

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Karin Brownlee at 8:30 a.m. on March 11, 2004 in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Kathie Sparks, Legislative Research  
Susan Kannarr, Legislative Research  
Helen Pedigo, Revisor of Statutes  
Nikki Kraus, Committee Secretary

Conferees appearing before the committee:

Richard Cram, Department of Revenue  
Trudy Aron, American Institute of Architects  
Ken Daniel, Midway Wholesale  
Chris Wilson, Kansas Building Industry Association

Others attending:

See Attached List.

Chairperson Brownlee brought the meeting to order.

In regard to the previous day, Senator Barone asked if there is any way to see fiscal impact of private letter rulings on the state revenue.

Richard Cram, Department of Revenue, stated that it was a conflict of interest to say that the state has lost revenue because the state issues the letters.

Senator Emler stated that his clients had nothing in writing; there was no private letter ruling for them, and therefore, there could be nothing based on previous private letter rulings. If these companies were audited and had not been in compliance, the state would have said, "You should have been paying taxes."

Senator Barone pointed out that there are many examples as to why this is not fair because some rulings would allow some to pay taxes and others not. Chairperson Brownlee stated that the law changed last year because the Legislature passed the nexus law and it is with that Amazon.com and Cabela's should be complying. She stated that the law is on the side of the Department of Revenue to make sure that Cabela's pays.

Senator Brungardt asked if there is change in the law, would that overrule private letter rulings. Chairperson Brownlee replied that subsequent law trumps previous law, and specific also tends to trump general; **HB 2005** was silent on streamline sales tax last year.

Senator Steineger asked Mr. Cram about more information, and Mr. Cram replied that the department cannot provide specific taxpayer information in any situation because of confidentiality. He stated that in this situation, however, it would give us more flexibility to say this is what happened in this situation.

Chairperson Brownlee directed the committee's attention to working:

**SB 395—Payment sources of sales tax revenue bonds**

The Chair stated that yesterday's motion to amend the bill failed.

Senator Steineger moved the bill favorable for passage; Senator Buntten seconded.

Following discussion, both withdrew their motion and second.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMERCE COMMITTEE at 8:30 a.m. on March 11, 2004 in Room 123-S of the Capitol.

Senator Wagle stated that she would hate to see this apply only to Wyandotte county. Senator Kerr stated that he was not favorable on legislation, but he did not want to hold it up at this stage because he did not wish to discriminate against Sedgwick county. He stated that he would be favorable to this if he thought the committee had the tax issue cleared up.

Senator Kerr moved to amend SB 395 with the balloon and recommend favorable for passage; Senator Buntun seconded the motion.

Chairperson Brownlee commented that there was going to be a meeting with the Secretary Wagon and Cabela's tomorrow. Senator Barone stated that he would hope that the committee could send the Secretary a message that the issue should also be retroactive. Chairperson Brownlee stated that Mr. Cram would be accompanying the Secretary tomorrow, so he could pass along that message.

Chairperson Brownlee stated that it had been moved and seconded to accept language that affects those bonds already sold.

Motion to amend passed and SB 395 was recommended favorably.

Chairperson Brownlee continued the public hearing on:

**SB 445-Fairness in private construction contracts**

Ms. Aron gave testimony as an opponent of the bill. (Attachment 1)

Senator Emler stated that he had read some stories about egregious errors, but not issues concerning subcontractors. Ms. Aron stated that the owner is not party to contracts between contractor and sub contractors; all are subject to contracts and their agreements should all be spelled out in those contracts. She stated that it is all open to negotiations, and there can be different levels of retainage in contracts in this process of negotiation.

Senator Emler asked if the real issue is retainage; Ms. Aron stated that retainage and how the security, and indemnification process applies. She stated that the AIA has problems with many parts of the bill.

Chairperson Brownlee asked if there were any other questions. She pointed out that a lot of the bill is actually based on AIA documents. Ms. Aron replied that not everyone uses AIA documents. Chairperson Brownlee stated that what is at issue is that contractors can be in a predatory relationship with the subcontractors and the general contractors' non-payment is why that issue is before us. Ms. Aron stated that the AIA represents the owners, and for them, the only leverage they have is to withhold retainage or else there is no leverage.

Chairperson Brownlee stated that then the subcontractors don't get paid. Ms. Aron replied that they could put a lien on the property, but the Chair asked when liens pay out and Ms. Aron said that she could not answer that. Senator Emler stated that sometimes a subcontractor loses a lien because there is a filing time period of 5 months; if they are not paid in 5 months because the general contractor thinks that there is no need to file a lien, the subcontractors lose those rights and then can only sue without lien rights.

Ms. Aron stated that certainly an owner would not want the title to the property to be held up, and would therefore want to put pressure on the general contractor. Chairperson Brownlee stated that many big projects would not be sold. Ms. Aron replied that they would still need financing, and that would be affected.

Senator Barone stated that Ms. Aron's testimony refers to "one more reason not to do business in Kansas." He said that the Legislature has had people say that if Kansas could just be like Missouri, we would be okay; there has been testimony to the contrary regarding the East side of state, though. Ms. Aron stated that owners have a option when coming into a state for the first time, and we need to make sure that we provide a friendly atmosphere. Senator Barone asked Ms. Aron if she was familiar with Missouri law, and she replied that she was not.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMERCE COMMITTEE at 8:30 a.m. on March 11, 2004 in Room 123-S of the Capitol.

Chairperson Brownlee stated that there were around 25 other states who have this type of prompt pay legislation.

Mr. Daniel presented testimony in favor of the bill. (Attachment 2) He commented that he also does business in Missouri, and the world has not ended there because of similar laws.

Senator Emler stated that Missouri has a contractor and subcontractor law, but not one dealing with private contracts and subcontractors. The committee discussed private contracts further.

In response to a question from Senator Emler, Mr. Daniel stated that his company names people on their policy as additional insured. He stated that in California, they literally come after the subcontractors' insurance when subcontractor has done nothing wrong; the insurance of the subcontractor is used to defend the general contractor. He stated that in his businesses, one has to be heavily insured, but, at the same time, subcontractors just want to pay for themselves, not for other people.

Chairperson Brownlee clarified that subcontractors are being forced to indemnify the general contractors.

The Chair stated that the committee would not be able to work **HB 2719** today; she instructed the committee to note the "Construction Project Payment Timeline." (Attachment 3)

Ms. Pedigo presented the committee with possible amendments (Attachment 4)

Senator Barone commented that the amendment had good language because it allows owner to have more than one escrow account if desired, but it does not mandate more than one.

Ms. Pedigo stated that if the committee decided to make the period longer than 30 days notice, they may have intended to just say 30 days, not 30 business days.

Emler moved to amend **SB 445** to strike business in line 26 and 28; Senator Bunten seconded. The motion passed.

Chairperson Brownlee stated that the following day, the committee would be shifting to biosciences, and would meet at 8:15 a.m.

Senator Wagle stated that she could not be at the committee meeting tomorrow, but she wanted to voice opposition to bill **SB 445** because it seemed the bills was medaling in private in contracts.

Chairperson Brownlee pointed out several examples of the state intervening in private contracts and stated that medaling in private contracts was somewhat common.

Ms. Sparks gave the committee several examples including lawn and garden rental agreement laws, uniform commercial codes, and several others.

Chairperson Brownlee adjourned the meeting at 9:30 a.m. The next meeting will be at 8:30 a.m. on March 12, 2004 in Room 123-S of the Capitol.





March 11, 2004

TO: Senator Brownlee and Members of the Senate Commerce Committee

FROM: Trudy Aron, Executive Director

RE: **Opposition to SB 445**



*President*  
Rich Bartholomew, AIA  
Overland Park  
*President Elect*  
Mark Franzen, AIA  
Overland Park  
*Secretary*  
Jan Burgess, AIA  
Wichita  
*Treasurer*  
Michael Seiwert, AIA  
Wichita

*Directors*  
Tracy Anderson, AIA  
Manhattan  
Richard Blackburn, AIA  
Topeka  
Joy Coleman, AIA  
Lawrence  
Douglas R. Cook, AIA  
Olathe  
Timothy J. Dudte, AIA  
Wichita  
Robert D. Fincham, AIA  
Topeka  
John Gaunt, FAIA  
Lawrence  
Jane Huesemann, AIA  
Lawrence  
J. Jones, Associate AIA  
Manhattan  
Michael G. Mayo, AIA  
Manhattan  
Rick McCafferty  
Wichita  
Tom Milavec, AIAS  
Manhattan  
Courtney Miller, AIAS  
Lawrence  
Bobbi Pearson, Assoc, AIA  
Emporia  
C. Stan Peterson, AIA  
Topeka  
Jennifer Rygg, Assoc, AIA  
Wichita  
Jason Van Hecke, AIA  
Wichita  
Kyle Wedel, AIAS  
Manhattan

*Executive Director*  
Trudy Aron, Hon. AIA, CAE  
aron@aiaks.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.) I appreciate the opportunity to testify in opposition to SB 445.

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 more. Other 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 existing ones.

We have never seen a bill that will provide more animosity between owners, architects, contractors, subcontractors and lower tiered subcontractors. If passed, it nearly guarantees that there will be litigation at the end of every building project.

The construction of a building involves many trades and, scores of workers. For example, different firms will provide excavating, structural steel, concrete work, electrical, mechanical, interior framing, drywall, painting, etc. The firm who holds the contract with the owner is responsible for delivering a completed project to the owner at a specified price and time. This firm is responsible for coordinating all the work and making sure it is completed.

The payment deadlines in SB 445 will certainly be cause for friction and debate. The requirement for the owner notifying the contractor within 5 days of an improperly completed or disputed request for payment is ludicrous and will virtually guarantee that each request for payment will be disputed just to give the owner more time to determine that the request is proper.

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 other work. The contractor says the project is complete but when the owner and architect walk through the project, many items are not finished.

The withholding of funds, in many cases, becomes the owner's only leverage to get the contractor to finish the work. We believe the decision on what percentage of funds is retained should remain with the owner. Our current practice gives owners 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. Likewise, the contractor should have the same rights regarding their subcontractors.

This is not a "fairness in private construction act." SB 445 takes away the rights of the owner who pays for the project and gives them one more reason for not doing business in Kansas. Thank you for allowing us to testify in opposition to SB 445. I will be happy to answer any questions you may have.

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Senate Commerce  
03/11/04  
Attach #1



Midway Sales & Distributing, Inc. d/b/a

**MIDWAY WHOLESAL**

Topeka • Salina • Lawrence • Manhattan • Elwood • Kansas City • Wichita

Ken Daniel

**Testimony on Senate Bill 445  
Senate Commerce Committee  
March 10, 2004**

Madame Chairman and Members of the Committee:

My name is Ken Daniel. I am Chairman and C.E.O. of Midway Wholesale. Today I am speaking for myself and my business partners.

I would like to speak in support of Senate Bill 445.

Midway Wholesale is both a supplier and a subcontractor to the construction industry. In fact, more than 99% of our volume is with contractors and subcontractors. We are long-time members of both the AGC and of the National Association of Credit Managers, which are in opposition to one another on this bill.

It pains me greatly to advocate for measures which impinge on private contracts, but we have reached the point where the unfairness to those of us at the "bottom of the food chain" has reached an unbearable level. I see no way for the situation to correct itself. In fact, it continues to get worse and worse.

In 1970, when I started Midway Wholesale, the documents we had to accept from purchasers of our products and services were simple, straightforward, and fair. Over the years, more and more conditions and "boilerplate" have been added to those documents until today they are so biased in favor of those above us on the food chain that we are left only with a choice between high risks or no sale. We call this the "tyranny of the boilerplate".

There is also the "tyranny of the checkbook", where the weaker party is always "wrong" until they agree to the stronger one's conditions.

Virtually all of our customers are highly honorable and treat us fairly even though the documents don't require it. Unfortunately, there are always a few bad actors up the food chain who use the "tyranny of the boilerplate" and the "tyranny of the checkbook" to keep our money.

*Senate Commerce  
03/11/04*

We are not a party to the contracts between building owners and contractors. However, our money is used to leverage and finance those contracts. Some of these contracts are completely financed with subcontractor and supplier money.

A recent trend that is highly disturbing is the dumping of liability onto those lower on the food chain. This is being driven by big insurance companies and a handful of large insurance agencies that specialize in contractor insurance, along with some large building owners. In a nutshell, this makes those of us who are low on the food chain pay for insurance to cover the bad acts of those higher on the food chain. This bill stops that abuse.

Finally, we are often forced to agree to subject ourselves to the authority of out-of-state courts when the jobs are in Kansas. This bill stops that abuse.

I encourage you to pass Senate Bill 445.





SENATE BILL No. 445

By Committee on Federal and State Affairs

2-5

AN ACT concerning private construction contracts; enacting the Kansas fairness in private construction contract act.

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

Section 1. (a) Section 1 through 9, and amendments thereto, shall be known and may be cited as the Kansas fairness in private construction contract act.

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

Sec. 2. As used in the Kansas fairness in private construction contract act:

(a) "Act" means the Kansas fairness in contracting act.

(b) "Bank" means an institution the deposits of which are insured by the federal deposit insurance corporation and which legally is doing business in the state of Kansas.

(c) "Building" shall not mean single-family residential housing and multi-family residential housing of four units or less.

(d) "Construction" means furnishing materials, equipment, labor, supplies or services for the design, planning, construction, reconstruction, installation, alteration, remodeling, repair, demolition or maintenance work, including, without limitation, excavation, backfilling or grading on any real property.

(e) "Contract" means a contract or agreement made and entered into by an owner, contractor or subcontractor concerning construction on real property.

(f) "Contractor" means a person performing construction and having a contract with an owner of real property or with a trustee, agent or spouse of an owner.

(g) "Owner" means a person who holds an ownership interest in real property.

(h) "Person" means an individual, corporation, estate, trust, partnership, limited liability company, association, joint venture or any other legal entity including the state of Kansas.

(i) "Real property" means any building, road, bridge, tunnel, sewer,

POSSIBLE AMENDMENTS

Revisor

March 11, 2004

Senate Commerce  
03/11/04  
Attach # 4

Senate  
03/11/04  
Attach # 4

4-2

1 water or other utility line.

2 (j) "Retainage" means the amount of money withheld from each pay-  
3 ment from an owner or contractor due under a construction project.

4 (k) "State" means the state of Kansas and any department or branch  
5 of state government or any agency, authority, institution or other instru-  
6 mentality of the state.

7 (l) "Municipality" means any city, county, township, school district or  
8 other political or taxing subdivision of the state or any agency, authority,  
9 institution or other instrumentality of a municipality.

10 (m) "Government entity" means the state or any municipality.

11 (n) "Subcontractor" means any person providing materials, equip-  
12 ment, labor, supplies or services for the design, planning, construction,  
13 reconstruction, installation, alteration, remodeling, repair, demolition or  
14 maintenance work, including, but not limited to, excavation, backfilling  
15 or grading on any real property covered by a contract between an owner  
16 and a contractor but not having a contract with the owner.

17 (o) "United States" means the federal government of the United  
18 States and any department or branch of the federal government or any  
19 agency, authority, institution or other instrumentality of the federal gov-  
20 ernment and any corporation wholly-owned by the United States.

21 (p) "Substantial completion" means sufficient completion so that an  
22 owner can occupy or utilize the improvement or portion of the improve-  
23 ment for its intended use.

24 Sec. 3. (a) All contracts for private construction shall provide that  
25 payment of amounts due a contractor from an owner, except retainage,  
26 shall be made within 30 [business] days after the owner receives a timely,  
27 properly completed, undisputed request for payment.

?

28 (b) If the owner fails to pay a contractor within 30 [business] days  
29 following receipt of a timely, properly completed, undisputed request for  
30 payment, the owner shall pay interest to the contractor beginning on the  
31 thirty-first business day after payment was due, computed at 1.5% of the  
32 undisputed amount per month or fraction of a month until the payment  
33 is made.

34 (c) If the owner receives an improperly completed request for pay-  
35 ment or in good faith disputes a request for payment, the owner shall  
36 notify the contractor within ~~five~~ [20] business days of receipt of the improperly  
37 completed or disputed request for payment. No payment shall become  
38 due on such a request until such request is properly completed or the  
39 dispute is resolved. If the owner fails to notify the contractor within the  
40 ~~five-day~~ [20-day] period of any improper completion or dispute, the request for  
41 payment shall be considered proper and the owner shall make payment  
42 thereon in accordance with subsection (a). Any undisputed portion of any  
43 request shall be paid in accordance with subsection (a).

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4-3

1 (d) A contractor shall pay its subcontractors any amounts due within  
2 seven days of receipt of payment from the owner, if the subcontractor  
3 has provided a timely, properly completed, undisputed request for pay-  
4 ment to contractor.

10 business days

5 (e) If the contractor fails to pay a subcontractor within the seven-day  
6 period, the contractor shall pay interest to the subcontractor beginning  
7 on the eighth day after receipt of payment by the contractor, computed  
8 at 1.5% of the undisputed amount per month or fraction of a month until  
9 the payment is made.

10-day

eleventh business

10 (f) If the contractor receives an improperly completed request for  
11 payment or in good faith disputes a request for payment from a subcon-  
12 tractor, the contractor shall notify the subcontractor within five business  
13 days of receipt of the improperly completed or disputed request for pay-  
14 ment. No payment shall become due on such a request until such request  
15 is properly completed or the dispute is resolved. If the contractor fails to  
16 notify the subcontractor within the five-day period of any improper com-  
17 pletion or dispute, the request for payment shall be considered proper  
18 and the contractor shall make payment thereon in accordance with sub-  
19 section (d). Any undisputed portion of any request shall be paid in ac-  
20 cordance with subsection (d).

?

21 (g) The provisions of subsections (d), (e) and (f) shall apply to all  
22 payments from subcontractors to their sub-subcontractors and suppliers.

) strike? modify?

23 Sec. 4. (a) Retainage shall not be withheld on any private construc-  
24 tion project in the state of Kansas, unless an escrow arrangement com-  
25 plying with this act is implemented.

26 (b) An owner may retain no more than 5% of the amount of any  
27 payment due a contractor. Any such retainage shall be deposited into an  
28 escrow account complying with this act no later than the time when the  
29 payment from which the retainage is being withheld is due to the  
30 contractor.

10%

31 (c) A contractor shall not withhold from a subcontractor, and a sub-  
32 contractor from a lower-tier subcontractor, more retainage than the  
33 owner withholds from the contractor, or the contractor from the subcon-  
34 tractor, for that party's work.

35 (d) Retainage may be withheld only until substantial completion of  
36 each separate division of the contract for which a price is stated separately  
37 in the contract or for which a separate price can be ascertained from the  
38 contractor's schedule of values. Upon such substantial completion, such  
39 retainage shall be paid by the owner to the contractor in the manner and  
40 within the time specified in section 3, and amendments thereto.

41 (e) An escrow account, established pursuant to a valid escrow agree-  
42 ment, shall be entered between the escrow agent, the owner and con-  
43 tractor upon the following conditions:

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4-4

- 1 (1) Only banks shall serve as escrow agents.
- 2 (2) The investment of funds held in escrow shall be limited to de-
- 3 posits in banks and obligations of the United States government and the
- 4 state of Kansas.
- 5 (3) As interest or other income on investments held in escrow be-
- 6 comes due, it shall be collected by the escrow agent and paid to the
- 7 contractor.
- 8 (4) The escrow agent shall provide monthly reports to the owner,
- 9 contractor and any subcontractor of the nature and amounts of the in-
- 10 vestments in the escrow account and any additions to or payments from
- 11 the escrow account. Payments from the escrow account shall be made
- 12 only at the direction of the owner who has established the escrow account.
- 13 (5) If an owner has entered into more than one construction contract
- 14 providing for an escrow account, the owner may elect to combine the
- 15 amounts held as retainage under each contract into one or more escrow
- 16 accounts or may establish a separate escrow account for each contract.
- 17 (6) Upon default by or overpayment to the contractor as determined
- 18 by a court of competent jurisdiction or an arbitrator, the escrow agent
- 19 shall pay the owner the amount determined to be due on account of the
- 20 default or overpayment. Such amount shall be subject to the redemption
- 21 value of the investments in the escrow account at the time of
- 22 disbursement.
- 23 (7) The escrow account may be terminated upon completion and ac-
- 24 ceptance of the construction project as provided in this act.
- 25 (8) All fees and expenses of the escrow agent shall be paid by the
- 26 owner.
- 27 (9) The escrow account shall constitute a specific pledge to the
- 28 owner. A contractor or subcontractor shall not assign, pledge, discount,
- 29 sell or transfer its interest in an escrow account except to its surety. The
- 30 escrow account shall not be subject to levy, garnishment, attachment, lien
- 31 or any other process.
- 32 (10) The form and terms of the escrow agreement shall be included
- 33 in all solicitations for construction projects and shall be given to the con-
- 34 tractor prior to entering into a contract.
- 35 (11) The owner shall not be liable for a breach of fiduciary duty of,
- 36 or a failure to perform by, the escrow agent under the escrow agreement
- 37 as established by a court of competent jurisdiction, or for failure of a
- 38 financial institution to honor investments issued by it that are held in the
- 39 escrow account.
- 40 (12) An escrow agent shall not be liable to a party to the escrow
- 41 agreement unless the escrow agent is found by a court of competent
- 42 jurisdiction to have breached its fiduciary duty to a beneficiary of the
- 43 escrow agreement.

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1 (f) If an owner fails to deposit retainage that is being withheld or fails  
2 to make payments due as required by this act, the owner shall pay an  
3 additional 1.5% of the amount not deposited or paid for each month or  
4 fraction of a month until such retainage is deposited or paid.

5 (g) (1) A contractor may tender to an owner acceptable substitute  
6 security with a written request for release of retainage in the amount of  
7 the substitute security. To the extent of the security tendered, and pro-  
8 vided the contractor is not in default of any of its obligations under the  
9 contract, the contractor shall be entitled to receive cash payment of re-  
10 tainage already withheld and shall not be subject to the withholding of  
11 further retainage.

12 (2) A subcontractor may tender to a contractor acceptable substitute  
13 security with a written request for release of retainage in the amount of  
14 the substitute security. To the extent of the security tendered, and pro-  
15 vided the subcontractor is not in default of any of its obligations under  
16 the contract, the subcontractor shall be entitled to receive cash payment  
17 of retainage already withheld and shall not be subject to the withholding  
18 of further retainage.

19 (h) If the tender described in subsection (g) is made after retainage  
20 has been withheld, the party holding the retainage, within five business  
21 days after receipt of the tender shall direct the escrow agent to pay over  
22 to the tendering party the withheld retainage to the extent of the substi-  
23 tute security. If the tender of substitute security is made before retainage  
24 has been withheld, the party entitled to hold retainage, to the extent of  
25 the substitute security, shall refrain from withholding any retainage from  
26 all future payments properly due.

27 (i) The following shall constitute acceptable substitute security for  
28 purposes of this section:

29 (1) Negotiable securities with a market value equal to or greater than  
30 the amount of retainage, including:

- 31 (A) Obligations of the United States government;
- 32 (B) obligations of the state of Kansas; and
- 33 (C) certificates of deposit issued by banks.

34 (2) A retainage bond naming the owner as obligee, issued by a surety  
35 company authorized to issue surety bonds in the state of Kansas, in the  
36 amount of the retainage to be released and conditioned upon substantial  
37 completion of the work of the party tendering the bond.

38 (3) An irrevocable and unconditional letter of credit in favor of the  
39 owner, issued by a bank, in the amount of the retainage to be released.

40 (j) The party depositing the substitute security shall be entitled to all  
41 interest or other income earned on any such substitute security deposited  
42 by such party.

43 (k) Upon substantial completion of the work of the party tendering



4-9

1 the substitute security, such substitute security shall be returned to such  
2 party.

3 (1) Upon final completion of the construction project, any amounts  
4 remaining due shall be paid within the time specified by section 4, and  
5 amendments thereto, conditioned upon the receipt of the following by  
6 the party from whom payment is requested:

7 (1) A properly completed application for final payment.

8 (2) A release, if required, of all payment claims and claims of lien  
9 against the owner arising under and by virtue of the contract in question,  
10 other than such claims, if any, as may be specifically excepted by the  
11 contractor or subcontractor or supplier from the operation of the release.

12 (m) If a party obligated to make payment fails to pay such amounts  
13 within the time specified in section 4, and amendments thereto, such  
14 party shall pay an additional 1.5% of the amount not paid for each month  
15 or fraction of month until payment is properly made.

16 (n) Within five business days after the owner makes a payment or  
17 when the owner directs disbursement from an escrow account, the owner  
18 shall give notice of the date and amount of the payment to any subcon-  
19 tractor who makes a written request to the owner for such notice.

20 (o) In no event shall any retainage be withheld when a payment or  
21 performance bond has been provided by the contractor or subcontractor.

22 Sec. 5. If any payment properly due, including payment of retainage,  
23 is not made or if retainage is not deposited in an escrow account in ac-  
24 cordance with the provisions of this act, the contractor and any subcon-  
25 tractors, regardless of tier, shall be entitled to suspend further perform-  
26 ance under any contract for construction until payment, including  
27 applicable interest, is made or retainage, including applicable interest, is  
28 deposited. Any party to whom payment is due shall be entitled to recover  
29 from the party obligated to make payment any costs incurred on account  
30 of the suspension.

31 Sec. 6. (a) No provision in a contract or subcontract for construction  
32 in the state of Kansas that purports to waive, release or extinguish the  
33 right of ~~a contractor or subcontractor~~ to recover costs or damages, or  
34 obtain an equitable adjustment, for delay in performing the contract or  
35 subcontract, if the delay is caused in whole or in part by acts or omissions  
36 within the control of the other party to the contract or subcontract or  
37 persons acting on behalf of the other party, is against public policy and  
38 void and unenforceable. The section shall not affect the validity or en-  
39 forceability of any contract provision that (1) precludes a contractor or  
40 subcontractor from recovering the portion of any delay costs or damages  
41 that are caused by acts or omissions within the control of the contractor  
42 or subcontractor or persons acting on behalf of the contractor or subcon-  
43 tractor or (2) requires the contractor or subcontractor to give notice of

~~to recover costs or damages, or obtain an equitable adjustment, for delay in performing the contract or subcontract,~~ [The owner,  
sub-subcontractor or supplier]

~~to give notice of~~ [owner,  
sub-subcontractor or supplier]

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4-7

1 any delay.

2 (b) Any provision for or in connection with a contract for construction  
3 which requires a contractor or subcontractor or that person's surety or  
4 insurer to indemnify any party for death or injury to persons or damage  
5 to property not caused by the contractor or subcontractor or its employ-  
6 ees, agents, subcontractors or suppliers, shall be void as against public  
7 policy and wholly unenforceable.

8 Sec. 7. In any action to enforce sections 4 and 5, and amendments  
9 thereto, including arbitration, the court, or arbitrator shall award costs  
10 and reasonable attorneys fees to the prevailing party. Venue of such an  
11 action shall be in the state or federal court for the district or county where  
12 the real property is located.

[may]

13 Sec. 8. The provisions of the Kansas fairness in private construction  
14 contract act shall not apply to [the improvement of] single-family residential  
15 housing and multi-family residential housing of four units or less.

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

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