rule ensures that only the wealthy have the financial resources to undertake the risk of filing a civil action. Injured people and their families who are already shouldering the financial burden of another’s carelessness are least able to afford the risk of paying the wrongdoer’s costs and attorney fees. The risk of losing to corporate giants who have the resources to overwhelm the poor leaves the injured vulnerable and deterred from exercising their right to go to court.

It should be noted that the definition of “owner” under Sec. 1 of the bill includes “the State of Kansas, and agencies, instrumentalities and political of the State of Kansas

including counties, towns, districts, boards, and other public bodies.” As such, the State of Kansas and Kansas municipalities would likewise be subject to the egregious time requirements of Sec. 1 and attorney fee provisions of Sec. 18.

Enacting legislation such as SB 616 benefits contractors at the expense of the State of Kansas, Kansas municipalities, and Kansas consumers. SB 616 also potentially limits the ability of such persons from pursuing their legal remedies against the contractor. For these reasons, SB 616 cannot be supported by the KTLA.

Thank you for the opportunity to express our serious concerns about SB 616. We would ask you to oppose this anti-consumer legislation that unjustly benefits Kansas contractors.

KANSAS
ASSOCIATION



OF
SCHOOL
BOARDS



1420 SW Arrowhead Road • Topeka, Kansas 66604-4024
785-273-3600

Testimony on
SB 616 – Concerning Construction Contracts
Before the
Senate Commerce Committee

By

Amy Brunner, Governmental Relations Specialist
Kansas Association of School Boards

March 7, 2002

Madam Chair, Members of the Committee:

Thank you for the opportunity to submit written testimony on SB 616. KASB would like to go on record as an opponent of this bill. In its current form, the bill would affect school districts with respect to payment of construction contracts.

KASB opposes this legislation because it limits retainage to five percent and requires retainage to be paid to the contractor upon substantial completion. This is problematic because school districts will no longer have any leverage to get the punch lists done. If a dispute develops over the punch list, the school district will be forced to litigate the matter because the retainage has already been paid to the contractor. Leaving school districts with no other recourse than litigation will result in increased costs for schools at a time when school budgets are already overburdened.

KASB also opposes the escrow provisions in this bill. SB 616 requires that retainage must be put in escrow and that the contractor earns the interest. This is an unfair provision because it allows contractors to earn interest on money that does not yet belong to them. The retainage is the property of the school district until the project is completed; therefore, any interest earned should belong to that school district.

In summary, this bill would take away leverage for school districts in getting projects completed and award undue interest money to contractors. KASB would urge this Committee not to recommend this bill for those reasons.

Thank you for your consideration.

Senate Commerce Committee
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Attachment 16-1



KANSAS BOARD OF REGENTS

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March 5, 2002

Senator Karin Brownlee, Chairperson
Senate Committee on Commerce
300 S.W. 10th St., Room 136N
Topeka, Kansas 66612-1504

Subject: Senate Bill 616
March 7, 2002 Hearing

Madame Chairperson and Members of the Committee:

My name is Eric King, Director of Facilities for the Kansas Board of Regents. I am unable to attend the hearing on March 7, but I appreciate the opportunity to provide written testimony.

The Board of Regents opposes this bill for the following reasons:

Section 2 requires payment within ten business days. Prompt payment to contractors is a goal that all parties should strive to achieve, however, ten days is not adequate time to review contractor pay applications to ascertain that all invoiced materials and labor have been provided, and then to process the payment through normal state accounting channels. Existing prompt payment statutes requiring payment within thirty days are fair and reasonable.

Section 3 requires that contractors pay their subcontractors within ten business days. There is no mention as to who is to monitor and enforce this requirement. If it is assumed that the Owner will perform this role, this is problematic as the Owner's contract is with the contractor and not the subcontractors.

Section 4 requires an escrow arrangement on retainage for all Kansas construction projects. Further, Section 7 requires the Owner to pay all escrow fees and expenses. This would burden the projects with additional costs and accounting.

Sections 5 & 6 limit the amount of retainage to 5%, vs. the 10% currently withheld, and also require that retainage be paid at substantial completion. On many of our State projects, retainage is the only lever available to ensure performance by a contractor. 5% in many cases, will not provide the incentive to accomplish this. Substantial Completion is the stage of a project where the Owner may occupy the building, but the project is incomplete. Any Owner will tell you that typically, the most difficult stage of a

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project is the period between Substantial Completion and Final Completion. Often, the contractor has left the site, leaving only a skeleton crew to complete the punchlist. To pay the contractor in full at the Substantial Completion stage would leave the Owner without any options to ensure project completion.

Section 16 requires the Owner to notify subcontractors that request information pertaining to payments to Contractors. On any given project, this could be a substantial number of notifications. This again would burden the projects with additional costs and time.

Current practices protect the Owner while attempting to be as fair as possible to the Contractor. Countless state projects have been constructed using these methods - they have stood the test of time.

The Board of Regents' respectfully opposes the bill and asks for your support.

Thank you,

Sincerely,

A handwritten signature in black ink, appearing to read "Eric King", written over a large, stylized circular flourish.

Eric King
Director of Facilities

Cc: Kim Wilcox
Marvin Burris
Dick Carter



CITY OF
WICHITA

TESTIMONY

City of Wichita
Mike Taylor, Government Relations Director
455 N Main, Wichita, KS. 67202
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Senate Bill 616 Contractor Payments

**Delivered March 7, 2002
Senate Commerce Committee**

The City of Wichita opposes Senate Bill 616. The requirements proposed in Senate Bill 616 are not only unneeded, but unworkable.

- The 10 day payment requirement is unreasonable. The checks and balances used at Wichita City Hall to make sure tax funds are spent properly do not allow for such a short payment schedule. Even most private businesses work on a 30 day payment time frame, and even then, most businesses don't consider a bill delinquent until after 60 days. The City of Wichita almost always gets its bills paid within 30 days.
- The requirement that contractors pay subcontractors within 10 days is probably unworkable as well.
- Placing a 5% limits on retainage fees is not appropriate and does not offer taxpayers sufficient protection that large projects are completed satisfactorily. There are some projects that may require higher retainage fees.
- Placing retainage fees in escrow accounts benefits banks, but not taxpayers. Cities should be able to retain control of retainage fees in its own accounts and under its own financial management procedures until the job is completed satisfactorily by the contractor. In some cases, withholding retainage fees, is the only way to make sure a job is completed according to the specifications in the contract, much the same way homeowners may withhold final payment on a home remodeling job until the work is completed and the final punch list is completed.

Senate Bill 616 takes away too much control from City officials responsible for managing public projects and it takes away too much protection from taxpayers who should have confidence that public projects are being completed properly.

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**TESTIMONY OF
ASSOCIATED GENERAL CONTRACTORS OF KANSAS
BEFORE SENATE COMMITTEE ON COMMERCE
ON SB 616**

March 7, 2002

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

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

The Associated General Contractors of Kansas asks that you do not recommend Senate Bill 616 for passage. Rationale for opposition to SB 616 includes the following:

- 1) While the AGC of Kansas supports prompt payment, it feels that government should not legislate contract language and payment terms in the private sector. This should be a negotiating and business decision between the two contracting parties (contractor and its client or contractor and its subcontractor/supplier). There are already provisions in contracts to provide a remedy for all parties to pursue if payments are unduly held.
- 2) Owners would be disallowed the right to negotiate more lenient payments terms, which may result in fewer construction projects being pursued.
- 3) Requiring escrow accounts for retainage would be burdensome for the owner and extremely difficult for the general contractor to maintain and distribute. This would unnecessarily add to the cost of new construction.
- 4) This bill applies to all construction projects. It would be particularly onerous for small commercial and residential construction.

Again, for the reasons outlined above, AGC of Kansas requests that you do not recommend SB 616 favorable for passage. Thank you for your consideration.

Senate Commerce Committee
March 7, 2002
Attachment 19.1