

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairman Karin Brownlee at 8:35 A.M. on February 1, 2005 in Room 123-S of the Capitol.

Committee members absent:

Senator Susan Wagle-excused

Committee staff present:

Kathie Sparks, Legislative Research
Susan Kannarr, Legislative Research
Helen Pedigo, Revisor of Statutes
Jackie Lunn, Committee Secretary

Conferees appearing before the committee:

Ken Keller-Controller-Western Extralite Company
Bill Miller-Vice President American Sub-Contractors, President and Owner of Building Erection Services Co. And Midwest Crane & Rigging
Jeff Rosen-Attorney-Polsinelli, Shalton, Welte
Dan Haake-Sub-Contractor-Mark One Electric
Kathy Tolle-National Assoc of Credit Managers
Kathy Damron-Kansas City Kansas Area Chamber of Commerce
Thomas E. Farrar-Advanced Building Systems, Inc.

Others attending:

See attached list

Chairperson Brownlee opened the meeting by asking Kathie Sparks from Legislative Research to give an explanation of **SB 33**. Ms. Sparks stated that **SB 33** is called the Kansas Fairness in Private Construction Act. Ms. Sparks explained the bill. (Attachment 1) She also referred to a chart comparing **SB 33** to **SB 445** (**SB 445** from the last Legislative session) (Attachment 2), which showed the major difference between **SB 33** and **SB 445**.

Chairperson Brownlee opened the hearing on **SB 33** by introducing the first conferee, Ken Keller, Controller for Western Extradite Company. Mr. Keller, after giving a brief introduction of his company, Western Extradite; a wholesale distribution of electrical supplies to contractors, stated his purpose was to introduce the committee to **SB 33**. He stated that **SB 33** deals with fairness, the Golden Rule. This proposed legislation makes sure the General Contractor, the Sub-Contractor and supplier are treated fairly and paid timely for work properly preformed. He referred to his written testimony (Attachment 3). During his testimony regarding **SB 33** and also referred to the binder entitled "The Kansas Fairness In Private Construction Contract Act".(Attachment 4). In closing Mr. Keller urged the Committee to pass **SB 33**.

Chairperson Brownlee introduced Bill Miller, Vice President of the American Subcontractors Association, President and Owner of Building Erection Services Co. And Midwest Crane & Rigging. Mr. Miller presented written testimony (Attachment 5) and stated the American Subcontractors Association, Greater Kansas City Chapter representing 70 subcontractors is in favor of **SB 33**. Mr. Miller also explained the bill and the advantage to all involved for this bill to pass. He referred to an article from the Construction Contracts Law Report-Volume 28, Number 14, July 9, 2004 (Attachment 6) which listed the 2003 "Billion Dollar Club". This article ranked the Construction Firms and listed their 2003 revenues. Mr. Miller also referred to a study done by Clemson University regarding contractual agreements with contractors and subcontractors.(Attachment 7). Mr. Miller stated that Missouri had a bill in place. There are 41 states with prompt pay requirements for public work, 18 states have requirements for private work and 10 other states have legislation pending in one form or another. In closing Mr. Miller stood for questions.

There was some discussion on the Missouri bill. The consensus is **SB 33** is a better bill than what Missouri has in place. There was other discussion on how many states have laws in place with reference made to a chart contained in attachment 4 showing the national summary of states with laws in place. Also, there was some discussion on the number of days to issue a dispute on payment of monies to

CONTINUATION SHEET

MINUTES OF THE Senate Commerce at 8:30 A.M. on February 1, 2005 in Room 123-S of the Capitol.

subcontractors. Reference was made to KA 60-206 and it was determined that this statute is in reference to court time and not contract time. Mr. Miller agreed that the 5 days should definitely be defined a little better in **SB 33**. There was some discussion and questions regarding disputes taken to court in order to receive monies owed. Mr. Miller stated the cost of a lawsuit in most cases is as much or more than the monies owed.

With no further questions, Chairperson Brownlee introduced Jeff Rosen, attorney for Polsinelli, Shalton, Welte. Mr. Rosen did not provide written testimony. He stated he had been an attorney representing contractors and subcontractors for 27 years. He feels his experience and knowledge gives him the expertise he needs to testify that this is a very good bill. His representation of contractors in other states gives him knowledge of bills in other states and he stated that if **SB 33** would pass, Kansas would by far have the best laws governing prompt pay of contractors and subcontractors. Mr. Rosen stated during his 27 years representing subcontractors the two most asked questions by subcontractors are: "Can I get my retainage and can I get the attorney fees paid" and his answer is "no" and "no". Mr. Rosen feels that the subcontractors have to wait too long for their money which puts them in compromising positions with employees and suppliers. He stated this is a good and fair bill and urged the committee to vote in favor. In closing he stated passage of this bill would not only benefit the contractors and subcontractors but also their suppliers and their employees.

Chairperson Brownlee introduced Dan Haake representing Haake Foundations, Inc., a cement contractor in the state of Kansas. Mr. Haake stated he was in favor of **SB 33**(Attachment 8). He also presented a chart entitled "Cost of Money Analysis" from his company.(Attachment 9) In closing Mr. Haake asked the Committee to set minimum standards for Owners, Contractors and their Subcontractors by passing this Fairness in Contracting Act.

Chairman Brownlee introduced Kathy Tole with the National Association of Credit Managers. Ms. Tole urged the committee to pass **SB 33**. She stated when the subcontractors have to wait for their monies it affects their line of credit and puts their credit rating at risk. (Attachment 10) She stated that the National Association of Credit Managers was in favor of **SB 33**.

Chairperson Brownlee introduced Kathy Damron representing the Kansas City Kansas Area Chamber of Commerce. Ms. Dacron spoke in favor of **SB 33** making reference to **SB 445** from the previous session stating **SB 33** is a fair and good bill. (Attachment 11)

Chairperson Brownlee introduced Thomas Farrar representing Advanced Building Systems, Inc. Mr. Farrar spoke in support for **SB 33** and stated this type of legislation is long overdue in the state of Kansas. (Attachment 12) He also stated that many times the only way to stay current with his subs and suppliers is to borrow money, and as a small business, it's difficult at best, and not getting any easier with bank and lending institutions regulatory requirements and changes, and the banks expectation of being paid on time, or face the possibility of incurring serious delinquent interest charges. It's a fact that no bank will lend money without charging interest for it and for late payments. **SB 33** will eliminate much of this burden, and sometimes a nightmare. He feels that subcontractors should not be in the finance business and feels subcontractors should be a team player and not a catch all.

Meeting Adjourned at 9:33 a.m. with the next meeting scheduled for Wednesday, February 2, 2005 at 8:30 a.m. in room 123S.

Senate Commerce Committee

Guest List

Date: February 1, 2005

Kathy Tolle	NACM Kansas City Div Inc.
Kathy Tolle	NACM K.C. Div
David F. Massey	NACM K.C. Division, Inc.
Steve Johnson	Kansas Gas Service
Dick Conner	Manhattan Club
Martha Jean Smith	KUMHA
Wendy Williams	KAPA-KEMCA
Jim H. Hoff	Kansas A-F-C
Jim Buyer	ASA
Charles E. Lane	ADVANCED BUILDING
Kathy Lane	KCK Chamber
DAN M HAAKE	HAAKE FOUNDATIONS
Ron Seiber	Hewlett Pack
COREY PETERSON	AGC of KS
Keri Kelly	Kolley Construction Co, Inc., Topeka
Tim Brown	Furner CONST. OF TOPEKA INC.
Mike Beecht	Jackie Braden Builders Assoc.
Mike Murray	Sprint
Carl DeGen	Associates Builders & Contractors
Dave Holtwick	HBA of Greater K.C.
Jim May	Foulston Siedkin LLP
Debbie Kelly	Kansas Inc.
Tom Slattery	AGC KS
Judy Gilson	Amicus of Arch/Ks

January 29, 2005

To: Senate Commerce Committee

From: Kathie Sparks, Principal Analyst

Re: Senate Bill 33 – The Kansas Fairness in Private Construction Contract Act

Section 1: The bill does not allow contracts to waive provisions of this Act.

Section 3: The section establishes the timing for payment from owner to general, general to sub, sub to sub-sub or supplier. If the owner has a dispute over a bill, he has five days to notify the contractor of the dispute. If the bill is undisputed, the owner has 30 days to make payment. Once the 31st day occurs, a 1.5 percent per month charge is added to the bill. The contractor has five days of receipt of payment to make payment to the subcontractor or the 1.5 percent charge is added to the subcontractor's bill. The contractor also has five days to dispute the bill.

Section 4: A maximum 10 percent retainage from owner to general, general to sub, sub to sub-sub or supplier is allowed. A contractor may offer the owner an acceptable substitute security with a written request for release of retainage in the amount of the substitute security. Acceptable substitute securities are:

- negotiable securities with a market value equal to or greater than;
- obligations of the United States government;
- obligations of the State of Kansas; or
- certificates of deposit issued by banks.

Additional securities are the following:

- A retainage bond; and
- An irrevocable and unconditional letter of credit in favor of the owner.

If any party fails to pay the retainage as required, an additional 1.5 percent per month will be charged.

Section 5: Failure to pay can result in a suspension of work and a recovery of costs incurred due to the suspension.

Section 6: No provision in a contract or subcontract for construction that waives, releases, or extinguishes the right of a contractor or subcontractor to recover costs or damages, when the delay is caused by acts or omissions within the control of the other party to the contract or subcontract or persons acting on behalf of the other party, is against public policy and void and unenforceable. The bill does not affect the validity or enforceability of any contract or subcontract provision that requires the contractor or subcontractor to give notice of any delay or recover costs that are due to acts or omissions within the control of the contractor, etc.

Senate Commerce Committee

2-1-05
Attachment 1-1

Section 7: In any action to enforce sections 3, 4, and 5, costs and fees will be awarded to the prevailing party. The venue is the court in which the real property is located.

Section 8: The Act does not apply to single family residential housing and multi-family residential housing of four units or less.

Section 9: This Act takes effect after publication in the statute book.

2-1-05

5 rs 0248 FAIRNESS IN PRIVATE CONSTRUCTION CONTRACT ACT

Section	Provision	2004 SB 445	Position
1	Does not allow contracts to waive provisions of this act.	<i>Same.</i>	
2	Definitions.	Includes act, building, state, real property, municipality, government entity, United States and substantial completion definitions. Definitions for construction, person, retainage and subcontractor are different	
3	Establishes timing for payment from owner to general, general to sub, sub to sub-sub or supplier. Lists penalty for nonpayment.	Notice provisions and payment requirements set at 5 or 7 business days.	
4	Retainage amount max @10% and timing for payment also, alternate security instead of retention. Line item release.	5% max retainage. Alternatives to retainage?	
5	Right to stop work for nonpayment.	<i>Same.</i>	
6	Prohibits no damage for delay.	<i>Same.</i>	
7	Loser pays. Venue in district or county where project is located.	<i>Same.</i>	
8	Eliminates residential or 4 units or less.	<i>Same.</i>	
9	Effective date.	<i>Same.</i>	

Senate Commerce Committee

2-1-05

Attachment *2-1*

Testimony of Kenneth R. Keller Controller of Western Extralite Company
Proponent of Senate Bill 33, the Kansas fairness in private construction contract act.
February 1, 2005

Madam Co-Chairman,

First, let me thank you and your committee for the opportunity to address you on the merits of SB 33, the Kansas fairness in private construction contract act.

I'm Ken Keller, Controller of Western Extralite Company. We are a wholesale distributor of electrical supplies and we supply electrical products to the construction industry. We have stores in Topeka, Lawrence, Lenexa, Leavenworth and Manhattan plus various locations in Missouri. My purpose today is to introduce you to SB 33. Bill Miller and others will get more into the specific details.

SB 33 deals with fairness, the Golden Rule, treat others as you want to be treated. A current Kansas State Senator recently told me "when it comes to construction, sub contractors are treated as sub-human.

Our proposed legislation will insure the general contractor, sub-contractors, and suppliers are treated fairly and paid timely for work properly performed. For those of you who might be unfamiliar with a construction project, please turn to the red tab in the front portion of your handout. Let's take a moment to review the organizational structure of a construction project

First, you have the owner. He is responsible for financing the project, hiring the general contractor, and receives the economic gain from the completion of the project.

Tier I is the general contractor, who is responsible to see the project is completed as specified and on time.

Tier II is the sub-contractor, who actually performs the work. The plumber, electrician, heating and air conditioning etc. On occasion, a supplier can be Tier II when he is supplying material directly to the general contractor.

Tier III is normally the supplier who provides material for the project. Sometimes on a large job the sub-contractor will hire another sub-contractor to help and he becomes Tier III and the supplier goes to Tier IV

There are several parts to our proposed legislation. Virtually all of it comes from the AIA American Institute of Architects standard contract and related documents. This is the Bible of the construction industry. For your convenience we have supplied you with some of the documentation in the back of your handout. We have tabbed the pages and highlighted the paragraphs that relate to our bill.

The first item is prompt pay. You must be paid timely for work performed. SB 33 calls for the owner to have 30 calendar days from the receipt of an approved payment request to pay the general contractor. The owner has 5 days to notify the general contractor in writing of any exceptions. After 5 days the billing is presumed to be acceptable and is payable in the 30 days allowed. In the event there is an exception, the unchallenged portion of the bill is due in 30 days. Once the general has been paid, he has 5 days to pay the sub-contractor who in turn has 5 days to pay the supplier.

What options exist if the payment schedules are not met? First, the unpaid party can stop work, or in the case of a supplier, he can stop delivering materials and neither will be in default of the contract. If this action doesn't get the unpaid party paid, then a claim can be made in court and if successful, the unpaid party will get the money due plus interest at 1.5% per month plus he will be reimbursed for the court cost and reasonable attorney's fees by the losing party. The venue for any court action or arbitration will be in the county where the project is located and subject to Kansas Law. No longer will we deal with contracts calling for venue in New Jersey, Arizona, or wherever.

Our proposed legislation deals with changes to retainage. Retainage is an amount withheld from each payment and is theoretically paid when the project is completed. The purpose of retainage is to provide leverage for the owner and the general contractor to see that the work is performed as specified. Retainage should be paid once the project is complete.

Retainage will be limited to 10% and the general contractor cannot withhold more retainage than the owner is withholding from him.

Our proposed legislation provides for specific alternative securities that can be provided in lieu of cash retainage. This will protect the owner and the general contractor and will provide working capital for

Senate Commerce Committee

2-1-05
Attachment 3-1

the sub-contractor. Examples of this are a retainage bond or letter of credit from a bank which can be provided to protect the owner and the general contractor. The dollars freed up can be used on other jobs.

Currently, retainage can be tied up for 18 months or longer which inhibits the working capital of the contractor or sub-contractor. A bank will not give you credit on your borrowing base for receivables over 60 days old.

SB 33 provides that you receive your retainage once your work is complete as set forth in the schedule of values. The schedule of values is part of the contract and defines the timing and the value of work to be done and is used as a basis for payment. Once your work is completed and accepted, then you will be paid your retainage. This will allow sub-contractors that perform work early in the contract such as earth movers, steel erection and concrete work to get paid when their work is accepted without having to wait months, even years.

In summary, much of SB 33 comes right from the AIA standard contract.

SB 33 does not apply to single family dwellings or multi-family units of 4 or less.

The fiscal note is "0".

Fairness is all we ask.

I urge your support and passage of SB 33, the Kansas fairness in private construction contract act.

Thank you.

Senate Commerce Committee

2-1-05

Attachment 3-2

***THE KANSAS
FAIRNESS IN PRIVATE
CONSTRUCTION
CONTRACT ACT***

Senate Commerce Committee

2-1-05

Attachment 4-1

Construction Project Payment Timeline

30 Day Cycle	1st Month	25	30
Start Work Day 1			
Submit Invoice On Day 25 for Work Thru Day 30			
General Contractor Invoices Owner after 5 Day Approval Period			

31	40	2nd Month	60
Architect Approval - 10 Days			
Owner Pays Contractor			

61	65	70	3rd Month
Contractor Pays Subcontractor			
Subcontractor Pays Supplier			

At the start of the project, subcontractor is paid 65 days after start up.
 Payment is always one month behind

Senate Commerce Committee

2-1-05

Attachment 4-2

CONTENTS

1. LETTERS FOLLOWED BY LIST OF SUPPORTERS
2. APPLICATION AND CERTIFICATE FOR PAYMENT
(AIA DOCUMENTS)
3. EDITORIALS
4. RETAINAGE FOR OWNERS AND CONTRACTORS
5. RETAINAGE PRACTICE IN CONSTRUCTION
INDUSTRY
6. STATES WITH PROMPT PAY LAWS, PUBLIC AND
PRIVATE
7. AIA DOCUMENTS – STANDARD FORM OF
AGREEMENT BETWEEN CONTRACTORS AND
SUBCONTRACTORS
8. AIA DOCUMENT – GENERAL CONDITIONS OF THE
CONTRACT FOR CONSTRUCTION

Senate Commerce Committee

2-1-05
Attachment 4-3

**The Kansas Fairness in
Private Construction
Contract Act**

**Ken Keller, Controller
Western Extralite Company
1470 Liberty Street
Kansas City, Missouri 64102**

February 2005

Senate Commerce Committee

2-1-05

Attachment

4-4

WESTERN EXTRALITE COMPANY

DISTRIBUTORS OF QUALITY ELECTRICAL & VOICE DATA PRODUCTS

1470 Liberty Street • Kansas City, MO 64102-1018

www.westernextralite.com

January 25, 2005

Kansas City, MO

1470 Liberty Street
Kansas City, MO 64102
816-421-8404

St. Louis, MO

2444 Northline Industrial Dr.
Maryland Heights, MO 63043
314-432-4560

Lee's Summit, MO

105 N.W. Victoria Drive
Lee's Summit, MO 64086
816-246-8300

N. Kansas City, MO

1124 Howell Street
N.K.C., MO 64116
816-421-5888

St. Joseph, MO

1302 Frederick Ave.
St. Joseph, MO 64501
816-364-4500

Jia, MO

1501 Thompson Blvd.
Sedalia, MO 65301
660-827-3880

Tiffany Springs, MO

9701 N. Conant Avenue
Kansas City, MO 64153
816-880-9900

Warrensburg, MO

608 N. Ridgeview Drive
Warrensburg, MO 64093
660-429-6900

Lawrence, KS

1811 West 31st Street
Lawrence, KS 66046
785-843-4174

Leavenworth, KS

4601 Brewer Place
Leavenworth, KS 66048
913-727-2941

Lenexa, KS

14903 W. 99th Street
Lenexa, KS 66215
913-438-1777

Manhattan, KS

221 Colorado Street
Manhattan, KS 66502
785-5665

Topeka, KS

4024 S. Topeka Blvd.
Topeka, KS 66609
785-266-3541

The Honorable Jay Emler
Kansas State Capitol Building, Room 449-N
300 SW 10th
Topeka, KS 66612

Dear Senator Emler:

RE: THE KANSAS FAIRNESS IN PRIVATE CONSTRUCTION
CONTRACT ACT

The purpose of this letter is to introduce you to and ask your support of Senate Bill #33, the Kansas Fairness In Private Construction Contracts Act.

The purpose of this proposed legislation is to ensure that the general contractor, the subcontractors, the subcontractors to a subcontractor, and material suppliers on construction projects are treated fairly, paid timely when work is properly performed.

First, let me introduce myself. I am Ken Keller, Controller of Western Extralite Company. We are a wholesale distributor of electrical supplies used in the construction industry. We have 13 locations, 5 of which are located in Kansas, and they include Topeka, Lawrence, Manhattan, Lenexa, and Leavenworth. Some of the elements of the proposed legislation are:

- Prompt pay – The owner must pay the general contractor in 30 days. The general in turn must pay the subcontractor in 5 days, and the subcontractor must pay his subcontractor or the supplier within 5 days. Both the owner and the general contractor have 5 days to dispute payments requests. If they do not, then they are deemed to be appropriate and need to be paid according to this schedule.
- In the event that payment is not made, then interest would accrue at 1-1/2% per month until paid. If payment still is not received, the general contractor, subcontractor, and suppliers have the right to stop work or, in the case of the supplier, stop supplying material and not be in default of the contract.

Senate Commerce Committee

2-1-05
Attachment 4-5

January 25, 2005

Page 2

- If legal action is required, the venue will be in the county where the project is located and will be under Kansas law. The loser of the legal action will be required to pay reasonable legal costs and attorney fees of the winner.
- Retainage will be limited to 10%. The general contractor cannot retain a higher percentage of retainage than is retained by the owner. The proposed legislation provides for alternative securities, which may be used in lieu of retainage. These securities are set forth in the proposal and would free up working capital for those that have retainage withheld. An important element of the retainage factor is the requirement that subcontractors are paid their retainage after substantial completion of work. Substantial completion is defined within the bill as sufficient completion, so that an owner can occupy or utilize the improvement or a portion of the improvements for its intended use. This will allow the subcontractors that perform work early in the project, such as earth movement, steel erection, and concrete work to be paid their retainage once they are completed. As it now stands, the retainage is often times tied up for 18 months or longer, even though their work is entirely performed.
- Our proposed legislation does not apply to single family dwellings or multi-family dwellings of four or less.
- The fiscal note on our proposed legislation is zero.


We request that you set a hearing date on this bill as quickly as possible.

Our list of supporters is substantial and growing daily. Some of these are: National Association of Credit Managers, Electric League of Missouri and Kansas, NECA Kansas City Chapter, The Sheet Metal & Air Conditioning Contractors, National Association of Kansas City, Fire Sprinklers Association of Kansas City, American Subcontractors Association of Kansas City, plus countless individual business owners involved in the construction industry.

Again, we ask for a hearing and the support of your committee.

Please contact me should you have any questions or comments regarding our proposed legislation.

Sincerely,



Kenneth R. Keller
Controller Senate Commerce Committee

2-1-05
Attachment 4-6

Construction Organizational Chart

Owner

Tier I General Contractor

Tier II Subcontractor or supplier to
general contractor

Tier III Subcontractor to a subcontractor
or a supplier to a subcontractor

Senate Commerce Committee

2-1-05

Attachment

4-7

**The Kansas Fairness in
Private Construction
Contract Act**

**William Miller, President
Building Erection Service Co., Inc.
15585 S Keeler
Olathe, Kansas 66051**

February 2005

Senate Commerce Committee

2-1-05
Attachment 4-8

BUILDING ERECTION SERVICES COMPANY

15585 S. KEELER • P.O. BOX 970 • OLATHE, KANSAS 66051-0970
(913) 764-5560 • FAX (913) 764-2317

January 28, 2005

The Kansas Senate Commerce Committee
Hon. Karin Brownlee and Hon. Nick Jordan, Chairpersons
Hon. Committee Members

Re: Senate Bill 33

As Owner and President of Building Erection Services Co., Inc., I am writing to you to ask that you vote in favor of Senate Bill 33, which will insure that we are paid timely for our work and materials furnished for private construction projects in Kansas. Our labor must be paid weekly as well as federal withholding taxes and material suppliers demand payment within 30 days.

It has become a serious cash flow problem within the Construction Industry and has forced many smaller contractors out of business. Eighteen states currently have payment requirements on private work and forty-one states have payment requirements for public work. Fair contracts can not be negotiated between parties when one party is much stronger than the other.

The only way to protect the weaker from the predatory practices of the strong is to put in place legislation that requires payment when due, and punish those who do not pay for work timely performed and materials furnished.

This Bill will have a positive fiscal impact on the State of Kansas by reducing the cost of business for subcontractors, which increases profits. This Bill, also will decrease litigation and ease the caseload pressure on our court system.

Sincerely,



William R. Miller
President
Building Erection Services Co., Inc.

Senate Commerce Committee
2-1-05

Attachment 4-9



**The Kansas Fairness in
Private Construction
Contract Act**

**Thomas Farrar, President
Advanced Building Systems, Inc.
Kansas City, Kansas**

February 2005

Senate Commerce Committee

2-1-05

Attachment

4-10

January 31, 2005

The Senate Commerce Committee
Hon. Karin Brownlee & Nick Jordon, Chairpersons
Kansas State Capitol Building
300 SW 10th Street
Topeka, Kansas 66612

Senate Committee Members:

Jim Barone, Jay Elmer, Laura Kelly, Roger Reitz, Jean Schodorf, Susan Wagle, David Wysong

Re: Senate Bill 33 – Kansas Fairness in Private Construction Contracts Act

Dear Honorable Senators:

My name is Thomas E. Farrar. I'm owner and president of Advanced Building Systems, Inc., a sub construction company in Kansas City, Kansas. We established our company in 1987, and have operated in several states, but most of our work is confined to Kansas & Missouri.

As a subcontracting company, we have encountered many unfair contract agreements over the years, and do not have much remedy to take exception to the unfair contract language. Some contract agreements may be an equitable agreement for the most part, but usually leave no or little provisions or remedies for slow payment, non-payment, recovery of costs incurred for project delays not caused by your company or personnel, the right to stop work for non-payment, and the prompt collection of retainage. As it stands today, if you can't negotiate the unfair language out of the contract or ADD provisions in to protect your company, your only choice is to not sign the agreement which translates into no job, or sign the contract agreement and assume the risks. When contracting is your livelihood, it's a terribly agonizing decision to turn down profitable work.

Therefore, I would like to say with much excitement, **I'm in favor of Senate Bill 33** and all it has to offer. The bill is extremely comprehensive and covers most or all of the items I mentioned above, i.e. slow pay, recovering damages for delays, retainage, etc. The cost of operating a construction company now days is extraordinary. A lot of our costs are insurance driven, but also finance driven. The high cost of insurance is something everyone has to deal with, but the cost of financing money to pay our sub's and suppliers because of slow payment, forced additional costs we may have to incur to accelerate a schedule because of delays caused by others, and the cost to finance project retainage has been the burden of subcontractors. Our retainage on any given project could run into several thousand if not hundreds of thousands of dollars, and without this bill and retainage reform, it's anybody's guess as to when retainage will be released on the project.

(Cont. pg 2)

Senate Commerce Committee

2-1-05
Attachment 4-11

Page 2
January 31, 2005
Senate Bill 33

Retainage is typically 10% of your contract amount which was designed years ago to protect the owner, basically to give the owner some leverage to help insure his construction project is completed properly and on time. The problem is, it's usually up to the owner and sometimes the general or prime contractor when the retainage will be released. That could involve several months after your work has been completed. The retainage payment may be held up because of some problem on the job out of your control, or waiting on a dispute to get settled between the owner/general contractor and another subcontractor which could take months or years. The way contract language is written now, it's the owners call and/or the general contractors call on when to release the retainage. That's more money not in your pocket, typically a lot of your profit. So your cash flow is held up, but your bills keep coming in, which means more finance charges you incur to keep your bill paying current. We are also material men (furnish material on projects). None of our suppliers accept retainage of any kind on their material they provide/deliver, so many times we end up having to finance the 10% portion of retainage on their bill, and pay our supplier in full.

An unfair subcontract agreement or a subcontract agreement with unfair language or no provisions or rights to collect other than a mechanic's lien means one thing, the subcontractor is out of pocket money that is due him. The subcontractor assumes the burden for slow pay, long retainage payment delays, and a host of other costs incurred only by the subcontractor, and its sub's.

Senate Bill 33 address' these issues and will level the playing field for all contracting parties involved, including the general or prime contractors. There is also language in the bill to help the general contractor's rights to fair contracting between them and owners.

Please give this bill the careful and prudent consideration it deserves. I plan on sub-contracting for many more years in the great State of Kansas. My time would be much better spent and more profitable if I didn't have to spend so much of my time trying to collect money that is due me, or planning another way to finance more cash flow.

Thank you for your review and consideration !!

Respectfully Submitted,

Thomas E. Farrar
Advanced Building Systems, Inc
Sb33.corr.1-31-05

Senate Commerce Committee

2-1-05

Attachment

4-12

**The Kansas Fairness in
Private Construction
Contract Act**

**Tonya Bair, Vice President
Bair Company
2785 W 247th Street
Louisburg, Kansas 66053**

February 2005

Senate Commerce Committee

2-1-05
Attachment 4-13



(913) 681-2407

2785 W. 247th STREET
LOUISBURG, KS 66053

Fax (913) 947-7223

January 28, 2005

The Senate Commerce Committee
Hon. Karin Brownlee & Nick Jordan, Chairpersons
Kansas State Capitol Building
300 SW 10th Street
Topeka, Ks. 66612

RE: Senate Bill No. 33

Dear Senators:

I am writing to you as Vice President on behalf of my family business. We currently employ 30 employees and are asking you to support passage of Senate Bill No. 33.

Passing this bill is very important to us and to our customers. Prompt payment is essential for a small business like us to stay competitive and continue running our business. If we are not promptly paid by our customers, who usually are General Contractors, we have to fund payments to our employees and suppliers from other sources and that will incur substantial additional costs to us.

We are frequently asked to assume the liability for the negligent actions of these General Contractors either contractually or through an additional insured endorsement to our GCL policy.

Thank you in advance for your support of these bills. Please feel free to contact me personally if you have any questions regarding the above.

Respectfully,

Tonya Bair
Vice President

Senate Commerce Committee

2-1-05

Attachment 4-14

**The Kansas Fairness in
Private Construction
Contract Act**

**David Gabert, Vice President of Sales
Builders Steel Company
601 E 12th Ave.
North Kansas City, Missouri**

February 2005

Senate Commerce Committee

2-1-05
Attachment 4-15



BUILDERS STEEL COMPANY

FABRICATORS AND ERECTORS OF STRUCTURAL STEEL AND MISCELLANEOUS IRON WORK
P.O. BOX 12598 • 601 E. 12TH AVE. • NORTH KANSAS CITY, MO 64116
(816) 471-1628 • FAX (816) 471-3692



January 28, 2005

Bill Miller <bmiller@builderec.com>

Building Erection Services

Re: Senate Bill No. 33

Dear Sir:

Please accept this letter as our authorization for your use in support of *Senate Bill 33*. Since we are a steel fabricator and erector, we like your company, are one of the first companies on site, and continually fight the same issues with prompt pay and retainage discussed in this bill.

While we have been fortunate with minimal cases in the legal action issues, we still support these as stated in the bill as being "*more subcontractor friendly*".

Since we have been in business since 1927 we have seen the legal issues becoming more and more slanted towards owners and contractors and not the subcontractors. We also feel this needs to change, and greatly appreciate your efforts in these areas on our behalf.

Please let us know if we can be of any further support.

Sincerely submitted

David Gabert
Vice President of Sales

Senate Commerce Committee

2-1-05
Attachment 4-110

**The Kansas Fairness in
Private Construction
Contract Act**

**Doug Carlson
C & O Electric Sales Company
10201 West 105th
Overland Park, Kansas 66212**

February 2005

Senate Commerce Committee

2-1-05

Attachment 4-17

Subject: [Fwd: Senate Bill 33]

Date: Fri, 21 Jan 2005 10:21:46 -0600

From: Doug Carlson <doug.carlson@candoelec.com>

To: kkeller@westernextralite.com

Per your request.

Good luck,

Doug

----- Original Message -----

From: - Fri Jan 21 10:20:38 2005

X-Mozilla-Status: 0001

X-Mozilla-Status2: 00800000

Message-ID: <41F12BD5.3060901@candoelec.com>

Date: Fri, 21 Jan 2005 10:20:37 -0600

From: Doug Carlson <doug.carlson@candoelec.com>

User-Agent: Mozilla/5.0 (Windows; U; Win98; en-US; rv:1.4) Gecko/20030624
Netscape/7.1 (ax)

X-Accept-Language: en-us, en

MIME-Version: 1.0

To: brownlee@senate.state.ks.us

Subject: Senate Bill 33

Content-Type: text/plain; charset=ISO-8859-1; format=flowed

Content-Transfer-Encoding: 7bit

Dear Karin,

The environment that many small business owners must operate under in our state is not equitable and continues to put these small businesses at risk of failure. Most sub-contractors are small businesses and the labor and materials that they supply on a construction project represent almost the entire budget that the small business operates with.

Senate Bill 33 provides fair payment of the material and labor bill by the General Contractor to those sub contractors by enforcing the amount of time in which their expenses need to be paid and limits the amount of retainage or the amount that the General Contractor may hold back until completion of the job to 10%. It also proposes line item releases so major project materials and labor bills cannot be held up for months solely for a small issue of contention.

Other small businesses involved in this process are the suppliers to the many sub contractors. When the sub's are paid they must also pay the supplier in the same amount of time. That is only fair and accurately describes the Senate Bill 33, The Kansas Fairness in Private Construction Contract Act.

We are also a small business that sells into the construction market and have been for forty years this year. If our industry is to prosper we need to bring a more uniquely fair process for all of us to be paid.

Thank you for your time and consideration.

Sincerely,

Doug Carlson

Senate Commerce Committee

2-1-05
Attachment 4-18

**The Kansas Fairness in
Private Construction
Contract Act**

**Ardyce Shipman
Complete Home Concepts
2401 Burlington
North Kansas City, Mo. 64116**

February 2005

Senate Commerce Committee

2-1-05

Attachment

4-19

Subject: FW: Senate Bill 33

Date: Fri, 28 Jan 2005 09:11:24 -0600

From: Kathy Tolle <ktolle@nacmkc.org>

To: kkeller@westernextralite.com

From: Ardyce Shipman [mailto:ardycs@completehomeconcepts.com]

Sent: Thursday, January 27, 2005 10:17 AM

To: ktolle@nacmkc.org

Subject: Senate Bill 33

Kathy,

This is just a repeat of what I spoke with you about yesterday.

We finished a large project in December, 2001 expecting to receive the retainage within hopefully 3-4 months. Time passed and I inquired as to why we were not being paid and was told, the owners were withholding all retainage, because of problems with the paving of the parking lots. We had nothing to do with any of that.

We finally received our retainage, two payments, the last being in December, 2004.

Ardyce

Complete Home Concepts

2401 BURLINGTON
N KC MO
64116

Senate Commerce Committee

2-1-05

Attachment 420

**The Kansas Fairness in
Private Construction
Contract Act**

**Mark Simpson, General Manager
Coreslab Structures, Inc.
759 South 65th Street
Kansas City, Kansas 66111**

February 2005

Senate Commerce Committee

2-1-05

Attachment 421

CORESLAB®
STRUCTURES (KANSAS) INC.

January 25, 2005

The Senate Commerce Committee
Hon. Karin Brownlee & Nick Jordan, Chairpersons
Kansas State Capitol Building
300 SW 10th Street
Topeka KS 66612

Re: Senate Bill No. 33

Dear Senators:

I am writing to you in my capacity as the General Manager of the Kansas City, Kansas, plant of Coreslab Structures (Kansas), Inc.. We currently employ 60 persons at our plant. We are asking you to support passage of Senate Bill No. 33.

Passage of these bills is very important to us and to our customers, including the State of Kansas. Prompt payment is essential for us to stay competitive and in business. Most of our costs, as a supplier of precast concrete materials, are direct costs: raw materials (such as steel and cement), labor, fuel, equipment, and insurance. If we are not promptly paid by our customers, who usually are General Contractors, we have to fund payments to our suppliers from other sources, and therefore incur a substantial additional cost (cost of capital). In these tough economic times, not being paid promptly imposes a considerable hardship on suppliers and subcontractors like us.

Additionally, we are frequently asked to assume the liability for the negligent actions of these General Contractors either contractually, or through an additional insured endorsement to our GCL policy. As the General Contractors usually have the greater bargaining power ("Sign it or leave it!"), suppliers and subcontractors frequently see no other option than to agree to such an unconscionable provision in order to survive as a business. It is our opinion that it is more equitable for each party to assume the risks of their own actions or inactions, and insure themselves for those risks only. Our insurance costs, already outrageously high in the wake of September 11, are increased dramatically by having to cover those risks.

Thank you in advance for your support of these bills. Please feel free to contact me personally if you have any questions regarding the above.

Very truly yours,


Mark Simpson
General Manager - Kansas City Plant

Senate Commerce Committee
2-1-05

Attachment 4-22

**The Kansas Fairness in
Private Construction
Contract Act**

**Lisa Lucas, Accounting Credit Manager
Diamond Vantage Inc.
10965 Granada Lane, Suite 200
Leawood, Kansas 66211**

February 2005

Senate Commerce Committee

2-1-05

Attachment

4-23

Diamond Vantage, Inc. ©
10965 Granada Lane, Suite 200
Leawood, KS. 66211

January 18, 2005

The Honorable Karin Brownlee
Kansas State Capitol Building, Room 136-N
300 SW 10th
Topeka, KS 66612

Dear Ms. Brownlee

I am writing you today to encourage you to vote in favor of Senate Bill 33, The Kansas Fairness in Private Construction Contract Act. My company Diamond Vantage, Inc. located in Leawood, Kansas provides diamond cutting tools to the construction industry.

Senate Bill 33, the Kansas Fairness in Private Construction Contract Act is necessary legislation that will benefit my company (a Kansas creditor) by providing another tool to help ensure we receive payment, and receive it when due. It will also provide some recourse for the complete construction supply chain (our customers) in the event of non- or slow payment. As the old cliché goes "a sell is not a sell until the money is in the bank".

This Bill is comprehensive, fair and it today's time...necessary.

We here at Diamond Vantage encourage your support of this legislation.

Sincerely,

Lisa B. Lucas
Accounting and Credit Manager
(913) 322-4078

Senate Commerce Committee

2-1-05

Attachment

4-24

**The Kansas Fairness in
Private Construction
Contract Act**

**John Owens, Treasurer
Kansas City Electrical Supply Co.
10900 Mid America Avenue
Lenexa, Kansas 66219**

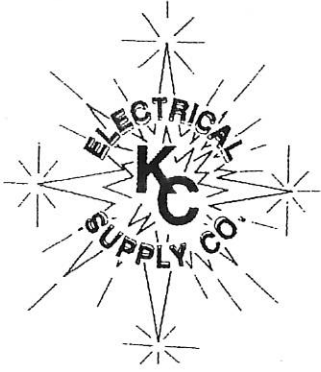
February 2005

Senate Commerce Committee

2-1-05

Attachment

4-25



KANSAS CITY ELECTRICAL SUPPLY CO.

4451 Troost Avenue
Kansas City, MO 64110-1791
Phone (816) **924-7000**
Fax (816) 931-2918

10900 Mid America Avenue
Lenexa, KS 66219-1235
Phone (913) **541-1717**
Fax (913) 541-1112

January 20, 2005

The Honorable Jim Barone
Kansas State Capitol Building, Room 504-N
300 SW 10th
Topeka, KS 66612

Re: Senate Bill 33

Dear Senator Barone,

I'm writing to ask for your support on Senate Bill 33 which is the Kansas Fairness in Private Construction Contract Act. Included in this bill are several issues that would guarantee the prompt payment to the general contractor, the subcontractor and the supplier, with provisions for those involved if these terms are not met.

As an electrical distributor in this area for more than 77 years, we have seen our share of legitimate companies fold, due to large amounts of money being withheld for no apparent reason. The passage of this bill would strengthen the companies in our industry and cut down on the legal fees being spent to protect our interests.

Thank you for your support.

Sincerely,

John M. Owens
Treasurer

Senate Commerce Committee

2-1-05

Attachment

4-26

**The Kansas Fairness in
Private Construction
Contract Act**

**Jim Lacy
5829 Fontana
Fairway, Kansas 66205**

February 2005

Senate Commerce Committee

2-1-05

Attachment 427

Jim Lacy

From: Jim Lacy [J.Lacy@ecahq.com]
Sent: Thursday, January 20, 2005 3:12 PM
To: 'schodorf@senate.state.ks.us'
Subject: Senate Bill 33, The Kansas Fairness in Private Construction Contract Act

The Honorable Jean Schodorf

Dear Senator Schodorf:

I am writing this letter for the purpose of requesting your help and support in passing Senate Bill 33, The Kansas Fairness in Private Construction Act.

I have been in the construction business, working as a subcontractor, for my entire forty plus year career. A large part of the bankruptcies, defaults, and unnecessary lawsuits that seem to clog up the system, stem from the issues Senate Bill 33 attempts to correct. Most contractors are hard working, honest, small businesses, and do not have the resources to adequately deal with these problems and are left to struggle in a system that works against them under present law.

While I could go on and on about individual problems, I think it would be best to say that the results of this Bills passage will be a positive for the owner, general contractor, subcontractor, sub-subcontractor as well as supplier.

Thank you for assistance

J.Lacy

5829 Fontana
Fairway, Kansas 66205

Senate Commerce Committee

2-1-05

Attachment 4-28

1/27/2005

**The Kansas Fairness in
Private Construction
Contract Act**

**Harold Mitts Jr., General Counsel/Vice President
MMC Corp.
Leawood, Kansas**

February 2005

Senate Commerce Committee

2-1-05

Attachment 4-29



MMC Corp
Construction Services Nationwide

January 26, 2005

Kansas Commerce Committee
Kansas Senate Labor and Commerce Committee
Kansas House Federal and State Affairs
State Capital Building
300 SW 10th Street
Topeka, Kansas 66612

RE: S33

To all Honorable Members:

I am General Counsel and a Vice President of MMC Corp, a Kansas Corporation, located in Leawood, Kansas. I have held this position for nearly five years. Prior to my present employment, I grew up in the construction industry in the Kansas City area and had a private law practice for 17 years in which I represented clients of all segments of the construction industry.

MMC Corp is the parent company to eight subsidiaries with hundreds of employees, both inside and out of Kansas. We have performed numerous construction projects in the State of Kansas, and while doing so, have encountered instances of non-payment, disputes and other disruptive events for which we did not anticipate, nor provide a line item in our bid to cover those costs.

As many of you know, the construction industry as a whole has become much more competitive in the last decade or so. As such, the profit margins and contingency moneys in contracts and subcontracts are not what they used to be. The result is that a contractor or laborer today can no longer afford to wait months, or for that matter, years for their money or resolve disputes. Nor can they afford other related costs and attorneys fees.

Senate Commerce Committee

11100 Ash, Suite 100 • Leawood, KS 66211-1764
TEL: 913-469-0101 FAX: 913-469-8780

Attachment

Quality is our reputation



S33, in my opinion, represent an excellent opportunity for the State of Kansas to mandate fairness and promptness for the construction industry within Kansas. This bill, with minor tweaking related to notice, level the playing field as it relates to non-payment, disputes, promptness of payment and apportionment of costs related thereto. It also brings Kansas to the forefront of States that have enacted laws to protect laborers, contractors, subcontractors and suppliers. It will make it abundantly clear to people who engaged in the construction industry in Kansas that they will be fair, prompt and just in their practices within this great State.

The above referenced Bill is long overdue. It will be an asset to not only the construction industry as a whole, but provide positive benefits and a minimum level of expectations to the families and workers of this State.

I am doing my best to attend the upcoming event in Topeka but would like to be kept abreast of any future meetings or matters related to this most important issue. Again, I believe this Bill is very important legislation, which we will all be proud of for years to come after its enactment.

Thank you for your careful consideration of this issue.

I remain,

Very truly yours,

Harold W. Mitts, Jr.
General Counsel/Vice President
MMC Corp

HM

2-1-05

**The Kansas Fairness in
Private Construction
Contract Act**

**Beth Houser, Credit Manager
Mid-Am Building Supply
Crown Millwork
30 Osage Avenue
Kansas City, Kansas 66105**

February 2005

Senate Commerce Committee

2-1-05

Attachment 4-32

Mid-Am Building Supply
Crown Millwork
30 Osage Avenue
Kansas City, Kansas 66105

January 20, 2005

The Honorable Karin Brownlee
Kansas State Capitol Building, Room 136-N
300 SW 10th
Topeka, KS 66612

Re: Sentate Bill 33, The Kansas Fairness in Private Construction Contract Act

I am writing in support of this legislation. The construction industry has been in need of changes regarding contract law, payment law, and subcontractor law for a long time. I believe this is a great start.

Sincerely,

Beth Houser
Credit Manager

Senate Commerce Committee

2-1-05
Attachment 4-33

**The Kansas Fairness in
Private Construction
Contract Act**

**H. Patrick Tolle, President
National Association of Credit Management**

February 2005

Senate Commerce Committee

2-1-05

Attachment

4-34

N A C M



National Association of Credit Management

*"Providing Excellence In
Education To Credit
Professionals For Over
100 Years."*

NACM Kansas City Division
Officers

President
Patrick Tolle

Corporate Secretary
Rhonda Ross

Treasurer
Kurt Borneman

Chairman of the Board
Dave Massey,
Spencer Reed Group

First Vice Chairman
Beth Houser,
Crown Millwork

Second Vice Chairman
Paul Calahan, CCE
Cargill, Inc.

Councilor
Betty Carroll,
Paxton The Wood Source

Director At Large
Allen Bauer, CCE

One-Year Directors

- Rose Whorton
- Tim Wood
- Deborah Blevins
- Gabriella Weller

Two-Year Directors

- Ron Schulze
- Wanda Houghton
- Janice Dodds
- Dan Michalek

February 1, 2005

The Honorable Karin Brownlee, Kansas Senate, Olathe
Kansas State Capital Building, Room 136-N
300 SW 10th Street
Topeka, KS 66612

RE: Support of Senate Bill 33, Kansas Fairness in Private Construct
Act.

Dear Honorable Brownlee,

The National Association of Credit Management is a network
affiliated associations, which are the leading source for credit and fi
management, providing information, education, products and servic
legislative support for effective business credit and accounts receiva
management.

A part of our mission is to represent the business credit comm
legislative efforts. NACM works to enact better laws in order to mc
repeal outmoded federal and state laws affecting credit and finance.

Today, our local affiliate provides services to over 1000 com
267 being local members, of which 124 are Kansas businesses. Wit
construction industry representing 40% of our local base, we repres
suppliers in support of Senate Bill 33, the Kansas Fairness in Privat
Construction Contract Act.

The NACM KC Division is at the forefront of Creditors Rig
Protection. NACM supports the passage of Senate Bill 33; therefor
the committee to pass this most important piece of legislation exped
that it may be considered by the entire Senate for passage.

Sincerely,

H. Patrick Tolle
President

Senate Commerce Committee

2-1-05

Attachment 4-35

**The Kansas Fairness in
Private Construction
Contract Act**

**Ingrid Lehnert, Esq., Director, Contract Admin.
Rinker Materials Corporation**

February 2005

Senate Commerce Committee

2-1-05

Attachment

4-36

Brad Miller

From: "Lehnert, Ingrid" <ILehnert@rinker.com>
To: <bmillier@builderec.com>
Sent: Thursday, January 27, 2005 3:33 PM
Subject: Kansas Fairness In Contracting Act

Dear Bill -

Hydro Conduit Corporation d/b/a Rinker Materials Hydro Conduit Division does a lot of business in the State of Kansas, especially in the Kansas counties surrounding the Kansas City metropolitan area. As such, we strongly support your efforts with regard to this legislation. We often are affected by the fact that general contractors feel free to hold money due for undue lengths of time; our insurance costs have been driven sky-high because of unreasonable additional insured and waiver of subrogation requirements from general contractors who feel that the supplier ought to pick up their cost of doing business.

Please let us know if we can be of further assistance.

Thanks,
Ingrid Lehnert, Esq.
Director, Contract Administration
Rinker Materials Corporation
Phone: 816.741.4000 x302
Fax: 816.741.2167
Email: ilehnert@rinker.com

CONFIDENTIALITY: The information contained in this transmission may contain privileged and confidential information. It is intended only for the use of the person(s) named above. If you are not the intended recipient, you are hereby notified that any review, dissemination, distribution or duplication of this communication, and the information contained in it, is strictly prohibited. If you are not the intended recipient, please contact the sender and immediately destroy all copies of the original message.

Senate Commerce Committee

2-1-05

Attachment 4-37

**The Kansas Fairness in
Private Construction
Contract Act**

**Brian Shaw
Shaw Supply Company
1066 E 16th Street
Kansas City, Missouri 64108**

February 2005

Senate Commerce Committee

2-1-05

Attachment

4-38

January 20, 2005

The Honorable Senator Jim Barone
Kansas State Capitol Building, Room 504-N
300 SW 10th
Topeka KS 66612

RE: SUPPORT OF SENATE BILL 33
THE KANSAS FAIRNESS IN PRIVATE CONSTRUCTION CONTRACT ACT

Dear Senator Barone:

I am writing in support of Senate Bill 33.

This legislation includes:

- Prompt Pay – The owner must pay the general contractor in 30 days after a submittal of a payment request. The general, in turn, must pay the subcontractor in five days and the subcontractor must pay the supplier in five days.
- Work Stoppage is permitted to enforce timely payment and not be in default of the contract.
- If legal action is required it will be tried in the county where the project is located and under Kansas law. The loser pays the legal costs and attorney fees of the winner.
- Retainage will be limited to 10%. Alternative securities may be used in lieu of retainage. The general contractor or subcontractor, if dealing with another subcontractor, cannot demand a higher retainage rate than the owner has withheld from the general contractor. There will be line item releases so retainage isn't held for excessive duration.

SB33 does not apply to single family dwellings or multiply family dwellings of 4 or less.

This is extremely important to all business owners in the construction industry. Not only will it drastically improve cash flow on jobs, but it will also make the entire industry healthier.

Businesses deserve to get paid in a timely matter.

We urge your support of Senate Bill 33.

Respectfully,

Brian Shaw
Shaw Supply Co.

Senate Commerce Committee

2-1-05
Attachment 4-39

The Kansas Fairness in Private Construction Contract Act

**Carl Orser
Shawnee Steel
Merriam, Kansas**

February 2005

Senate Commerce Committee

2-1-05

Attachment

4-40

*See you at the
Johnson County 4-H
Auction*

HON. KARIN BROWNLEE
KANSAS STATE CAPITOL BUILDING
300 SW 10TH STREET
TOPEKA, KS 66612

DEAR SENATOR:

SENATE BILL NO. 33

I WOULD LIKE YOUR SUPPORT FOR SENATE BILL NO. 33.

IT IS VERY IMPORTANT THAT WE GET PAID PROMPTLY. A SUBCONTRACTOR IS AT THE MERCY OF THE GENERAL CONTRACTOR WHEN IT IS TIME TO GET PAYED. IF WE DO NOT GET PAYED ON TIME IT IS A REAL HARDSHIP. YOU CANNOT PUT DOLLARS IN YOUR BID TO COVER THE COST OF WAITING FOR YOUR MONEY. IF YOU DO, YOU WILL NOT GET A JOB.

WE NEED SOME HELP. SO WE CAN GET PAID ON TIME. THEN WE CAN PAY OUR BILLS ON TIME.

Carl Orser

*Shawnee Steel
Merriam, Ks.
913-432-8046*

Senate Commerce Committee

2-1-05

Attachment

4-41

**The Kansas Fairness in
Private Construction
Contract Act**

**Dave Massey, Corporate Credit Manager
Spencer Reed Group, Inc.**

February 2005

Senate Commerce Committee

2-1-05

Attachment

4-42

From: Dave Massey
Sent: Monday, January 28, 2005 11:25 AM
To: 'Wysong@senate.state.ks.us'
Subject: a message in support of Senate Bill 33

The Honorable Senator David Wysong
Kansas State Capitol Building, Room 143-N

Dear Senator Wysong,

I would like to indicate my support for The Kansas Fairness in Private Construction Contract Act.

This proposed legislation, if enacted, will be most beneficial to the small business contractors. In many instances, the individuals and companies least able to endure the financial hardship encountered when payment is unfairly delayed.

The owners and general contractors that already operate with the highest ethical standards and provide payment to their subcontractors promptly will not be adversely impacted by this legislation.

I respectfully ask for your support of Senate Bill 33.

Sincerely,

Dave Massey

Corporate Credit Manager
Spencer Reed Group, Inc.

Chairman
National Association of Credit Managers
Kansas City Division Board of Directors

Senate Commerce Committee

2-1-05
Attachment 4-43

**The Kansas Fairness in
Private Construction
Contract Act**

**Bill Keller, President
Stanion Wholesale Electric Co., Inc.
Kansas City, Kansas**

February 2005

Senate Commerce Committee

2-1-05

Attachment

4-44

January 28, 2005

The Honorable Senator Jim Barone
Senate Commerce Committee
barone@senate.state.ks.us

Re: Senate Bill #33
Kansas Fairness In Private Construction Contract Act

Dear Senator Barone,

I am writing to you to urge your support for the passage of Senate Bill #33, The Kansas Fairness In Private Construction Contract Act. Our company is a wholesale electrical distributor, serving the entire State of Kansas through seventeen branch locations throughout the state. Approximately 65% to 75% of our sales volume relates to construction projects, and a great deal of that business is in private construction.

Construction projects generally involve significant sums of money, and the chain of payment runs from owners to general contractors to subcontractors to suppliers. There can be several levels of sub-parties within each of those categories. The nature of the financing of construction projects with many contractors is that the cash flow of payments under the contract is used by the contractor or subcontractor to pay its subcontractors and suppliers. Delays or reductions in payments due from any party in the payment chain thus create a domino effect of financial problems for the parties downstream in the payment chain.

The two largest assets of a wholesale supplier are its inventory and its accounts receivable. Accounts receivable is the most liquid of the assets, and the cash flow from accounts receivable is the primary means through which a wholesale supplier stays in business by meeting payroll, paying its expenses, and paying its suppliers. Delays in receiving payment from contractors for supplies furnished to them on construction projects is, by far, the largest cause of all of our past due accounts receivable and bad debt write-offs. We can sometimes salvage some of what is owed us through mechanics liens (the recent change in Kansas law is very helpful), bond claims, collection agencies, and lawsuits. However, those remedies seldom bring in all that is due, and a great deal of time and expense is incurred in the process.

From our experience of many years in the construction supply business, delays or defaults in payments due in the payment chain of construction contracts is the most frequent reason contractors fail and go out of business. Such delays or defaults are one of the most frequent reasons, if not the most frequent reason, construction suppliers fail and

Senate Commerce Committee

J-1-05

Attachment

4-45

go out of business. Basic contract law and the provisions of the Uniform Commercial Code simply do not do enough to protect the various parties from the damaging ramifications of delays and defaults in payments. Some delays and defaults occur because of forces beyond anyone's control. However, some parties within the construction world have learned to use the leverage of delays and reductions in payments to gain advantages or benefits at the expense of others, knowing that it will be too difficult, time consuming, or expensive for others to force a change in behavior.

Senate Bill #33 has excellent features which can solve many of the problems which create and which result from payment delays and reductions. Strict payment deadlines would be uniformly required by law, and parties not being paid could stop performance without being in default. All legal actions would be brought in the Kansas county where the project is located and would be governed by Kansas law. Those who choose to violate the law would be required to pay the attorneys fees and court costs of those who bring legal action to enforce the law, thus eliminating one of the leverage tactics most frequently used by those who abuse current law. Retainage payments would be limited to ten percent, and alternative forms of security could be provided. Payments would be released on a line-item basis for work done, avoiding the problem of over-withholding. This Bill does not apply to construction of single-family dwellings or multi-family dwellings of four or less.

We believe that the implementation of the provisions of this bill would be advantageous to all parties: owners, contractors, subcontractors, and suppliers. Approximately twenty other states have laws of this type and have found them to be very beneficial. As you review the Bill and research related issues, I think you will find a great deal of support from all interested parties.

Thank you for your time and attention to this letter. We appreciate the work you do for all the citizens of Kansas.

Sincerely,

Bill Keller, President
Stanion Wholesale Electric Co., Inc.

Senate Commerce Committee

2-1-05

Attachment 4-46

**The Kansas Fairness in
Private Construction
Contract Act**

**Royce Fawcett, Asst. General Manager
The Stresscrete Group
14503 Wallick Road
Atchison, Kansas 66002**

February 2005

Senate Commerce Committee

2-1-05

Attachment

4-47

Senate Commerce Committee

Subject: [Fwd: SENATE BILL 33]

Date: Wed, 26 Jan 2005 15:19:17 -0600

From: WE Mail Review <spam@westernextralite.com>

To: kkeller <kkeller@westernextralite.com>

Subject: SENATE BILL 33

Date: Fri, 21 Jan 2005 08:22:30 -0600

From: "Royce Fawcett" <rfawcett@stresscrete3.com>

To: <kkeller@westernextralite.com>

Mr. Keller:

The StressCrete Group as a manufacturer in the State of Kansas highly supports the content of **SENATE STATE BILL 33, FAIRNESS IN PRIVATE CONSTRUCTION CONTRACT ACT.**

Specifically the verbage with respect to "prompt payment" are essential to the cash flow situation with our business.

Sincerely,

Royce Fawcett

Royce Fawcett
*Asst. General Manager
and Midwest Sales Manager*

THE STRESSCRETE GROUP

14503 Wallick Road
Atchison, Kansas
USA 66002
Telephone: (913) 255-3112
Fax: (913) 255-3124
Email: rfawcett@stresscrete3.com

Atchison, Kansas
Northport, Alabama
Jefferson, Ohio
Burlington, Ontario



King Luminaire • StressCrete • Est. 1953

www.stresscrete.com
www.kingluminaire.com

Senate Commerce Committee

2-1-05

Attachment

4-4/8

**The Kansas Fairness in
Private Construction
Contract Act**

**James Wissman, President
Structural Metals of Kansas City, Inc.
1911 Television Place
Kansas City, Missouri 64126**

February 2005

Senate Commerce Committee

2-1-05

Attachment

4-49

**STRUCTURAL
METALS OF KANSAS CITY,
INC.**

1911 Television Place
Kansas City, MO 64126-3092
(816) 461-4100 FAX 461-2200

January 27, 2005

The Senate Commerce Committee
Hon. Karin Brownlee & Nick Jordan, Chairpersons
Kansas State Capitol Building
300 SW 10th Street
Topeka, KS 66612

Re: Senate Bill No. 33

Dear Senators:

I am writing to you in my capacity as an owner and President of Structural Metals of Kansas City, Inc. Although we are a Missouri based facility, we are also a duly registered Kansas Corporation and normally see approximately 60-65% of our sales volume relating directly to Kansas construction projects. We also work for many Kansas General Contractors on Missouri projects. We are asking you to support passage of Senate Bill NO. 33.

As many of you know, the construction industry as a whole has become much more competitive in the last decade or so. As such, the profit margins and contingency moneys in contracts and subcontracts are not what they used to be. The result is that a subcontractor today can no longer afford to wait months, or for that matter, years for their money or to resolve disputes. Nor can they afford additional related costs and attorneys' fees.

Prompt payment is essential for us to stay competitive and in business. Most of our costs, as a structural steel fabricator/erector are direct costs: raw materials (such as steel, bar joists, decking), labor, fuel, equipment, and insurance. If we are not promptly paid by our customers, who usually are General Contractors, we have to fund payments to our suppliers from other sources, and therefore incur a substantial additional cost (cost of capital). In these tough economic times, not being paid promptly imposes a considerable hardship on suppliers and subcontractors like us.

Additionally, we are frequently asked to assume the liability for the negligent actions of these General Contractors and Owners either contractually, or through an additional insured endorsement to our GCL policy. As General Contractors usually have the greater bargaining power ("Sign it or leave it!"), suppliers and subcontractors frequently see no other option than to agree to such an unconscionable provision in order to survive as a business. It is our opinion that it is more equitable for each party to assume the risks of their own actions or inactions, and insure themselves for those risks only. Our insurance costs, already outrageously high in the wake of September 11, are increased dramatically by having to cover those risks.

Senate Commerce Committee

2-1-05
Attachment 4-50

S33, in my opinion, represents an excellent opportunity for the State of Kansas to mandate fairness and promptness for all in the construction industry within Kansas. This bill will level the playing field as it relates to non-payment, disputes, promptness of payment and apportionment of costs related thereto. It also brings Kansas to the forefront of States that have enacted laws to protect laborers, contractors, subcontractors and suppliers. It will make it abundantly clear to people engaged in the construction industry in Kansas that they will be fair, prompt and just in their practices within this great State.

Thank you in advance for your support of these bills. Please feel free to contact me personally if you have any questions regarding the above.

Very truly yours,

James J. Wissman
President

Senate Commerce Committee

2-1-05

Attachment 4-51

**The Kansas Fairness in
Private Construction
Contract Act**

**Robert Switzer Jr., President
A.T. Switzer Painting Company, Inc.
Kansas City, Missouri**

February 2005

Senate Commerce Committee

2-05

Attachment 4-52

Brad Miller

From: "Bob Switzer Jr" <bswitzer@atswitzer.com>
To: <bmillier@builderec.com>
Sent: Friday, January 28, 2005 8:56 AM
Subject: SB 33

January 28, 2005

Kansas Commerce Committee
Kansas Senate Labor and Commerce Committee
Kansas House Federal and State Affairs
State Capital Building
300 SW 19th Street
Topeka, Kansas 66612

Re: Senate Bill 33

To all Honorable Members:

As President of A.T. Switzer Painting Company, Inc., a Missouri Corporation, located in Kansas City, Missouri I am writing you in support of Senate Bill 33. My two brothers and myself are the 4th generation owners of the company, which my great grandfather started in 1911. We would like to pass it on to the 5th generation!!! Passing Senate Bill 33 would greatly help.

As a medium sized painting company, 35 plus employees, operating in both Kansas and Missouri, we often find the easiest part of our work is actually the painting. Collecting from General Contractors and Owners often becomes a little game. We have heard every excuse from "out of checks" to "we only pay our bills the 3rd Friday of each month". Trying to send interest charges to cover the delays does nothing. Passage Bill 33 provides us with leverage to collect our money.

The above referenced bill is long overdue!!! It will greatly help stay competitive in a very tough construction market.

Thank you in advance for you support for this bill.

Respectfully submitted,

A.T. SWITZER COMPANY, INC.

Robert L. Switzer Jr.,
President.

Senate Commerce Committee

2-1-05

Attachment 4-53

**The Kansas Fairness in
Private Construction
Contract Act**

**Jim McCourt, President
Tri-County Concrete, Inc.
5620 Wolcott Drive
Kansas City, Kansas 66112**

February 2005

Senate Commerce Committee

2-1-05

Attachment 4-54

Tri-County Concrete, Inc.

January 25, 2005

Senate Commerce Committee
Hon. Karin Brownlee & Nick Jordan, Chairpersons
Kansas State Capitol Building
300 SW 10th Street
Topeka, Kansas 66612

Re: Senate Bill No. 33

Dear Senators:

We are writing to you to ask you to support passage of Senate Bill No. 33.

We own a small family-owned business, Tri-County Concrete, that supplies concrete for residential, retail and public construction, and employ about 20 people in our plant and in the office. Passage of this bill is very important to us; prompt payment, whether in private or public construction, is crucial for us to be able to stay in business. Most of our costs are direct: raw materials, labor, fuel, equipment repair, and insurance. It is obvious that, if we are not paid by our customers in a timely fashion, we will not be able to pay our suppliers or our employees in a timely fashion either. Frequently, our customers are subcontractors and suppliers who are in the same boat – they cannot pay us because the general contractor for whom they work has not paid them.

Additionally, it is not fair for us, the small family-owned business, to be forced to assume liability for the general contractor's negligence through having to add him as an additional insured on our insurance policy. While it might keep the GC's insurance lower, it drives our costs up to the point where we may not be able to afford it. Having to add a general contractor as an additional insured and having to waive subrogation are unfair burdens on small businesses. The fact that our customers, multi-billion dollar corporations with a vast legal staff, have greater bargaining power and can force us to do so if we wish to have their business, is simply unconscionable.

Your support of this bill will be greatly appreciated by all small businesses in the State of Kansas. We are a part of the Kansas economy that needs to remain profitable and vibrant so that we will be able to provide employment to Kansans in the future.

Best regards,



Jim McCourt
President

5620 Wolcott Drive
P.O. Box 12637
Kansas City, KS 66112-0637

Phone: 913-788-3165
Fax: 913-788-0001
Senate Commerce Committee

2-1-05
Attachment 4-55

**The Kansas Fairness in
Private Construction
Contract Act**

**Sharon Lima, Credit Manager
Weber Carpet Inc.**

February 2005

Senate Commerce Committee

2-1-05

Attachment 4-56

Subject: The Kansas in Fairness in Private Construction Act

Date: Fri, 28 Jan 2005 15:31:41 -0600

From: "Sharon Lima" <lima@webercarpet.com>

To: "Karin Brownlee" <brownlee@senate.state.ks.us>

CC: "ken keller" <kkeller@westernextralite.com>

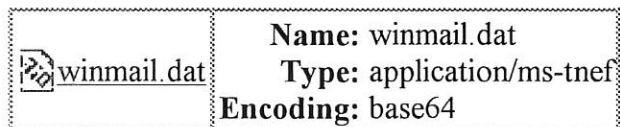
The Honorable Karin Brownlee,

I am the credit manager at Weber Carpet Inc, a privately owned company operating in the state of Kansas for over 28 years. We have in the past been involved with numerous large commercial projects. One of the major concerns in completing such work is the risks involved in getting paid in a timely fashion. We have several projects where collecting draws has been a problem and then collecting retainages becomes a secondary problem. A common statement heard was always ' We haven't been paid by the owner". We subcontractors, however, must pay our employees and pay our suppliers for any products we purchased for the project. One usually has to bid the jobs at a very low profit margin, thus creating an additional burden for the subcontractor.

I feel this new legislation would be a positive step to help promote additional business in the State of Kansas and give smaller companies more opportunities.

Sincerely,

Sharon Lima

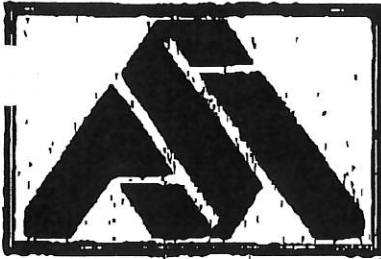


Senate Commerce Committee

2-1-05

Attachment

457



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480884 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

The American Subcontractors Association, along with the Electrical League of Missouri and Kansas, The Sheet Metal and Air Conditioning Contractors National Association, The Kansas City Masonry Association, National Electrical Contractors Association, The Kansas Prestress Concrete Association, The National Association of Credit Managers, Fire Sprinklers Association of Kansas City, and others believe that since this legislation is critically important to subcontractors, material suppliers, and their customers that this legislation be passed this year.

We need your help and support to accomplish the goal of being paid promptly for our work and or materials.

If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	This will be beneficial to my customer and me.
YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	I will support this legislation. *
YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	I am willing to testify on behalf of this bill.

Company Name: ADVANCED BUILDING SYSTEMS, INC.

Contact Person: Tom Farrell

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051
Senate Commerce Committee





AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas Contractors and Suppliers
RE: *The Kansas Fairness in Construction Contracts Act (FICCA)*

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

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If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES NO This will be beneficial to my customer and me.
YES NO I will support this legislation. *
YES NO I am willing to testify on behalf of this bill.

Company Name: BOAN MASONRY CO INC

Contact Person: Phil BOAN

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051
Senate Commerce Committee



2-1-05
Attachment 4-59



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas Contractors and Suppliers
RE: *The Kansas Fairness in Construction Contracts Act (FICCA)*

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

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If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES NO This will be beneficial to my customer and me.

YES NO I will support this legislation. *

YES NO I am willing to testify on behalf of this bill.

Company Name: Carpet Factory Outlet, Inc. D.B.A. McIntyre Mann Carpet

Contact Person: Tom Suley

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970

Senate Commerce Committee



2-1-05



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas Contractors and Suppliers
RE: *The Kansas Fairness in Construction Contracts Act (FICCA)*

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

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If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	This will be beneficial to my customer and me.
YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	I will support this legislation. *
YES <input type="checkbox"/>	NO <input checked="" type="checkbox"/>	I am willing to testify on behalf of this bill.

Company Name: CARTER WATERS

Contact Person: LARRY MEEHAN

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970

Senate Commerce Committee



2-1-05



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele: (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas Contractors and Suppliers
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

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If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES NO _____ This will be beneficial to my customer and me.
YES NO _____ I will support this legislation. *
YES _____ NO I am willing to testify on behalf of this bill.

Company Name: Carter-Waters Corp

Contact Person: Debbie Lehman

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970

Senate Commerce Committee



Attachment 4-62



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele: (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas Contractors and Suppliers
RE: *The Kansas Fairness in Construction Contracts Act (FICCA)*

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

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If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES NO This will be beneficial to my customer and me.
YES NO I will support this legislation. *
YES NO I am willing to testify on behalf of this bill.

Company Name: Complete Home Concepts

Contact Person: Ardena Shegrian

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

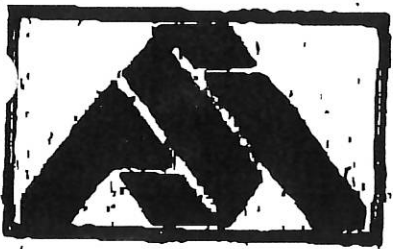
Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970

Senate Commerce Committee



2-1-05



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele (816) 842-1255 Fax (816) 842-1255
email: kcca@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as The Kansas Fairness in Construction Contracts Act (FICCA). This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

The American Subcontractors Association, along with the Electrical League of Missouri and Kansas, The Sheet Metal and Air Conditioning Contractors National Association, The Kansas City Masonry Association, National Electrical Contractors Association, The Kansas Precast Concrete Association, The National Association of Credit Managers, Fire Sprinklers Association of Kansas City, and others believe that since this legislation is critically important to subcontractors, material suppliers, and their customers that this legislation be passed this year.

We need your help and support to accomplish the goal of being paid promptly for our work and our materials.

If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax mail or e-mail back to us. Thank you in advance for your help.

YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	This will be beneficial to my customer and me.
YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	I will support this legislation. *
YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	I am willing to testify on behalf of this bill.

Company Name: CONCRETE MATERIALS, INC.
Contact Person: PAT CARMICHAEL

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66031



A CHARTERED CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

JAN 25 2005 16:32

742-7700

Senate Commerce Committee

2-1-05
Attachment 4-64



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480884 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
Email: kccsa@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (KICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (KICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

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If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES NO This will be beneficial to my customer and me.

YES NO I will support this legislation.

YES NO I am willing to testify on behalf of this bill.

Company Name: Cox, Kent & Assoc. Inc.

Contact Person: Bryan Cox

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

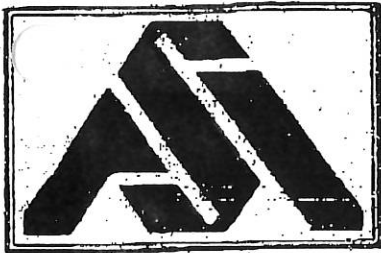
Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Senate Commerce Committee



A CHARTERED CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

2-1-05
Attachment 4-65



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele: (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas Contractors and Suppliers
RE: *The Kansas Fairness in Construction Contracts Act (FICCA)*

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

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If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES NO This will be beneficial to my customer and me.

YES NO I will support this legislation. *

YES NO I am willing to testify on behalf of this bill.

Company Name: Crown Millwork *IF I can help.*

Contact Person: Beth Houser

Comments: Thanks for all your work on this !!

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970

Senate Commerce Committee



2-1-05



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas Contractors and Suppliers
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

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If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	This will be beneficial to my customer and me.
YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	I will support this legislation. *
YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	I am willing to testify on behalf of this bill.

Company Name: Curby's Lawn & Garden

Contact Person: W. Curby Hughes

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051

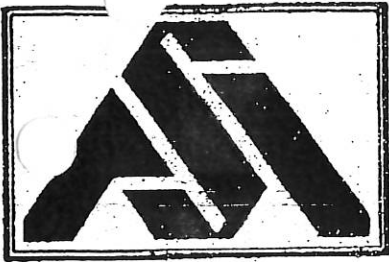


A CHARTERED CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

Senate Commerce Committee

2-1-05

Attachment 4-67



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas Contractors and Suppliers
RE: *The Kansas Fairness in Construction Contracts Act (FICCA)*

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

The American Subcontractors Association, along with the Electrical League of Missouri and Kansas, The Sheet Metal and Air Conditioning Contractors National Association, The Kansas City Masonry Association, National Electrical Contractors Association, The Kansas Prestress Concrete Association, The National Association of Credit Managers, Fire Sprinklers Association of Kansas City, and others believe that since this legislation is critically important to subcontractors, material suppliers, and their customers that this legislation be passed this year.

We need your help and support to accomplish the goal of being paid promptly for our work and or materials.

If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES NO This will be beneficial to my customer and me.
YES NO I will support this legislation. *
YES NO I am willing to testify on behalf of this bill.

Company Name: D+D MASONRY

Contact Person: ROSS A DISTEFANO

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970

Senate Commerce Committee



Attachment 2-1-05
4-68



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480884 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcas@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (KICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as The Kansas Fairness in Construction Contracts Act (KICCA). This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as other important provisions to foster fairness and accountability between parties to construction contracts.

The American Subcontractors Association, along with the Electrical League of Missouri and Kansas, The Sheet Metal and Air Conditioning Contractors National Association, The Kansas City Masonry Association, National Electrical Contractors Association, The Kansas Precast Concrete Association, The National Association of Credit Managers, Fire Sprinklers Association of Kansas City, and others believe that since this legislation is critically important to subcontractors, material suppliers, and their customers that this legislation be passed this year.

We need your help and support to accomplish the goal of being paid promptly for our work and materials.

If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

- YES NO This will be beneficial to my customer and me.
- YES NO I will support this legislation.*
- YES NO I am willing to testify on behalf of this bill.

Company Name: THE FAGAN CO

Contact Person: BILL ADAMS

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051

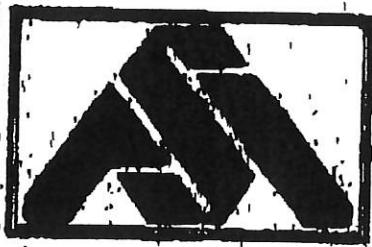


A CHARTERED CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

Senate Commerce Committee

2-1-05

Attachment 4-69



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480884 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcaaa@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

The American Subcontractors Association, along with the Electrical League of Missouri and Kansas, The Sheet Metal and Air Conditioning Contractors National Association, The Kansas City Masonry Association, National Electrical Contractors Association, The Kansas Precast Concrete Association, The National Association of Credit Managers, Fire Sprinklers Association of Kansas City, and others believe that since this legislation is critically important to subcontractors, material suppliers, and their customers that this legislation be passed this year.

We need your help and support to accomplish the goal of being paid promptly for our work and or materials.

If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES NO This will be beneficial to my customer and me.
YES NO I will support this legislation. *
YES NO I am willing to testify on behalf of this bill.

Company Name: FIRE PROTECTION SERVICES, INC.

Contact Person: MARK CARPENTER

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051



A CHARTERED CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

Senate Commerce Committee

2-1-05

Attachment

4-70



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480654 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as other important provisions to restore fairness and accountability between parties to construction contracts.

The American Subcontractors Association, along with the Electrical League of Missouri and Kansas, The Sheet Metal and Air Conditioning Contractors National Association, The Kansas City Masonry Association, National Electrical Contractors Association, The Kansas Precast Concrete Association, The National Association of Credit Managers, Fire Sprinkler Association of Kansas City, and others believe that since this legislation is critically important to subcontractors, material suppliers, and their customers that this legislation be passed this year.

We need your help and support to accomplish the goal of being paid promptly for our work and or materials.

If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES X NO This will be beneficial to my customer and me.

YES X NO I will support this legislation. "

YES NO X I am willing to testify on behalf of this bill.

Company Name: Jack Foster Co. Erectors Inc.

Contact Person: Merton Little

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051



A CHARTERED CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

Senate Commerce Committee

2-1-05



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 680684 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as other important provisions to restore fairness and accountability between parties to construction contracts.

The American Subcontractors Association, along with the Electrical League of Missouri and Kansas, The Sheet Metal and Air Conditioning Contractors National Association, The Kansas City Masonry Association, National Electrical Contractors Association, The Kansas Precast Concrete Association, The National Association of Credit Managers, Dan Spinkley Association of Kansas City, and others believe that since this legislation is critically important to subcontractors, material suppliers, and their customers that this legislation be passed this year.

We need your help and support to accomplish the goal of being paid promptly for our work and our materials.

If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES NO This will be beneficial to my customer and me.
YES NO I will support this legislation.
YES NO I am willing to testify on behalf of this bill.

Company Name: JONES PAINT

Contact Person: ARLOW JONES

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Number: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051



A CHARTERED CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

Senate Commerce Committee

2-1-05

Attachment 4-72

J 7.2005 2:44PM

BLDG ERECTION SRVCS

NO.746 P.2/8



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480864 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kccas@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as other important provisions to restore fairness and accountability between parties to construction contracts.

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If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES NO This will be beneficial to my customer and me.

YES NO I will support this legislation. *

YES NO I am willing to testify on behalf of this bill.

Company Name: Joyce Const Corp

Contact Person: John Joyce

Comments: 785-832-0185

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051



A CHARTERED CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

Senate Commerce Committee
2-1-05

Attachment 4-73



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480684 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasakc@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

The American Subcontractors Association, along with the Electrical League of Missouri and Kansas, The Sheet Metal and Air Conditioning Contractors National Association, The Kansas City Masonry Association, National Electrical Contractors Association, The Kansas Prestress Concrete Association, The National Association of Credit Managers, Fire Sprinklers Association of Kansas City, and others believe that since this legislation is critically important to subcontractors, material suppliers, and their customers that this legislation be passed this year.

We need your help and support to accomplish the goal of being paid promptly for our work and or materials.

If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES X NO _____ This will be beneficial to my customer and me.
YES X NO _____ I will support this legislation.
YES _____ NO X I am willing to testify on behalf of this bill.

Company Name: KANSAS BUILDING PRODUCTS

Contact Person: STEVE MORGAN

Comments: AS ABOVE

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051



A CHARTERED CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

Senate Commerce Committee

 2-1-05
Attachment 4-74

KCK CHAMBER BOARD 2004 CALL LIST (1/04)

Meeting date _____

Meeting location _____

Meeting time _____

Other _____

First	Last	Company	phone	Attendance
Russ	Archuleta	Great Wolf Lodge	913-299-7001	
Jan	Bautista	El Centro Inc	913-677-0100 ext 167	
Rosana	Privitera Biondo	Mark One Electric	816-842-7023	
Murrel	Bland	Wyandotte West	913-788-5565	
Jeff	Boerger	Kansas Speedway	913-328-3300	
Pat	Brune	Women's Chamber	816-512-5020	
Lisa	Cantwell	KCK JayCees	913-321-0629	
Cindy	Cash	KCK Chamber	913-371-3070	
Bill	Crandall	Zimmer Real Estate Services	816-474-2000	
Irene	Cumming	KU Med Center	913-588-1293	
Ray	Daniels	KCK Public Schools	913-551-3200	
Bill	Dunn, Jr.	JE Dunn	816-391-2604	
Bill	Epperheimer	Wyandotte Health Foundation	913-371-4033	
Wayne	Franklin	SBC	913-676-0300	
Jim	Gartland	The Woodlands	913-299-9797 ext 213	
Pat	Gaunce	KCK Community College Endowment Association	913-596-5800	
Gary D.	Grable	Security Bank of KC	913-831-2052	
FIRST	LAST	COMPANY	PHONE	ATTENDANCE

Senate Commerce Committee

2-1-05

Attachment H-75

CHAMBER

913 371 3732

P. 02

Mike	Guarasci	Procter & Gamble	913-573-0254	
Bob	Gutierrez	Art's Mexican Products	913-371-2163	
Mae	Harbor	Target Communication	913-488-0872	
Ed	Honesty	Best Harvest Bakeries	913-287-6300	
Evelyn	Hudson	Leadership 2000	913-371-5200	
Les	Johnson	Douglass National Bank	913-321-7200	
Kevin	Jones	ATMOS Energy	913-764-0531x241	
John J.	Jurcyk, Jr.	McAnany, Van Cleave & Phillips	913-371-3838	
Garry	Kemp	GKC Building & Construction Trades Council	816-836-8485	
Chris	Lopez	Mid-America Sign Company	816-753-1144	
Wendall	Maddox	United Way of Wyandotte County	913-371-3674	
Carol	Marinovich	Unified Government of WyCo/KCK	913-573-5010	
Mark	Myer	UMB Bank	913-573-1036	
Joab	Ortiz	Able Employment	913-281-1600	
Jim	Paquette	Providence Health	913-596-4951	
Rob	Pearcy	Pearcy Tice Krizman Communications	913-321-8989	
Ray	Reuter	KAZEN	913-851-2420	
Terry	Robinson	Robinson's Delivery Service	913-281-4952	
Pat	Sedlock	Pat Sedlock Commercial Real Estate	913-334-3333	
Erv	Sims	Mt. Cannel Redevelopment Corp.	913-621-4111	
Steve	Terbovich	Northwestern Mutual Financial Network	913-676-8017	
George	Turner	General Motors	913-573-7206	
Roy	Vinyard	Story Construction Co.	913-254-7617	
Al	Walker	Kansas Gas Service	913-319-8702	
Kaye	Walter	KCK Community College	913-288-7269	

Senate Commerce Committee

2-1-05

Attachment 4-76

CHAMBER

913 371 3732

P.03



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas Contractors and Suppliers
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

The American Subcontractors Association, along with the Electrical League of Missouri and Kansas, The Sheet Metal and Air Conditioning Contractors National Association, The Kansas City Masonry Association, National Electrical Contractors Association, The Kansas Prestress Concrete Association, The National Association of Credit Managers, Fire Sprinklers Association of Kansas City, and others believe that since this legislation is critically important to subcontractors, material suppliers, and their customers that this legislation be passed this year.

We need your help and support to accomplish the goal of being paid promptly for our work and our materials.

If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES NO This will be beneficial to my customer and me.
YES NO I will support this legislation. *
YES NO I am willing to testify on behalf of this bill.

Company Name: KISSICK CONST. CO

Contact Person: TIM KISSICK

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051



Senate Commerce Committee

2-1-05

6.2005 2:07PM

BLDG ERECTION SRVCS

NO.687

P.2/2



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480894, Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcmss@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as other important provisions to restore fairness and accountability between parties to construction contracts.

The American Subcontractors Association, along with the Electrical League of Missouri and Kansas, The Sheet Metal and Air Conditioning Contractors National Association, The Kansas City Masonry Association, National Electrical Contractors Association, The Kansas Precast Concrete Association, The National Association of Credit Managers, Fire Sprinkler Association of Kansas City, and others believe that since this legislation is critically important to subcontractors, material suppliers, and their customers that this legislation be passed this year.

We need your help and support to accomplish the goal of being paid promptly for our work and our materials.

If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES <input type="checkbox"/>	NO <input type="checkbox"/>	This will be beneficial to my customer and me.
YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	I will support this legislation. *
YES <input type="checkbox"/>	NO <input type="checkbox"/>	I am willing to testify on behalf of this bill.

Company Name: Leiser Construction LLC

Contact Person: Sandra Leiser

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Number: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051



A CHARTERED CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

Senate Commerce Committee

2-1-05

Attachment 4-78



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480654 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kccasa@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (RISCCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (RISCCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

The American Subcontractors Association, along with the Electrical League of Missouri and Kansas, The Sheet Metal and Air Conditioning Contractors National Association, The Kansas City Masonry Association, National Electrical Contractors Association, The Kansas Precast Concrete Association, The National Association of Credit Managers, Fire Sprinkler Association of Kansas City, and others believe that since this legislation is critically important to subcontractors, material suppliers, and their customers that this legislation be passed this year.

We need your help and support to accomplish the goal of being paid promptly for our work and or materials.

If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES NO This will be beneficial to my customer and me.

YES NO I will support this legislation. "

YES NO I am willing to testify on behalf of this bill.

Company Name: LEWIS STREET GLASS CO.

Contact Person: BOB CRAIGER Bob Craiger

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051

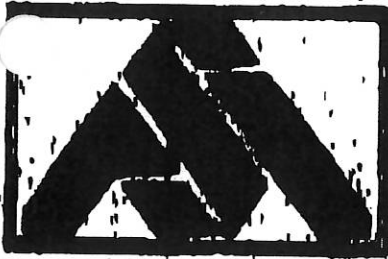


A CHARTERED CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

Senate Commerce Committee

2-1-05

Attachment 4-79



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 48888 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kansas@ksccr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Payment in Construction Contracts Act (PICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Payment in Construction Contracts Act (PICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to resolve disputes and accountability between parties to construction contracts.

The American Subcontractors Association, along with the Electrical League of Missouri and Kansas, The Sheet Metal and Air Conditioning Contractors National Association, The Kansas City Masonry Association, National Electrical Contractors Association, The Kansas Precast Concrete Association, The National Association of Credit Managers, The Electricians Association of Kansas City, and others believe that since this legislation is critically important to subcontractors, material suppliers, and their customers that this legislation be passed this year.

We need your help and support to accomplish the goal of being paid promptly for our work and/or materials.

If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	This will be beneficial to my customer and me.
YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	I will support this legislation.
YES <input type="checkbox"/>	NO <input type="checkbox"/>	I am willing to testify on behalf of this bill.

Company Name: MCCLELLAND SOUND INC.

Contact Person: Richard McClelland

Comments: WE DO NOT GET PAID SOMETIMES FOR 6 MONTHS

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

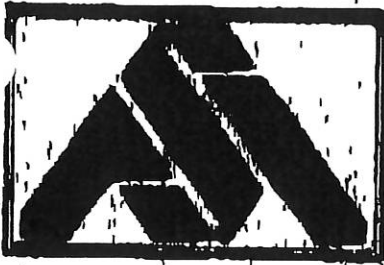
Bill Miller
Government Affairs

Fax Number: (816) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970

Senate Commerce Committee





AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480554 Kansas City, MO 64148
Tele (816) 842-1255 Fax (816) 842-1255
email: kcaaa@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as other important provisions to restore fairness and accountability between parties to construction contracts.

The American Subcontractors Association, along with the Electrical League of Missouri and Kansas, The Sheet Metal and Air Conditioning Contractors National Association, The Kansas City Masonry Association, National Electrical Contractors Association, The Kansas Pressmens' Caucus Association, The National Association of Credit Managers, Fire Sprinklers Association of Kansas City, and others believe that since this legislation is critically important to subcontractors, material suppliers, and their customers that this legislation be passed this year.

We need your help and support to accomplish the goal of being paid promptly for our work and our materials.

If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	This will be beneficial to my customer and me.
YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	I will support this legislation. *
YES <input type="checkbox"/>	NO <input checked="" type="checkbox"/>	I am willing to testify on behalf of this bill.

Company Name: McElroy's Inc.

Contact Person: Dan Beal

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Number: (913) 764-2317
(816) 842-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Senate Commerce Committee



A CHARTERED CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

Attachment 4-81



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcsaa@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

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We need your help and support to accomplish the goal of being paid promptly for our work and our materials.

If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	This will be beneficial to my customer and me.
YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	I will support this legislation. *
YES <input type="checkbox"/>	NO <input checked="" type="checkbox"/>	I am willing to testify on behalf of this bill.

Company Name: MIDWEST DRYWALL CO., INC. **CANNOT SCHEDULE AT THIS TIME**

Contact Person: DEWICK H. DICKER, TREAS

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051



A CHARTERED CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

Senate Commerce Committee
2-1-05

Attachment 4-82



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

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If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	This will be beneficial to my customer and me.
YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	I will support this legislation. *
YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	I am willing to testify on behalf of this bill.

Company Name: Omega Concrete Systems, Inc.

Contact Person: Gary L. Federburg *Gary Federburg* 913 287-4343

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051
Senate Commerce Committee



Received Time Jan. 23. 2005 12:59PM AMERICAN SUBCONTRACTORS ASSOCIATION Attachment 4-83



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas Contractors and Suppliers
RE: *The Kansas Fairness in Construction Contracts Act (FICCA)*

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

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If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES NO This will be beneficial to my customer and me.
YES NO I will support this legislation. *
YES NO I am willing to testify on behalf of this bill.

Company Name: RYAN BUILDING MATERIALS, LLC
Contact Person: MIKE FERGUSON 913-321-3225

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051
Senate Commerce Committee



Attachment 4-84



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as other important provisions to restore fairness and accountability between parties to construction contracts.

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YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	This will be beneficial to my customer and me.
YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>	I will support this legislation. ⁴¹
YES <input type="checkbox"/>	NO <input checked="" type="checkbox"/>	I am willing to testify on behalf of this bill.

Company Name: Salina Concrete Products, Inc

Contact Person: Clifford Thummel

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970

Senate Commerce Committee



Received Time Jan. 25. 4:33 PM AMERICAN SUBCONTRACTORS ASSOCIATION

Attachment 2-1-05
4-85



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas Contractors and Suppliers
RE: *The Kansas Fairness in Construction Contracts Act (FICCA)*

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If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES NO This will be beneficial to my customer and me.
YES NO I will support this legislation. *
YES NO I am willing to testify on behalf of this bill.

Company Name: Summit Masonry, Inc. 816-224-1010
Contact Person: John R. Sheehy johns@summitmasonryinc.com
Comments: Go Man Go!

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051
Senate Commerce Committee



*A CHARTERED CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOC

Attachment 2-1-05
4-86

JAN. 2005 5:01PM

BLDG ERECTION SRVCS

NO. 608

P. 2/2



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 420554 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasakc@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as other important provisions to restore fairness and accountability between parties to construction contracts.

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If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

YES NO This will be beneficial to my customer and me.

YES NO I will support this legislation. *

YES NO I am willing to testify on behalf of this bill.

Company Name: Superior Ply & White

Contact Person: Arch. Condit

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Number: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 64051
Senate Commerce Committee



A CHARTERED CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

Attachment 4-87



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

TO: Kansas Contractors and Suppliers
RE: *The Kansas Fairness in Construction Contracts Act (FICCA)*

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If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

- YES NO This will be beneficial to my customer and me.
- YES NO I will support this legislation. *
- YES NO I am willing to testify on behalf of this bill.

Company Name: Trio Masonry

Contact Person: Brett A. Turley

Comments: Will be out of town - back on Mon.

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe KS 66051
Senate Commerce Committee



2-1-05
Attachment 4-88



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

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RE: *The Kansas Fairness in Construction Contracts Act (FICCA)*

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YES X NO _____ This will be beneficial to my customer and me.
YES X NO _____ I will support this legislation. *
YES _____ NO X I am willing to testify on behalf of this bill.

Company Name: TRI-STATE MASONRY, Inc

Contact Person: PETER E. FRANDSEN

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

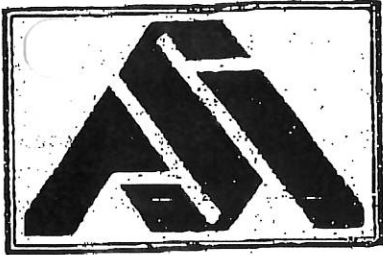
Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Olathe, KS 66051
Senate Commerce Committee





AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480664 Kansas City, MO 64148
Tele: (816) 942-1255 Fax (816) 942-1255
email: kcasa@kc.rr.com

January 24, 2005

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RE: *The Kansas Fairness in Construction Contracts Act (FICCA)*

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- YES NO This will be beneficial to my customer and me.
- YES NO I will support this legislation. *
- YES NO I am willing to testify on behalf of this bill.

Company Name: Weber Carpet Inc

Contact Person: Sharon Lima

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Senate Commerce Committee



2-1-05
Attachment 4-90



AMERICAN SUBCONTRACTORS ASSOCIATION

Greater Kansas City Chapter
P.O. Box 480684 Kansas City, MO 64148
Tele (816) 942-1255 Fax (816) 942-1255
email: kccaa@kc.rr.com

January 24, 2005

TO: Kansas AGC Specialty Contractors
RE: The Kansas Fairness in Construction Contracts Act (FICCA)

The American Subcontractors Association (Greater Kansas City Chapter) has introduced legislation in Kansas known as *The Kansas Fairness in Construction Contracts Act (FICCA)*. This legislation requires timely payment for work performed or materials supplied on private construction work in Kansas, as well as, other important provisions to restore fairness and accountability between parties to construction contracts.

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If you think this will help you and your customers, please check the appropriate box below, which indicates your position and fax, mail or e-mail back to us. Thank you in advance for your help.

- YES NO This will be beneficial to my customer and me.
- YES NO I will support this legislation. *
- YES NO I am willing to testify on behalf of this bill.

Company Name: WILCOX PAINTING

Contact Person: _____

Comments: _____

*Your indication of support means that we are allowed to testify before House and Senate Committee hearings that you are in favor of this legislation.

Sincerely,

Bill Miller
Government Affairs

Fax Numbers: (913) 764-2317
(816) 942-1255

Mailing Address: Bill Miller
Government Affairs
P.O. Box 970
Senate Commerce Committee



*A CHARTERED CHAPTER OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

2-1-05
Attachment 4-91

SUPPORTERS TO THE KANSAS FAIRNESS IN PRIVATE CONSTRUCTION CONTRACT ACT

Robert Switzer Jr., President	A.T. Switzer Painting Co., Inc.	Kansas City, Missouri
Thomas Farrar, President	Advanced Building Systems, Inc.	Kansas City, Kansas
John Kelble, President	Associated Air Products	Shawnee Mission, Kansas 66215
Tonya Bair, Vice President	Bair Company	Louisburg, Kansas 66053
	Bernie Electric	2316 S 5th Street Kansas City, Kansas 66103
Jerry Root, President	Boradway Electric Construction Co.	Kansas City, Kansas
	Broken Arrow Electric Supply, Inc	2350 W Vancouver Broken Arrow, Oklahoma 74012
David Gabert, Vice President of Sales	Builders Steel Company	North Kansas City, Missouri
W.R. Miller, President	Building Erection Services	Olathe, Kansas
Doug Carlson	C&O Electric Sales Company	Overland Park, Kansas
Robert Doran	Capital Electric Construction Company	Leavenworth, Kansas
Larry Meehan	Carter-Waters Corporation	PO Box 412676 Kansas City, Missouri 64141

Senate Commerce Committee

2-1-09

Attachment

4-92

SUPPORTERS TO THE KANSAS FAIRNESS IN PRIVATE CONSTRUCTION CONTRACT ACT

Ardyce Shipman	Complete Home Concepts	North Kansas City, Missouri 64116
Mark Simpson, General Manager	Coreslab Structures, Inc.	Kansas City, Kansas 66111
	Crescent Electric	Kansas City, Missouri
W. Curby Hughes	Curby's Lawn & Garden	
Lisa Lucas, Accounting Credit Manager	Diamond Vantage, Inc.	Leawood, Kansas 66211
	Electric League of MO & KS	638 West 39th Street Kansas City, Missouri 64111
Jim Lacy, President (Mr. Lacy is the former president of the Electric League of MO & KS)	Electrical Corporation of America	Raytown, Missouri
	Electrical Materials Company	3007 E 85th Street Kansas City, Missouri 64132
	French Gerleman	2446 Schuetz Road Maryland Heights, Missouri 63043
	Greater KC Mason Contractors Assoc.	PO Box 240036 Kansas City, Missouri 64124
Dan Haake, Owner	Haake Foundations	Raytown, Missouri
	IBEW & NECA Labor Management Corporation Trust	402 E Bannister Road, Suite E Kansas City, Missouri

Senate Commerce Committee

2-1-05

Attachment

4-93

SUPPORTERS TO THE KANSAS FAIRNESS IN PRIVATE CONSTRUCTION CONTRACT ACT

	Interstate Flooring dba Case Supply	507 N Montgall Kansas City, Missouri 64120
John Owens, Treasurer	Kansas City Electical Supply Co.	10900 Mid America Ave Lenexa, Kansas 66219
	Kansas City, KS Chamber of Commerce	727 Minnesota Avenue Kansas City, Kansas 66101
Rosana Privitera Biondo, President	Mark One Electric Company	Kansas City, Missouri
	Mechanical Contractors Assoc.	9229 Ward Parkway, Suite 270 Kansas City, Missouri 64111
	Mid Continent Safety, LLC	PO BOX 16689 Wichita, Kansas 67216
Beth Houser, Credit Manager	Mid-Am Building Supply, Inc.	30 Osage Avenue Kansas City, Kansas 66105
	Midwest Mechanical Corp.	11100 Ash, Suite 100 Leawood, Kansas 66211
Harold Mitts Jr., General Counse/Vice President	MMC Corp	Leawood, Kansas
H. Patrick Tolle, President	NACM National Association of Credit Management	10670 Barkley Overland Park, Kansas 66212
	NECA - Kansas City Chapter	PO Box 32255 Kansas City, Missouri 64171
Ingrid Lehnert, Esq., Director, Contract Administrator	Rinker Materials Corporation	
Brian Shaw	Shaw Electric Supply Company	Kansas City, Missouri 64108

Senate Commerce Committee

2-1-05

Attachment

4-94

SUPPORTERS TO THE KANSAS FAIRNESS IN PRIVATE CONSTRUCTION CONTRACT ACT

Carl Orser	Shawnee Steel	Merriam, Kansas
	SMACNA Kansas City Chapter	777 Admiral Blvd Kansas City, Missouri 64106
	Southland Carpet Supplies of Kansas, Inc.	3020 S 44th Street Kansas City, Kansas 66106
Dave Massey, Corporate Credit Manager	Spencer Reed Group, Inc.	
Bill Keller, President	Stanion Wholesale Electric	PO Drawer P Pratt, Kansas 67124
James Wissman, President	Structral Metals of Kansas City, Inc.	1911 Television Place Kansas City, Missouri 64126
	Teague Electric Construction	11325 Strangline Road Lenexa, Kansas 66215
	The Greater Kansas City Chapter American Subcontractors Assoc.	Kansas City, Kansas
Royce Fawcett, Assistant General Manager	The Stresscrete Group	14503 Wallick Road Atchison, Kansas 66002
	Thomas M. Moore, Attorney Moore, Hennessy & Freeman, PC	4435 Main Street, Suite 900 Kansas City, Missouri 64111
Jim McCourt, President	Tri-County Concrete, Inc.	Kansas City, Kansas 66112
Sharon Lima, Credit Manager	Weber Carpet, Inc.	

Senate Commerce Committee

2-1-05

Attachment

4-95

SUPPORTERS TO THE KANSAS FAIRNESS IN PRIVATE CONSTRUCTION CONTRACT ACT

Ken Keller	Western Extralite Company	1470 Liberty Street Kansas City, Missouri 64102
Phil Boan	Boan Masonary Co., Inc.	
Fran Suelez	Carpet Factory Outlet, Inc. Dba McIntyre Mann Carpet	
Pat Carmichael	Concrete Materials, Inc.	
Brian Cox	Cox - Kent & Assoc. Inc.	
Ross A Distefano	D&D Masonary	
Mark Carpenter	Fire Protection Servicec, Inc.	
Martin Little	Jack Foster Co., Erectors, Inc.	
Arlow Jones	Jones Paint	
John Joyce	Joyce Construction Corp.	
Steve Morgan	Kansas Building Products	
Jim Kissick	Kissick Construction Co	

Senate Commerce Committee

2-1-09

Attachment

4-960

SUPPORTERS TO THE KANSAS FAIRNESS IN PRIVATE CONSTRUCTION CONTRACT ACT

Sandra Leiser	Leiser Construction, LLC	
Bob Crager	Lewis Street Glass Co.	
Richard McClelland	McClelland Sound Inc.	
Dan Beal	McElroy's Inc.	
Dewitt Dieker	Midwest Drywall Co.	
Gary Fodenburg	Omega Concrete Systems, Inc.	
Mike Ferguson	Ryan Building Magterials, LLC	
Clifford Thummel	Salina Concrete Products, Inc.	
John Sheehy	Summit Masonry, Inc.	
Arch Conduff	Superior Plumbing of Wichita	
Bill Adams	The Fagan Company	
Brett Turley	Trio Masonry	
Peter Frandser	Tri-State Masonry, Inc.	

Senate Commerce Committee

2-1-05

Attachment

4-97

SUPPORTERS TO THE KANSAS FAIRNESS IN PRIVATE CONSTRUCTION CONTRACT ACT

	Wilcox Plumbing	

Senate Commerce Committee
2-1-05

Attachment 4-98

4-99

OWNER: PROJECT: APPLICATION NO.: Distribution to:
 PERIOD TO: OWNER
 PROJECT NOS.: ARCHITECT
 CONTRACTOR
 FROM CONTRACTOR: VIA ARCHITECT: CONTRACT DATE:

CONTRACT FOR:

CONTRACTOR'S APPLICATION FOR PAYMENT

Application is made for payment, as shown below, in connection with the Contract. Continuation Sheet, AIA Document G703, is attached.

1. ORIGINAL CONTRACT SUM \$ _____
2. Net change by Change Orders \$ _____
3. CONTRACT SUM TO DATE (Line 1 ± 2) \$ _____
4. TOTAL COMPLETED & STORED TO DATE \$ _____
 (Column G on G703)
5. RETAINAGE:
 - a. _____% of Completed Work \$ _____
 (Columns D + E on G703)
 - b. _____% of Stored Material \$ _____
 (Column F on G703)
 - Total Retainage (Line 5a + 5b or
 Total in Column I of G703) \$ _____
6. TOTAL EARNED LESS RETAINAGE \$ _____
 (Line 4 less Line 5 Total)
7. LESS PREVIOUS CERTIFICATES FOR PAYMENT
 (Line 6 from prior Certificate) \$ _____
8. CURRENT PAYMENT DUE \$
9. BALANCE TO FINISH, INCLUDING RETAINAGE
 (Line 3 less Line 6) \$ _____

CHANGE ORDER SUMMARY	ADDITIONS	DEDUCTIONS
Total changes approved in previous months by Owner		
Total approved this Month		
TOTALS		
T CHANGES by Change Order		

The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.

CONTRACTOR:

By: _____ Date: _____
 State of: _____
 County of: _____
 Subscribed and sworn to before
 me this _____ day of _____

Notary Public:
 My Commission expires: _____

Senate Commerce Committee

2-1-05

Attachment 4-99

ARCHITECT'S CERTIFICATE FOR PAYMENT

In accordance with the Contract Documents, based on on-site observations and the data comprising this application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

AMOUNT CERTIFIED \$ _____

(Attach explanation if amount certified differs from the amount applied for. Initial all figures on this Application and on the Continuation Sheet that are changed to conform to the amount certified.)

ARCHITECT:

By: _____ Date: _____

This Certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the Contractor named herein. Issuance, payment and acceptance of payment are without prejudice to any rights of the Owner or Contractor under this Contract.

INSTRUCTION SHEET

AIA DOCUMENTS G702 and G703

Attachment 1
50-1-6
Senate Commerce Committee

A. GENERAL INFORMATION

1. Purpose and Related Documents

AIA Document G702, Application and Certificate for Payment, is to be used in conjunction with AIA Document G703, Continuation Sheet. These documents are designed to be used on a Project where a Contractor has a direct Agreement with the Owner. Procedures for their use are covered in AIA Document A201, General Conditions of the Contract for Construction, 1987 Edition.

2. Use of Current Documents

Prior to using any AIA document, the user should consult the AIA, an AIA component chapter or a current AIA Documents List to determine the current edition of each document.

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B. COMPLETING THE G702 FORM:

After the Contractor has completed AIA Document G703, Continuation Sheet, summary information should be transferred to AIA Document G702, Application and Certificate for Payment.

The Contractor should sign G702, have it notarized and submit it, together with G703, to the Architect.

The Architect should review G702 and G703 and, if they are acceptable, complete the Architect's Certificate for Payment on G702. The Architect may certify a different amount than that applied for, pursuant to Paragraphs 9.5 and 9.6 of A201. The Architect should then initial all figures on G702 and G703 that have been changed to conform to the amount certified and attach an explanation. The completed G702 and G703 should be forwarded to the Owner.

C. COMPLETING THE G703 FORM:

Heading: This information should be completed to be consistent with similar information on AIA Document G702, Application and Certificate for Payment.

Columns A, B & C: These columns should be completed by identifying the various portions of the Project and their scheduled value consistent with the schedule of values submitted to the Architect at the commencement of the Project or as subsequently adjusted. The breakdown may be by sections of the Work or by Subcontractors and should remain consistent throughout the Project. Multiple pages should be used when required.

Column C should be subtotaled at the bottom when more than one page is used and totaled on the last page. Initially, this total should equal the original Contract Sum. The total of column C may be adjusted by Change Orders during the Project.

Column D: Enter in this column the amount of completed work covered by the previous application (columns D + E from the previous application). Values from column F (Materials Presently Stored) from the previous application should not be entered in this column.

Column E: Enter here the value of Work completed at the time of this application, including the value of materials incorporated into the project which were listed on the previous application under Materials Presently Stored (column F).

Column F: Enter here the value of Materials Presently Stored for which payment is sought. The total of the column *must* be recalculated at the end of each pay period. This value covers both materials newly stored for which payment is sought and materials previously stored which are not yet incorporated into the Project. Mere payment by the Owner for stored materials does not result in a deduction from this column. Only as materials are incorporated into the Project is their value deducted from this column and incorporated into column E (Work Completed—This Period).

Column G: Enter here the total of columns D, E and F. Calculate the percentage completed by dividing column G by column C.

Column H: Enter here the difference between column C (Scheduled Value) and column G (Total Completed and Stored to Date).

Column I: This column is normally used only for contracts where variable retainage is permitted on a line-item basis. It need not be completed on projects where a constant retainage is withheld from the overall contract amount.

Change Orders: Although Change Orders could be incorporated by changing the schedule of values each time a Change Order is added to the Project, this is not normally done. Usually, Change Orders are listed separately, either on their own G703 form or at the end of the basic schedule. The amount of the original contract adjusted by Change Orders is to be entered in the appropriate location on the G702 form.

Construction Change Directives: Amounts not in dispute that have been included in Construction Change Directives should be incorporated into one or more Change Orders. Amounts remaining in dispute should be dealt with according to Paragraph 7.3 in A201.

D. MAKING PAYMENT

The Owner should make payment directly to the Contractor based on the amount certified by the Architect on AIA Document G702, Application and Certificate for Payment. The completed form contains the name and address of the Contractor. Payment should not be made to any other party unless specifically indicated on G702.

E. EXECUTION OF THE DOCUMENT

Each person executing the Agreement should indicate the capacity in which they are acting (i.e., president, secretary, partner, etc.) and the authority under which they are executing the Agreement. Where appropriate, a copy of the resolution authorizing the individual to act on behalf of the firm or entity should be attached.

CONTINUATION SHEET

AIA DOCUMENT G703 (Instructions on reverse side)

PAGE OF P.

AIA Document G702, APPLICATION AND CERTIFICATE FOR PAYMENT, containing Contractor's signed Certification, is attached.

In tabulations below, amounts are stated to the nearest dollar.

Use Column I on Contracts where variable retainage for line items may apply.

APPLICATION NO.:
 APPLICATION DATE:
 PERIOD TO:
 ARCHITECT'S PROJECT NO.:

A ITEM NO.	B DESCRIPTION OF WORK	C SCHEDULED VALUE	D WORK COMPLETED		F MATERIALS PRESENTLY STORED (NOT IN D OR E)	G TOTAL COMPLETED AND STORED TO DATE (D+E+F)		H BALANCE TO FINISH (C - G)	I RETAINAGE (IF VARIABLE RATE)
			D FROM PREVIOUS APPLICATION (D + E)	E THIS PERIOD		% (G ÷ C)			

Senate Commerce Committee
 2-1-85
 Attachment 4-101

INSTRUCTION SHEET

AIA DOCUMENTS G702 and G703

Attachment 4-102
Senate Commerce Committee

A. GENERAL INFORMATION

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Time for State Legislatures to Stand Up for Subs



For the past three years, U.S. construction companies have been dealing with a struggling market. Starting in early 2001 and accelerated by the 9/11 attacks, the construction climate has cooled outside homebuilding. No one knows this better than

subcontractors. ENR's Top 600 Specialty Contractors ranking and analysis reflect this trend, with revenue for the group falling for the third straight year (see p. 38). Only recently have specialty contractors had a slight turnaround.

Any time the market is tough, contractors become more aggressive. For general contractors, this may take the form of tough and even questionable bidding practices and onerous contract provisions. The victims generally are downstream. Subs in the scramble for work—*any work*—will take the bait even though it is not particularly palatable. They may end up choking on it, but they also hurt the industry as a whole by creating the illusion that there is an approved open season on subs.

General contractors, in turn, are being pushed and pulled in directions they don't necessarily want to go by the competition, owners and the markets in general. But if the generals demand and subs accept pay-if-paid, hold-harmless or additional insureds clauses, why should generals stop asking for them?

There are no simple solutions. One possible path is for state legislatures to recognize the problem and provide minimum fundamental protections for subs. At first blush, that only makes sense on public projects where the state may end up holding the bag when a project turns sour. But most state legislatures take the position that construction

contracts are matters for the parties to negotiate. This is reflected in the recent analysis of state laws protecting subcontractors by the American Subcontractors Association, Alexandria, Va. New Mexico is the only state receiving a passing grade (barely) for laws protecting subs across the board.

Subcontractors should be savvy enough to understand the nature of the bargains they make. But there is a point where contract terms and business practices become so egregious that government must address them on public policy grounds. There are plenty of examples: usury is outlawed, the courts will not enforce contracts for illegal or immoral

There is a point where contract terms and business practices become so egregious that government must address them on public policy grounds.

purposes and interstate commerce has been an excuse for government to regulate all sorts of business activity.

It is time for state legislatures to reconsider the degree of business abuse being heaped on subcontractors. One place to start is "pay-if-paid clauses," which some states now prohibit. Subs generally have little connection to owners and have no say in general contract negotiations. Why should they take the risk of nonpayment to the general contractors? ■

Senate Commerce Committee

2-1-02

Attachment 4-103

Retainage Has Many Costs That Outweigh Benefits

Retainage has been a pain for contractors since it was first introduced in the 1840s in the U.K. Over the years, it became fully entrenched in the U.S. construction industry, but cracks have appeared in the concept. Some owners are backing away from retainage because they have

discovered the hidden costs, unfairness and relative ineffectiveness of holding back pay from contractors that have earned it in order to maintain some leverage over them as a project winds down.

The concept is deceptively simple—withhold about 10% of the fee to make sure the project will be finished and all discovered defects and punchlist items resolved. It is a kind of insurance policy that some owners think is free. The premiums, in fact, are pretty stiff, according to a new study by Dennis C. Bausman, assistant professor at South Carolina's Clemson University.

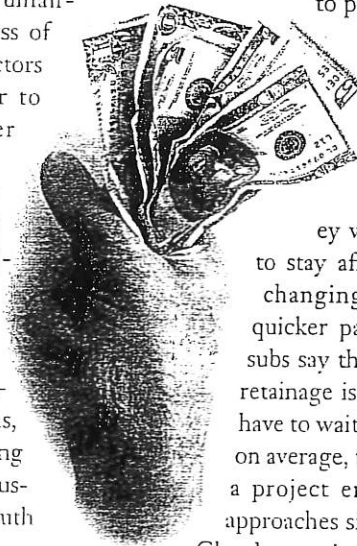
The Clemson study found that general contractors and construction managers (at risk) boost their bids for jobs with retainage by 2.2 to 2.4% to cover lost use of money during and after the project and lost opportunities due to a reduced cash flow. This is a clear, hard-dollar cost to owners—a multimillion-dollar insurance policy on large projects (see p. 14).

There also are more subtle costs. Competition for such contracts is reduced because contractors are reluctant to bid jobs with heavy retainage requirements if other alternatives are available. Ironically, this opens the door to lesser-skilled contractors and the kinds of problems that retainage is supposed

to prevent in the first place.

Retainage is bad enough by itself, but the industry also is notoriously slow in paying it back, preferring to enjoy the float of free money while contractors struggle to stay afloat or downright short-changing them in exchange for quicker payment. Contractors and subs say that in up to 10% of cases, retainage is not paid in full and they have to wait more than three months, on average, to receive the money after a project ends. For subs, the wait approaches six months.

Clearly, retainage imposes a hardship



The best insurance for owners that projects will be completed is to pick contractors with a reputation and track record of performing.

across the board for contractors. Instead of cracking the retainage whip, owners can take some practical action to ease the pain. This includes lowering retainage from the traditional 10%, releasing retainage to subs after they satisfactorily complete their portion of the project and using performance bonds as a substitute, if needed. But the best insurance for owners is to pick contractors with a reputation and track record of performing. ■

Senate Commerce Committee

2-1-05

Attachment

4-104

RETAINAGE

Owners and Contractors Disagree on Costs, Effects

There is a major disconnect between owner and contractor views on the costs and use of retainage in construction contracts, according to a new study by the Clemson University's Construction Science & Management Dept.

The study, which included more than 1,000 responses from owners, architects construction management firms (both for-fee and at-risk), general contractors and subcontractors, found that owners believe that retainage does not place severe financial burdens on contractors or subs. But construction firms disagreed, claiming that retained funds effectively block their ability to pursue subsequent projects and limit competition.

According to the study, bids from CM-at-risk firms average 2.4% lower on projects where there is no retainage, general contractors 2.2% lower and subs 3.6% lower. "The results were not totally unexpected," says Dennis C. Bausman, survey author and an assistant professor in the department at the university. "I expected subcontractors to say that retainage raised costs and lowered competition." But he was surprised that general contractors and CM-at-risk firms vigorously agreed.

Many contractors and contractor groups say low profit margins increase the toll that retainage takes on firms. "If you have a 3% profit margin, withholding 10% of the contract price until the entire project is finished can hurt," says David Mendes, senior director of communications at the American Subcontractors Association, McLean, Va.

There is a general trend to reduce or cut retainage in the federal sector and, to lesser extent, on the state and local level. In the survey, 63% of federal owners require no retainage while 56% of private owners surveyed said they continue to retain the traditional 10% of payments.

Some private owners have eliminated retainage. Merck & Co., Whitehouse Station, N.J., was cited by the study as changing its policy. Intel Corp. is another. "We eliminated it in favor of releasing

CM-for-fee firms claimed payment is made promptly upon completion of the project. But CM-at-risk firms and general contractors said they wait an average of 98 and 99 days, respectively, after project completion to be paid, while subs said their wait is 167 days.

Richard Wanner, executive vice president of steel fabricator and erector Wanner Metal Works Inc., illustrates the problem. The firm did some steel work on the three-year-long renovation of Ohio State

Views on Retainage Differ Sharply

- ▶ Owners do not believe retainage reduces contractor profits, increases failures, or places severe financial burdens on contractors and subcontractors.
- ▶ General contractor's bids average 2.2% lower on non-retainage jobs, CM-at-risk firms' are 2.4% lower and subs' bids are 3.6% lower.
- ▶ Owners strongly believe that contractors are paid retainage in full.
- ▶ General contractors are paid in full on 93.8% of jobs, while CM-at-risk firms and subs 89.6%.
- ▶ Owners strongly believe that retainage is paid promptly.
- ▶ General contractors say they are paid an average of 99 days after project completion, CM-at-risk firms 98 days and subcontractors 167 days.
- ▶ Owners and their agents marginally believe retainage motivates performance and are neutral on its effect on quality, but strongly believe that retainage provides effective leverage to correct deficiencies and close out the project.
- ▶ All parties support reducing retainage, but most owners and their agents object to elimination.

SOURCE: CLEMSON UNIVERSITY DEPT. OF CONSTRUCTION SCIENCE & MANAGEMENT

payments on hitting performance milestones," says Tom Weise, Intel corporate director of facilities, materials and services. He agrees that retainage drives up bid prices. "Who do you think pays for [retainage-related] contractor financing problems? The owner," Weise says. "It's insurance for the owner, but it's very expensive insurance."

Bausman says the problem for contractors could get even worse. "If interest rates rise much higher, the value of retainage will increase to the owner and be tougher for contractors," he warns.

Another disconnect between owners and contractors is on payment. Owners strongly believe that retainage is paid in full on each project. But CM-at-risk firms, general contractors and subs claimed that they received full payment of retainage due only 89.6%, 93.8% and 89.6% of the time, respectively. Owners, architects and

University's football stadium and had about \$238,000 in fees retained. "We had to wait more than two [football] seasons before we finally received the retained fees, five months after Ohio State won the national championship," Wanner says. "You can't grow your business if you can't access your money."

Surprisingly, the owners surveyed do not see retainage as motivating performance or ensuring quality. They strongly believe that retainage encourages correction of defects, submission of closeout documents and completion of punchlist items.

The survey shows general support among all parties for reductions in retainage levels. However, owners and their agents do not support its elimination. Only subcontractors supported elimination of subcontractor retainage. ■

Senate Commerce Committee

2-1-05

Attachment 4-105



“Retainage Practice in the Construction Industry” Executive Summary

Commissioned by the Foundation of the American Subcontractors Association (www.fasaonline.com) as the first study in its Contractors' Knowledge Quest research series, “Retainage Practice in the Construction Industry” provides insight into contemporary attitudes toward the practice of retainage, as well as historical background illustrating the evolution of attitudes toward the practice. Author Dr. Dennis Bausman of Clemson University explains the historical trend toward reduction of retainage on construction projects, largely driven by high-profile industry efforts to reduce retainage on projects funded by federal government agencies. Dr. Bausman also reveals contemporary perceptions of construction owners (public and private), architects, construction managers, general contractors and subcontractors about the role and effects of retainage, and analyzes the significance of these perceptions for the construction industry.

“Retainage Practice in the Construction Industry” provides quantitative data that answer some of the long-standing questions about retainage in the construction industry. Through careful review of the survey responses of over 1,000 owners, architects, construction managers, general contractors and subcontractors, Dr. Bausman definitively answers questions such as whether retainage influences project relationships (it does), whether owners and their agents really believe that retainage is needed as an incentive for quality work (they are neutral), and whether there usually is substantial “float” time between the general contractor’s receipt of subcontractor retainage and payment to the subcontractor (there is).

Dr. Bausman’s analysis is guided by the research program set forth in the research objectives of “Retainage Practice in the Construction Industry” (p. 12):

1. Identify the detriments of retainage for members of the construction team.
2. Identify the benefits of retainage for members of the construction team.
3. Identify alternatives that will minimize the detrimental impact of retainage.
4. Where such alternatives are already in use, evaluate their effectiveness.

One key finding is that alternatives to retainage are not in wide use, despite the industry’s overall progress toward retainage reduction. The survey data also confirm that there are differences among construction team members about what the benefits and detriments of retainage are, and the desirability and effectiveness of different alternatives.

The differences are numerous. For example, on page 22, Dr. Bausman writes:

Owners and their agents strongly believe that retainage is paid in full on each project. However, construction managers at-risk, general contractors, and subcontractors (at-

(over)

FOUNDATION OF THE AMERICAN SUBCONTRACTORS ASSOCIATION, INC.
1004 Duke Street, Alexandria, VA 22314-3588
Phone: (703) 684-3450 Fax: (703) 836-3482
e-mail: info@contractorsknowledgenetwork.org

Senate Commerce Committee

2-1-05

Attachment 4-1060



risk builders) state that they receive 100% of their retainage on only 89.6%, 93.8%, and 89.6% of their projects respectively. There apparently is a disagreement on the definition of *paid in full*. In addition, there is a wide divide on the timeliness of payment. Owners, architects, and construction managers submit that retainage is paid promptly upon completion, whereas at-risk contractors and subcontractors claim it is not. Here it appears there is a disagreement on the definition of *prompt payment*.

There is yet wider disagreement on other issues:

1. Owners/agents believe that at-risk construction managers and builders are not less likely to pursue a project if funds are retained, while majorities of at-risk CMs, general contractors and subcontractors all say they are less likely to pursue such projects (p. 19).
2. Federal government construction owners — the group with the most experience in totally eliminating retainage — believe that the elimination of retainage on projects has had a favorable impact on project relationships, while other owners — who rarely eliminate retainage — believe that retainage elimination does not facilitate project relationships (p. 20).
3. Owners/agents believe that retainage abuse is not widespread, while all other parties, and especially subcontractors, believe that the economic leverage of retainage is used to favorably settle claims or changes for extra work (p. 23).

The study concludes with recommendations on possible alternatives to retainage. Central to these recommendations are two findings: (1) That the view, pervasive among owners, that retainage adds no costs to construction projects is a position not “in harmony with economic theory,” (p. 26) and (2) That alternatives to the current practice of retainage might meet the main concern of owners who defend current practice, which is proper completion of projects. Assurance of subcontractors’ proper completion of projects does not require that subcontractors be universally saddled with financial risk until the whole project is complete. For example, Dr. Bausman determines that the whole construction team could support reduction of retainage levels; line-item release of retainage to early-finishing trades; escrow accounts for retained funds; and prompt payment of retained funds (pp. 24-25). The conclusion of the study also mentions alternatives to retainage suggested by survey respondents, such as that funds be retained for non-performance only.

The historical background, data and analysis of “Retainage Practice in the Construction Industry” are a profound contribution to the body of knowledge on the practice of retainage, and no doubt will make this study a must-read for everyone who wants to understand the topic. ■

FOUNDATION OF THE AMERICAN SUBCONTRACTORS ASSOCIATION, INC.
1004 Duke Street, Alexandria, VA 22314-3588
Phone: (703) 684-3450 Fax: (703) 836-3482
e-mail: info@contractorsknowledgenetwork.org

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**Foundation of the
American Subcontractors Association**

**Contractors' Knowledge Quest
Research Series**

**Retainage Practice in the
Construction Industry**

by
Dennis C. Bausman, PhD
Clemson University

November 2004

Foundation of the American Subcontractors Association, Inc.
1004 Duke Street
Alexandria, VA 22314-3588
Telephone: 703-684-3450 Fax: 703-836-3482
Email: info@contractorsknowledgenetwork.org
Web: www.contractorsknowledgenetwork.org

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Retainage Practice in the Construction Industry

Dennis C. Bausman, PhD

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Alexandria VA 22314-3588

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Fax: 703-836-3482

Email: info@contractorsknowledgenetwork.org

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2-1-05

Attachment

4-109

Table of Contents

ABOUT THE FOUNDATION OF ASA AND THE CONTRACTORS' KNOWLEDGE NETWORK	i
ABOUT THE AUTHOR	v
INTRODUCTION	1
History and Purpose	1
Evolution of Retainage Practice in the US	2
Industry Standards for Retainage	5
Impact of Retainage	6
Retainage Alternatives	8
Retainage Abuse	11
Opinions Vary	11
RESEARCH OBJECTIVES	
Methodology Overview	13
Sample Selection	13
Survey Distribution	14
Survey Response	14
FINDINGS AND ANALYSIS	15
Organization and Statistical Analysis	15
Current Retainage Practices	16
Use of Alternative Retainage Practices	17
Assessment of Retainage Practices	18
Retainage Abuse	21
Retainage Alternatives	23
CONCLUSIONS AND RECOMMENDATIONS	26
BIBLIOGRAPHY	28

About the Foundation of ASA and the Contractors' Knowledge Network

The Foundation of the American Subcontractors Association (FASA) was established in 1987 as a 501(c)(3) tax-exempt entity to support research, education and public awareness. Through its Contractors' Knowledge Network, FASA is committed to forging and exploring the critical issues shaping subcontractors and specialty trade contractors in the construction industry. FASA provides subcontractors and specialty trade contractors with the tools, techniques, practices, attitude and confidence they need to thrive and excel in the construction industry.

FASA's Contractors' Knowledge Network has four components:

- Contractors' Knowledge Quest, a program for commissioning and funding research on issues of importance to construction subcontractors and specialty trade contractors.
- Contractors' Knowledge Bank, an online knowledge base of research and educational materials on issues of importance to construction subcontractors and specialty trade contractors.
- Contractors' Knowledge Depot, a "bookstore" of digitized educational products designed for construction subcontractors and specialty trade contractors.
- *The Contractor's Compass*, a quarterly educational journal designed to equip construction subcontractors and specialty trade contractors with the knowledge they need to prosper. The American Subcontractors Association has made the *Compass* its official educational journal.

Contractors' Knowledge Quest

FASA's Contractors' Knowledge Quest is dedicated to expanding the existing body of knowledge on subcontractor issues. Under the hallmark of the Quest, FASA funds and commissions research on the key business issues of construction subcontractors and specialty trade contractors. The research goals are two-fold: (1) to identify trends that could impact construction subcontractors and specialty trade contractors in order to help them prepare for these changes; and (2) to identify best practices for subcontractors and specialty trade contractors. Current and planned research includes the following:

- **Retainage Reform.** On Nov. 16, 2004, FASA will release the results of its first research project. Titled *Retainage Practice in the Construction Industry*, it was prepared by Dr. Dennis C. Bausman at Clemson University. Dr. Bausman not only addressed the history and practice of retainage, but he also conducted a comprehensive survey of the members of the construction team on their views on retainage. An executive summary of the report is available for free online at

www.contractorsknowledgenetwork.org. A copy of the full report may be purchased through the Contractors' Knowledge Depot at the same Web address.

■ **Electronic Reverse Auctions.** FASA, in conjunction with the Associated General Contractors Education & Research Foundation and with the support of several other leading construction associations, has commissioned Louisiana State University to conduct a research project on electronic reverse auctions. Phase I of the project is slated for publication in late 2004.

■ **Insurance/Tort Reform.** FASA has joined The Electrical Contracting Foundation in funding a study by Ducker Worldwide on the potential impact of insurance and tort reform on the construction industry. The research will include an assessment and quantitative analysis of the impact of liability claims and litigation, and internal insurance industry policies, and explore the impact of alternative remedies. The report is slated for publication in early 2005.

■ **Additional Insured.** FASA has started discussions with prospective research institutions to conduct research on additional insured endorsements. The research will explore the perceived and real detriments and benefits of additional insured for various members of the construction team, including the impact on risk management practices and insurance premiums. It will also explore barriers to the use of alternatives to additional insured, including Owners and Contractors Protective (OCP) liability insurance.

■ **Wrap-Up Insurance.** FASA is developing an RFP on the impact of wrap-up insurance on various members of the construction team. The research will explore the perceived and real detriments and benefits of wrap-up insurance, including the impact on safety, risk management practices and insurance premiums.

Topics for consideration for future research include pay-if-paid clauses, best practices for negotiating strategies for subcontractors, best practices for collection techniques for subcontractors, and the impact on the bottom line of safety best practices.

For more information on FASA's Contractors' Knowledge Quest, go to www.contractorsknowledgenetwork.org or contact FASA at 1-888-374-3133.

Contractors' Knowledge Bank

The Contractors' Knowledge Bank is a powerful tool for anyone in the business of construction. The Bank is a digital information repository comprised of the knowledge that ASA has gathered during its more than 35 years of existence. It includes educational materials, special reports, white papers, manuals, etc., on topics as wide-ranging as subcontract terms and marketing. Its goal is to provide subcontractors and specialty contractors with 24/7 access to the type of information they need to operate successful businesses. The Bank can be accessed at www.contractorsknowledgenetwork.org or contact FASA at 1-888-374-3133.

Senate Commerce Committee

2-105

Attachment 4-112

Contractors' Knowledge Depot

The Contractors' Knowledge Depot is an online "bookstore" of educational products designed for construction subcontractors and specialty trade contractors. Educational products address key topics, such as subcontracts, business management, and construction claims. Many of the products were developed by FASA just for subcontractors. These include, for example, *Fundamentals of Fair Subcontracts*, *Mastering Subcontracts: A Reference Guide*, *Lien & Bond Claims in the 50 States*, and *The Specialty Contractor's Guide to Marketing Success*. For a complete list of educational products, go to www.contractorsknowledgenetwork.org or contact FASA at 1-888-374-3133.

The Contractor's Compass

The Contractor's Compass is a quarterly educational journal focusing on the business management education needs of construction subcontractors and specialty contractors. The journal is designed to equip readers with the ideas, tools and tactics they need to thrive! *The Contractor's Compass* addresses a wide range of topics. Its editorial calendar for 2005 includes "Subcontractor: Builder or Banker?"; "Surviving Design Games"; "Negotiating a Contract You Can Live With"; and "Managing Clients: The Good, the Bad and the Ugly." To subscribe to or advertise in *The Contractor's Compass*, go to www.contractorsknowledgenetwork.org or contact FASA at 1-888-374-3133.

For More Information

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Senate Commerce Committee

2-1-05

Attachment 4-113

About the Author

Dennis C. Bausman, PhD, CPC, has over 30 years experience in construction and construction education. Prior to his present position as an Assistant Professor in the Construction Science & Management Department at Clemson University he was in large commercial contracting where he held the positions of Executive Vice President, Division Manager, Senior Project Manager, Project Manager, Superintendent, Assistant Superintendent and Field Engineer over a 22 year career in industry. His industry experience includes management responsibility for over 300 projects totaling in excess of \$2 billion of construction with a project size ranging up to more than \$120 million. His project experience includes commercial, healthcare, industrial, entertainment, and public construction. He has personal knowledge and involvement with a variety of contracting formats including lump sum, guaranteed maximum price, cost plus, design-build, and construction management and has extensive experience with the 'practice of retainage'.

Bausman is a member of the board for the American Institute of Constructors and has been honored as a Certified Professional Constructor. He is a member of the Panel of Arbitrators for the American Arbitration Association and a licensed general contractor (inactive). Dr. Bausman has conducted numerous research projects relating to construction issues and has published and presented the results of his studies extensively. In addition, he has developed and taught various continuing education programs for construction companies and the National Center for Construction Education and Research.

Senate Commerce Committee
2-1-05
 Attachment 4-114

Retainage Practice in the Construction Industry

by Dennis C. Bausman, PhD
Clemson University

INTRODUCTION

The value of new construction in the United States is in excess of \$860 billion (US Census Bureau, 2003). On a significant portion of this work the practice of retainage is common. Retainage is generally characterized as a contractual arrangement where payment for a percentage of the value of completed work is withheld until completion (Jervis and Levin, 1988). In essence, retainage is money that has been earned but payment is delayed until a later stage of the project. Retainage held by an owner on a general contractor typically cascades through the entire delivery chain to include project subcontractors and vendors. The practice is commonly perceived to provide a level of financial protection to the party withholding retainage as well as an added incentive for proper and timely performance of the work. However, in an industry where profit margins are thin and cash management is essential, withholding retainage can create a financial strain on contractors and their delivery partners (Harrell, 2003).

History and Purpose

Construction projects are distinctive undertakings that typically involve a significant commitment of money and resources. Each project is often complicated, typically involves new methods and technologies, and generally has severe time and cost constraints. Because of the magnitude of cost and duration of production, partial payments for the work are typically disbursed during production. In essence, owners are providing partial payment for a 'product' prior to completion and final acceptance. Extending payment for a project during production has inherent risks including overpayment for the work installed, payment for defective work, and the continued solvency of the parties until the work is complete. To counter these risks retainage has evolved as a common practice in the construction industry whereby owners retain a percentage of each progress payment to their contractors, and contractors in turn typically withhold a similar amount from their subcontractors until satisfactory completion of the project (OPPAGA, 2000).

The practice of retainage has its origin in the UK industry at the onset of construction of the railway system in the 1840's. This massive construction undertaking created an environment encouraging new entrants into the construction industry to meet surging demand. Many of these 'new' contracting entities were unable to successfully perform, resulting in a high number of insolvencies. This situation led to the practice whereby railroad companies would withhold 20% or more of the contractors' payments to ensure performance and offset completion costs should the firm default (SECG, 2002; Mendes, 2003). Retainage provided a pool of funds to draw upon for completion of the work should the contractor be unwilling or financially incapable of completing the project (SECG, 2002).

From its origin in the UK the practice of retainage has grown to widespread use in the United States. In addition to protection against contractor insolvency, proponents have encouraged its use to provide a 'buffer' for the valuation of work installed, remedy defects found during turnover of the facility, and encourage contractor performance. However, opponents often argue that the primary purpose of retainage is to provide a source (or offset the need) for cash for the organization holding the retained funds (SECG, 2002).

Contractual arrangements vary, but retainage typically ranges from five to ten percent of the value of work installed. The contract may permit a reduction in the retainage percentage upon reaching certain construction milestones, but the total amount of retained funds is generally not released until substantial completion of the entire project. Contractors typically 'pass' the owner's retainage requirements through to their subcontractors and vendors. Even if an owner does not hold retainage on the contractor, it is not uncommon for the contractor to withhold retainage from its subcontractors (McGreevy, 2002). The trend in the construction industry has been for general contractors to self-perform less of the actual work. As a result, the financial burden imposed by retaining funds for work completed has fallen disproportionately on subcontractors, especially those that finish their work early in the delivery period (OPPAGA, 2000).

The practice of retainage is becoming an increasing hardship on contractors and subcontractors as profitability margins narrow. Robert Morris Associates (RMA) collects financial data from companies and compiles industry averages for comparison and benchmarking. In 1972 RMA noted that contractors earned approximately 6% profit on each dollar of revenue. By 1986 the profitability rate had declined to 3% and at the turn of the century it hovers around 2% of revenue. The financial situation is not much better for the subcontracting community where profitability now averages 3%-4% or less. Therefore, an owner retaining 10% on work installed is typically withholding up to five times the contractor's, or three times the subcontractors', profit on the project. This financial strain poses cash flow problems and has been linked to contractor failure (SCEG, 2002).

Evolution of Retainage Practice in the US

Due to the unique and fragmented structure of the construction industry, few individual contractors or subcontractors have the ability or influence to change retainage practices. As a result, national organizations representing industry members have taken the lead. These organizations include the Associated General Contractors of America (AGC), the Association of Builders and Contractors (ABC), the American Subcontractors Association (ASA), and the Associated Specialty Contractors (ASC). Each has a constituency that often times overlaps. AGC is an organization with over 33,000 members primarily consisting of general and specialty contractors. ABC is a national trade association representing over 23,000 members. Its primary membership also consists of contractors, subcontractors, and suppliers. ASA is a nonprofit trade association representing more than 6,000 subcontractors and specialty contractors in the construction industry, and ASC is an umbrella organization representing eight specialty contractor groups. Recognizing that Federal, State, and Local governments account for close to half of the expenditures for non-residential new work, much of the organizational focus has been on the public sector.

In the early 1980's, ASA and ASC were at the forefront of the effort to enhance the industry's payment practices (Semling, 1982). In 1983 the Office of Federal Procurement Policy urged that the general practice of holding 10% retainage on Federal work be limited to those cases where the practice was deemed necessary to ensure completion (Schweizer, 1983). This executive action applied to the contract between the government and the prime contractor. Five years later, the Prompt Payment Act Amendments of 1988 extended protection to subcontractors. This legislative action prohibited general contractors from retaining or withholding from a subcontractor more than the government retains from the contractor. In addition, it established minimum standards for the prompt release of retainage.

2-1-05

The Current Federal Acquisition Regulation (F.A.R.) continues to support the government's shift in policy to a more equitable approach to retainage. Paragraph 32.103 of the regulation states *"...Retainage should not be used as a substitute for good contract management, and the contracting officer should not withhold funds without cause. Determinations to retain and the specific amount to be withheld shall be made by the contracting officers on a case-by-case basis. Such decisions will be based on the contracting officer's assessment of past performance and the likelihood that such performance will continue."*

Subsequent to FAR's policy shift, the retainage policy of the individual Federal agencies was in a state of flux with retainage practice varying from project to project and agency to agency. Policy ranged from a 'zero retainage' policy adopted by the Department of Defense to other agencies' continued use of the 'old Federal Standard' of 10% on the first half of the work and zero retainage held on the last half of the project if performance on the project was satisfactory.

However, the overall trend for both the Federal and State agencies since the early 1980's has been toward a reduction in the percentage of retained funds on new construction. This shift is largely due to the continuing efforts of the American Subcontractors Association, the Associated General Contractors of America, and the Associated Specialty Contractors. Currently, Federal agencies such as the Department of Defense, the General Services Administration, and the US Department of Transportation have 'zero' retainage policies and typically only withhold retainage if there is just cause.

Federal policy has also had an impact on State retainage policy, in particular for those projects utilizing Federal funding. One of the most significant actions involves the US Department of Transportation (USDOT). Responding to a 1995 ruling by the US Supreme Court in the Adarand case, the USDOT revised its Disadvantaged Business Enterprise (DBE) program in 1999. The new regulation required that States establish contract language that required their prime contractors on DOT-funded projects to promptly pay all subcontractors (DBE and non-DBE) final retainage upon satisfactory completion of the subcontractor's work. Payment was due the subcontractor even if the prime had not received payment from the state or final approval (acceptance) from the state for the subcontractor's work. Under this requirement, commonly referred to as the 'Pay Before Paid' requirement, the prime contractor could be financing up to 10% of the construction costs (Deery, 2001). Primes argued this new requirement reduced their leverage on subcontractors to correct defects and left them with little protection should the subcontractor not pay their suppliers or second tier subcontractors.

There was an outcry from contractors and their industry representatives to address the shortcomings of the 1999 regulation. In response the USDOT proposed new regulations in 2001 that were subsequently adopted in July 2003. The new (and current) regulation removes the prime's 'Pay Before Paid' requirement and essentially allow the states to adopt one of three methods to ensure prompt payment of subcontractor retainage:

- *"... decline to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors" or*
- *"... decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed" or*
- *"... hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the*

prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work." (Ichniowski, 2003:1):

In 2001 the AASHTO-Subcommittee on Construction surveyed the states to assess the impact of this USDOT regulation on state retainage policies for their state Department of Transportation (DOT) work. Of the 47 states participating in the survey, only seven, or 15%, had a zero retainage policy prior to the regulation change. However, by the date of the survey two years later, twenty-one states (45%) had a zero retainage policy for primes and/or subcontractors on DOT work. As expected, Federal policy had a significant impact on state retainage practices (AASHTO, 2001).

In addition to the modification of state law to comply with Federal regulations on USDOT funded work, most states have also adjusted their retainage statutes to reflect changes in the percentage withheld, payment timing, and/or implemented alternatives to conventional retainage practices. For some states these statutes apply only to certain departments, such as the State's DOT projects, while others are applicable for all state work. While no state has taken the position of abolishing retainage, the trend has been toward a reduction in the percentage of funds withheld and/or policies more sensitive to the contractor's cash flow concerns (ASA, 2003a; Stockenberg, 2001b).

Just in the past several years Maryland, Mississippi, and Arizona reduced the retainage percentage on all state work (ASA, 2003a). Legislative efforts in Utah capped subcontractor retainage to the amount being held by the owner and required retention to be released on portions of the building accepted for early occupancy. In addition, legislation to reduce or limit the retainage percentage has been introduced in Ohio, Oklahoma, Colorado, Florida, and Wisconsin (Pitts, 2003; Grimm, 2003; Stockenberg & Limbaugh, 2002). In Wisconsin the proposed legislation reduces retainage on all public work to 5% till 50% complete and zero thereafter - a considerable change from the requirement 30 years ago of 15% for the duration of the project (Fabishak, 2003).

Changes in retainage policy are not just limited to reductions in the percentage of retained funds. The State of Oklahoma was one of the first to allow contractors to avoid retainage altogether if they would post security such as a certificate of deposit or a letter of credit. Continuing with the trend to adopt 'alternatives' to the traditional retainage practices, Arizona and Maryland passed regulations permitting securities in lieu of retainage and recently Illinois enacted legislation allowing retainage to be placed in an interest-bearing account with the interest accruing to the subcontractor (ASA, 2003a; Gordan, 2001).

In 2001 New Mexico enacted one of the most ambitious retainage programs legislated up to that point in time. The statute limited GC and subcontractor retainage to 5%, required interest-bearing escrow accounts for retainage, mandated the release of retainage held on each 'separately ascertainable item of the schedule of values' upon substantial completion of that portion of the work, allowed for the substitution of securities, and established prompt payment requirements and penalties (Calvert, 2001).

The reassessment of state retainage policies is continuing. Connecticut and Oklahoma have current legislative proposals requiring the creation of an interest bearing escrow account for retainage and Oklahoma's pending legislation requires the early release of retainage for subcontractors completing their work early on in the project. Ohio's proposed legislation eliminates retainage on all public work and withholds the Certificate of Occupancy until the contractor provides certification that subcontractor retainage has been paid (Pitts, 2003; Ohio General Assembly, HB208).

2-1-05

4-118

Legislation for retainage policy has not been limited to public work. For example, Missouri and Montana limit retainage on private work to 10% and New York, as well as Montana, limit subcontractor retainage to the amount being held on the contractor by the owner for the subcontractor's portion of the work. In 2002 Missouri passed comprehensive legislation for private construction projects limiting retainage to 10%, permitting the substitution of securities for both the GC and subcontractors, line item release of retainage, established provisions requiring retainage to be held in a trust fund, mandated the release of retainage upon substantial completion, and established prompt payment guidelines for subcontractor retainage. In addition, New Mexico's recently enacted legislation reducing retainage to 5%, establishing requirements for prompt payment, and providing for the substitution of securities applies to both public and private construction. This evolution of retainage policy governing private work continues with Colorado and Ohio both having current legislative initiatives affecting retainage practice on private work (Stockenberg & Limbaugh, 2002; McGreevy, 2003; Calvert, 2001; Grimm, 2003; Stockenberg, 2003).

All but three states (New Hampshire, West Virginia, and Wyoming) have statutes regarding retainage covering public and/or private work. Forty states specify a retainage percentage. Of those states that specify a retainage percentage, thirteen retain 10% on the first 50% of the work but ten of these states hold no retainage (or return half of the 1st portion) on the 2nd half of the work so that at completion the combined percentage is 5% or less. One state withholds 8% and twenty-three states retain 5% while three states withhold less than 5%. In total, the amount withheld for retainage at completion is 5% or less for all but two states specifying a retained percentage. That equates to ninety-five percent requiring 5% or less compared to 20 years ago when the typical retained percentage was closer to 10%. In addition to addressing retainage amounts, 21 states permit securities, three allow bonds and one permits a letter of credit as a substitute for retainage and 16 require interest to be paid on retained funds. Federal and State legislation has continued down the path of increased regulation, reduced retainage rates, and the increased acceptance of retainage alternatives for both public and private work. (Croysdale, 2003; Stockenberg & Limbaugh, 2002; ASA, 2003a; McGreevy, 2002; Calvert, 2001; Grimm, 2003).

Industry Standards for Retainage

The retainage practices of the various departments within the Federal government are becoming more consistent while the policies of the states are trending toward reducing the amount of retained funds and the use of alternatives. However, there remains considerable variance in retainage practices throughout the industry, particularly in the private sector (ASA, 2003a).

The American Subcontractors Association, the Associated General Contractors of America, and the Associated Specialty Contractors generally support the reduction or elimination of retainage. However, standard industry contracts and subcontracts typically have provisions for retainage, but avoid specifying retainage percentages and support limited use of alternatives. For example, AGC's standard contract between the Owner and Contractor contemplates retainage at a rate agreed to by the parties and suggests no additional retention be held once the work is fifty percent complete. This standard contract permits early release of retainage for subcontractors that have completed their work and allows securities to be substituted for retainage with interest on the securities accruing to the contractor (AGC No. 200, 2000).

AGC's standard subcontract permits subcontractor retainage at a rate agreed to by the parties and provides for retainage reduction at completion and/or if the Owner reduces the retained percentage of the contractor (AGC No. 650, 1998).

The AIA 201 General Conditions, an industry standard, provides for contractor retainage but does not specify a percentage. The document requires the release of retainage to the general contractor upon substantial completion. It provides for early release of subcontractor retainage only in the event that the subcontractor's retainage is released to the contractor by the Owner (AIA A201, 1997).

In practice, the retainage policy for a project is typically negotiated between the parties and is inconsistent throughout the industry. To aid the development of standard retainage practices, improve the fairness of retainage policy, and increase the acceptance of retainage alternatives several industry organizations reached an agreement outlining suggested industry practice for retainage. In 2002 the Associated General Contractors of America (AGC), the American Subcontractors Association (ASA), and the Associated Specialty Contractors (ASC) approved a 'joint' position concerning retainage practice as follows:

- *Whenever possible, retainage should be eliminated or reduced.*
- *If the need for retainage cannot be eliminated, an acceptable alternative form of security in lieu of retainage may be used.*
- *If retainage is required, the percentage retained should be as low as possible.*
- *Where retainage is held, the percentage level should be the same for subcontractors as for the prime contractor.*
- *Early (including line item) release of retainage should be encouraged.*
- *Reduction in retainage and release of retained funds should not be delayed because work under change orders has not been completed.*
- *When retainage is used, retained amounts should be deposited in an escrow account which bears interest inuring to the contractor and subcontractor in their respective shares. (AGC/ASA/ASC, 2003)*

Impact of Retainage

Even though there has been considerable evolution of retainage policy, there remains a spirited debate on the merits of its practice. Proponents argue that it provides financial protection for the owner and ensures performance while imposing minimal financial hardship on contractors. Opponents submit retainage reduces competition and increases project cost, provides a financial disincentive for timely completion of the work, and places a severe financial hardship upon contractors and subcontractors.

Impact on Construction Cost

Proponents of a reduction or elimination of retainage argue that retainage reduces competition and increases the cost of construction. In 1999 the American Subcontractors Association (ASA, 1999) conducted a national survey of its membership on retainage practices. In that study they found that 91% of their membership are more likely to pursue a project if no retainage is withheld. Also 69% of the responding subcontractors indicated they would lower their bid by an average of 3.1% if the project did not require retainage. ASA's conclusion was that owners and contractors utilizing retainage on their project(s) reduced competition and increased price (Mendes, 2003). Studies by Meir (2002) and SECG (2002) found a similar relationship between payment and price.

2-1-05

Croysdale (2003) submits that lowering the retained percentage from 10% to 5% results in construction savings of 1% to 1½ %. An earlier analysis by Farid (1986) purported a similar relationship - increasing the retained percentage raises the contract price. In Hughes, Hillebrandt, and Murdock's (1998) study the respondents noted an increase in contract price ranging from 0 to 4% with an average of .2% of the contract price for each year of the project.

The underlying basis for the conclusions of these studies is rooted in 'financing' costs and a reduction in competition. Retainage essentially requires that contractors incur the expense of financing a portion of the project. In addition, competition is reduced because capable, but smaller, less well-financed companies are not able to compete on projects with excessive retainage requirements (Harrell, 2003). The effect on project price is echoed by AGC's Chief Executive Officer Stephen E. Sandherr in his reaction to the DOT's relaxed position on retainage: "Not only will contractors and subcontractors benefit from the new retainage policy, but the government, and ultimately the taxpayer, will realize significant cost reductions" (Day, 2001:2).

Merck, one of the largest pharmaceutical companies in the world, also believes reducing retainage percentages can have a favorable impact upon project cost and performance. The firm changed its retainage policy on several projects "to attract a greater number of quality contractors" (Stockenberg, 2002:23). Their initial project retainage was lowered and at 50% completion no additional retainage was withheld if quality and performance were satisfactory. Similarly, H.G. Hill Realty, one of the largest private developers in Tennessee, does not withhold retainage because they believe that this approach enhances working relationships and contractor performance. They note that "as long as the job is progressing properly and they are getting good performance there is no need" (Bradbury, 2000:22).

Impact on Performance

Intuitively most owners can rationalize the relationship between retainage and price, but even with the increase in cost many believe that retainage affords a needed level of financial protection to ensure contractor performance. Lending support to that assessment is a 2001 study by the AASHTO Subcommittee on Construction. This study surveyed the states to determine the impact of the 1999 Federal DBE regulation that encouraged the elimination of retainage on federally funded DOT work. AASHTO found that 29% of the states with a zero retainage policy had 'problems with performance'. The concerns generally revolved around issues relating to completion of the work. State agencies reported problems such as contractors losing interest in the project, difficulty in getting contractors to complete repairs or cleanup, delays in obtaining closeout documentation, and increased difficulty in obtaining subcontractor bonding. Barnes and Ahmad's (1994) survey involving public agencies in Florida had similar findings. That study concluded that owners firmly believed retainage provided a needed incentive to ensure quality performance and timely completion of the work.

Studies involving the subcontracting community reach different conclusions regarding the relationship between performance and retainage. The Specialist Engineering Contractors Group (SECG), an umbrella organization in the UK comprised of six trade unions representing over 300,000 workers, recently completed a study on retainage. In September 2002, they submitted their report to the Trade and Industry Select Committee in the UK titled *The Use of Retentions in the Construction Industry*. The report contains a number of testimonials from its members on the subject as well as a series of findings and recommendations. Based on its investigation, SECG submits "retentions do not add value but, on the contrary, undermine efforts to obtain improvements both in performance and in relationships between all parties" (SECG, 2002:6) They submit the practice of retainage promotes adversarial relationships that reduce individual

2-1-05

and collective performance on the project. Its use tends to indicate a lack of trust promoting adversarial relationships while lowering or eliminating retainage improves the working relationship (Ahmad and Barnes, 1994). The elimination of retainage facilitates project partnering thereby encouraging the alignment of project goals, which is essential for performance improvement (Egan, 1998; Harrell, 2003).

SCEG (2002) contends "there is no evidence to link the existence of retentions to the elimination of defects or enhanced levels of performance" (SCEG, 2002:6). ASA's 1999 survey reached a similar conclusion. It found that retainage was not a motivating factor in the completion of the work for 80% of its membership.

In addition, opponents lament that retainage practices treat performing and non-performing contractors in the same manner thereby reducing its effectiveness. Many argue that retainage provides an incentive to delay completion of the work to minimize the contractor's financing cost. Opponents also submit that retainage is not an owner's only, or most effective, option to induce performance or correction of faulty work (SECG, 2002). They argue a more successful option is to withhold a portion of the progress payment(s) until the specific performance problems are remedied (ASA, 2003a; Lathrop & Gage, 2002).

Financial Impact on Contractors and Subcontractors

ASA's 1999 study found that 92% of the respondents noted retainage a serious problem facing their firm. Many of the respondents harbored a great deal of frustration concerning collection of retainage. Having these funds tied up for months, if not years, increased their cost of doing business, reduced their ability to take on additional work, and diverted management's efforts toward collection efforts. It also exposed the firm to the risk of continued solvency of the owner until collection. SECG noted that "construction was financed bottom-up - therefore the weakest and smallest firms (with the poorest access to credit) bear the financing burden" (2002:6). They found that many of the subcontractors bearing the financial burden felt the reason retainage practice persisted is that it remains a source of interest-free financing for an owner. What was particularly offensive to some was that if a contractor reported income based upon the percentage of completion method, they were actually paying income tax on funds not yet received, thereby further aggravating the cash flow burden (Barr, 2002).

Ahmad and Barnes's (1994) Florida study yields similar findings. It concludes that retainage reduces profitability, increases borrowing costs, precludes investment in additional work or equipment, and increases contractor bankruptcies. OPPAGA's (2000) investigation into retainage practices at the request of the Florida legislature supports this earlier study, but finds that the reduction, or elimination, of retainage may have some adverse effects. Restricting subcontractor retainage would encourage sureties to become more defensive and underwrite fewer subcontractors needing payment and performance bonds. This in turn would increase contractor risk, resulting in micro management of the subcontractor (or contractor) and/or the reluctance to contract with firms unfamiliar to the parties thereby restricting competition.

Retainage Alternatives

Downs (2002), in a recent article titled "*Big owners liken retainage reform to terrorism,*" points out that resistance to changing retainage practice in the private sector is high and OPPAGA (2002) found that this reluctance to change extends to public agencies. However, in spite of industry resistance, retained percentages are trending down and retainage alternatives are often

2-1-05

4-122

appearing in legislation and industry practice. Over the past couple of decades legislators have enacted prompt payment statutes, the Federal government has adopted a zero retainage policy, and many states have reduced their retained percentage on public work with some even extending statutes to the private sector. In addition to these trends, alternatives to the *standard* retainage practices have started to take hold. The payment of interest on retained funds, retainage escrow accounts, substitution of securities or bonds, line item release, and limiting the amount of retainage that a contractor can withhold from a subcontractor are some of the more commonly emerging alternatives.

Payment of Interest

Proponents of change in retainage practice claim there is a national movement to require interest on retained funds (TCA, 2001). AGC/ASC/ASA's 2002 Joint Position on Retainage states "Where retainage is used, retained amounts should be deposited in an escrow account, which bears interest, accruing to the contractor and the subcontractor in their respective shares." The general consensus emerging within the industry is "once earned, amounts held in retainage should benefit the subcontractor (or contractor)" (OPPAGA, 2000:7). Currently two-thirds of the states require interest on retainage or permit securities with interest accruing to the contractor on public work and five states have extended interest requirements to private work.

Escrow Accounts

With this approach, retainage is placed in escrow accounts that prevent unwarranted expenditure or diversion of the retained funds. This practice can also place the retained funds out of the reach of creditors should the owner experience financial difficulties. An escrow account generally involves two types of expense that must be borne by one or more of the parties – the cost of administering the account and the cost of financing the escrowed funds. Currently 14 states have legislation regarding escrow accounts for retainage with three states extending this protection to private work (Stockenberg & Limbaugh, 2002).

Substitute Securities

Substitution of securities is essentially a process whereby the contractor (and/or subcontractor) substitutes securities in a form acceptable to the parties in lieu of the owner withholding retainage. Currently more than 40% of the states have regulations permitting the substitution of securities for retention on public work and three have extended this practice to the private sector (Stockenberg & Limbaugh, 2002; Mendes, 2003).

Line Item Release

Construction retainage is generally withheld starting with the contractor's first progress payment on the project and held until final completion of the project some months or even years later. This practice places a severe financial burden on those subcontractors, such as excavation or foundation contractors, whose work is completed early in the project (OPPAGA, 2000; SLRC, 2002). Line item release of retainage is a practice whereby retained funds are released when a separately identifiable portion of the work is satisfactorily completed. Seven states currently have statutes permitting this practice on public work and one state, New Mexico, passed legislation in 2001 requiring line item release of retainage on private work (Stockenberg & Limbaugh, 2002).

Bonds in Lieu of Retainage

In public sector work it is a common requirement for the general contractor to supply Payment and Performance (P&P) bonds. The bonds provide the owner additional protection against poor performance, non-payment of the contractor's bills associated with the project, and/or financial failure of the contractor. General contractors also can require P&P bonds from subcontractors for similar reasons. In addition to the financial and performance protection afforded by the actual bonds, the bonding process itself is generally viewed as a prequalification process that screens out firms unable to effectively perform the project scope (Ahmad and Barnes, 1994). Industry organizations such as the ASA argue that P&P bonds, or a separate bond covering just the retained funds, should be allowed as a substitute for retainage. Otherwise, the owner has 'double' protection – the bonds plus retainage. Permitting substitution of a bond(s) provides protection to the owner while permitting the contractor (and/or subcontractor) to collect payment in full for work satisfactorily performed. Contractors often favor a P&P bond in lieu of retainage because it can cost up to seven times less to fund the bond requirements than to fund the retainage requirements (SECG, 2002).

Another form of surety protection is the substitution of a bond for only the retained funds. Retainage bonds are popular with contractors because they free up retained funds for relatively low cost. In Louisiana, where retainage bonds are permitted on DOT work, almost 100% of the contractors substitute a bond (Stockenberg & Limbaugh, 2002). However, contractor support disappears if only subcontractors are allowed to substitute retainage bonds, because then the contractor is forced to fund the project retainage.

Retainage bond opponents argue that their use reduces an owner's protection and encourages a more conservative approach, or actual under certification, of progress payments (Hughes *et al*, 1998). Owners have yet to embrace the substitution of P&P bonds or retainage bonds for retainage as evidenced by the findings of Ahmad & Barnes's 1994 study. They found that owners had serious reservations about bond substitution. The public owners in their study felt it was too difficult and time consuming to get a surety to respond should the contractor be unwilling to finish the project. Similarly, a study by Hughes *et al* (1998) found that owners typically viewed the threat of litigation as a necessary step to encourage surety action. Owners in that study felt that 'retention bonds must be on demand otherwise they are useless' (1998:25). The findings of these studies are supported in practice. Only four states, or 8%, have provisions to substitute a bond for retainage (Stockenberg & Limbaugh, 2002).

Limiting Subcontractor Retainage.

The American Subcontractors Association has continued to support legislation requiring that contractors be permitted to withhold no more retainage on a subcontractor than the owner is retaining on the contractor (ASA, 2002). Contractors have typically been non-supportive of this approach because it restricts their ability to withhold additional funds if they deem it necessary to ensure performance. However, in practice the retained funds are typically equal. Even AGC's Standard Form of Agreement between Contractor and Subcontractor states "The rate of retainage shall be {a percentage}, which is equal to the percentage retained from the Contractor's payment by the Owner for the Subcontract work" (AGC 650, Para. 8.2.2).

Retainage Abuse

Even though retained percentage rates are trending down and retainage alternatives are gaining popularity, retaining funds for work performed is still a significant operating challenge for the construction contracting community. The practice presents a financial burden, especially to small and medium sized contracting entities, and can be a source of financial abuse (SCEG, 2002; Stockenberg, 2001a).

As referenced earlier, ASA's 1999 study found that 92% of the respondents noted that retainage was a serious problem facing their firm. In this study, the average amount of retainage receivables 'on their books' was \$620,025 with an average age of 160 days but ranging up to 481 days. Three years later the problems and concerns persist. ASA's 2002 national survey of its membership found that 93% viewed retainage practices a serious or somewhat serious issue with slow final payment of retainage as a serious or somewhat serious issue for 95% of its membership. Additionally, slow payment was the most serious issue for 17% of the respondents which was up from 5% in 2000 (ASA, 2002).

Similar surveys were performed in several states in 2003 with comparable results. Ninety-three percent (93%) of ASA's membership in Ohio viewed retainage a serious or somewhat serious issue and 91% responded similarly for slow final payment. In Mississippi it was 92% and 83% while Ohio respondents indicated 94% and 94% respectfully. Colorado and Phoenix had similar results (ASA, 2003b).

An early UK study found that twenty-five percent (25%) of retained funds were never paid and a majority of the remaining retention was often paid late (Reading Construction Forum, 1998). Similarly, a study by Hughes *et al* (1998) found that payment of contractor and subcontractor retainage was often delayed and posed a serious problem for the industry.

Delays in the recovery of retention are often not justified as evidenced from a study commissioned by The Building Services, Research and Information Association (BSRIA) in 2002. The BSRIA study by Samuelson and Gooding (2002) investigated 27 cases and found only one with justifiable cause to hold the retained sums.

SCEG's (2002) investigation identified a number of instances of retention abuse including long delays in recovery of retained funds, the use of retained funds to unjustly offset alleged poor quality work, delaying retention payment to encourage a reduction in the amount of final payment, and the use of retention to offset charges or delays unrelated to the subcontractors work on the project. BSRIA's study identified common categories of retention abuse, including:

- Long delays in the recovery of retainage. In its study final payment of retained funds was often in excess of two years after completion of the project.
- Continuing to hold retained funds due to poor performance of others.
- Using retained funds to induce subcontractors into final settlement with unfavorable terms for the subcontractor (Samuelson and Gooding, 2002).

Opinions Vary

However, opinions on retainage and its impact and/or abuse often depend on one's vantage point. Most all agree that retainage practice has an impact upon the parties and the construction process, but whether its influence is favorable or unfavorable in large part depends upon perspective and contractual position. The polarization of opinion is evidenced in a 1994 study involving public

agencies and contractors in the State of Florida (Ahmad and Barnes, 1994). In this study 55 general contractors and 38 public agencies responded to a questionnaire on the practice of retainage.

These two groups essentially agreed that 10% retainage was common, that it encourages front-end loading, and both groups had similar opinions regarding the periodic release of retainage on long duration projects. However, beyond these three issues the public owners and contractors had very differing opinions. A significant majority (88%) of the contractors felt that retainage adversely impacted profitability while only 19% of the owners shared that opinion. Conversely, 87% of the owners felt that retainage protects the owner while only 27% of the contractors agreed. In fact, contractors felt that retainage increased the likelihood of financial failure. Similar disparity existed regarding the effect upon the Owner-Contractor relationship. A majority (59%) of the contractors believed that retainage practices harmed the relationship while only 8% of the owners thought that a revised policy would enhance the relationship.

A strong majority (72%) of the public agencies believed that no change in retainage policy was necessary while only 20% of the contractors thought the practice should remain unchanged. There was similar disagreement concerning relaxing retainage requirements, with most owners resisting the reduction of retainage to 5%. A majority (53%) of the owners did not support interest bearing escrow accounts versus 85% of the contractors and while 61% of the contractors supported bonds in lieu of retainage, only 1% of the owners felt that bonds were an acceptable alternative.

This study exposes the disparity of opinion between public owners and contractors on retainage practice and provides insight into the difficulty for policy change. Essentially, contractors viewed retainage as an unnecessary burden creating financial hardship with minimal benefits for the owner and felt retainage practices needed to change. Conversely, public owners believed that retainage afforded them a necessary degree of protection that imposed minimal burden upon the contracting community. They felt policy change was unnecessary and alternatives were typically undesirable.

However, Ahmad & Barnes's study was completed almost a decade ago on a very limited geographical scale. In addition, other participants in the construction process, including subcontractors, private owners and architects who are affected by retainage policy were not included in the study. Similarly, ASA's (2002) and SCEG's (2002) studies only obtained data from subcontractors and AASHTO's (2001) study was restricted to state DOT agencies. The limitations of these previous efforts, along with the recognition that retainage practices tend to evolve over time, give rise to the need for a comprehensive study on current retainage practices and the impact that retainage policy has on each member of the construction team.

RESEARCH OBJECTIVES

This research effort will build upon the work of previous studies investigating retainage practices in the construction industry. It will incorporate a national sampling representing the primary participants in the design and construction process, including owners, architects, contractors and subcontractors. The primary objectives of this research effort are to:

- Identify the detriments of retainage for members of the construction team.
- Identify the benefits of retainage for members of the construction team.
- Identify alternatives that will minimize the detrimental impact of retainage.

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- Where such alternatives are already in use, evaluate their effectiveness.

RESEARCH METHODOLOGY

Methodology Overview

There are two 'general' approaches that could be taken to address this research effort: 1) data could be obtained from a broad and representative sample of each population using a self-administered survey instrument, or 2) the practices and insight from a small sampling could be examined in greater detail. To obtain the benefits inherent with each approach, the research design incorporates elements of both methodologies.

Survey Instrument

A self-administered survey was developed to obtain input from a large sampling of members of the construction team using both closed-end and open-ended response options. Use of closed-end responses permitted an evaluation by each of the respondents on the selected topics of retainage practice. Incorporation of open-ended response options allowed respondents to provide additional insight or related information.

The survey instrument was designed using a seven-point likert scale for most of the closed-end responses and short answer or essay format for response to the open-ended questions. The instrument was structured to obtain input on the following primary topics:

- Company Data: General company information, including type of organization, annual construction volume, and area of operations.
- Current Retainage Practices: Retainage practices used on their projects, including the use of alternative practices.
- Retainage Abuse: Their assessment of the prevalence of abusive practices, and supporting documentation concerning the collection of project retainage.
- Retainage and Price: The impact, if any, that project retainage has on a) their willingness to pursue a project and b) their pricing of a project.
- Retainage Alternatives: Their support or opposition for alternatives to traditional retainage practices.

The survey instrument was pilot tested and needed refinements were incorporated. When completed, the survey instrument contained a total of eighty-seven (87) questions with either closed and/or open-ended response options.

Sample Selection

Data for this study was solicited from architects, general contractors, subcontractors, construction managers, public owners, and private owners. A probabilistic sampling for each category was selected as follows:

Architects: All of the Architects classified as Architect/Engineer (AE), Architect (A), and Engineer/Architect (EA) on Engineering News Record's (ENR) 2003 listing of the Top 500 Design Firms were included in the sample. In addition, six Architects from each state and two from the District of Columbia were randomly selected from the American Institute of Architects

(AIA) 2004 national membership listing. A combined total of 525 architects were included in the sample.

General Contractors: All contractors listed in ENR's 2004 listing of the Top 400 Contractors with the majority of their work in 'General Building' were included in the sample. Supplementing this list, were 645 randomly selected Contractors from the Associated General Contractors (AGC) 2004 national membership listing who belonged to the category of Building (B), Highway (H), or Industrial (I). A total of 970 contractors were included in the sample.

Subcontractors: The sample included all the 5,500+/- members of the American Subcontractors Association (ASA) listed in its 2003 Membership Roster.

Construction Managers: The sample included all the 2,500+/- members of the Construction Management Association of America (CMAA) members as recorded in its 2003 Membership Listing.

Public Owners: The sample of public owners included the highest-ranking construction official within each State Department of Transportation (DOT), including the District of Columbia. In addition, the highest-ranking construction and design facility administrators from each state were included in the sample. The sampling frame used to select these individuals was the National Association of State Facilities Administrators (NASFA). Combined, a total of 176 public owners were asked to participate.

Private Owners: Two hundred eighty-nine (289) private owners randomly selected from *Engineering New Record's* 2003 Listing of the Top Owners were included in the sample.

In total, the combined sampling of architects, general contractors, subcontractors, public owners, construction managers, and private owners for this study contained 9,960 candidates.

Survey Distribution

In late May 2004, a hard copy of the survey instrument was mailed to the sampling of architects, general contractors, and owners. They were asked to respond using an enclosed self-addressed, postage paid envelope, but were also given the option of completing the survey online. The membership of CMAA (construction managers) and ASA (subcontractors) were solicited electronically and requested to participate by completing the online survey.

Survey Response

By the July 2004 cutoff date for participation one thousand thirty-six (1035) usable responses were received. The response rate was 20.2% for those solicited by postal mail and 8.0% for those asked electronically to participate. The combined response rate was 10.4%. As shown in Table 1 – Usable Responses, the response rate for the various categories of participants ranged from 4.5% for construction managers to 56.8% for public owners.

Table 1 – Usable Responses

Category	# Solicited		Usable Responses			Response Rate		
	Postal	E-mail	Online	Postal	Total	Postal Solicitation	E-mail Solicitation	Combined
Public Owners	176		55	45	100	56.8%	Na	56.8%
Private Owners	289		10	8	18	6.2%	Na	6.2%
Architects	525		11	49	60	11.4%	Na	11.4%
Constr. Mgrs.		2500	108	5	113	Na	4.5%	4.5%
Gen'l Contr.	970		72	145	217	22.4%	Na	22.4%
Subcontractors		5500	516	11	527	Na	9.6%	9.6%
Totals	1960	8000	772	263	1035	20.2%	8.0%	10.4%

Respondents included public agency representatives from 41 states whose agency's annual construction volume ranged from \$459 million to \$9 billion. Representatives from 16 different federal agencies, 59 state agencies, and 25 local agencies provided input. Public agencies responding included the Department of Transportation, transit authorities, the Department of Corrections, General Services Administration, local counties, municipalities, school districts, water districts and community colleges. Private owners from 14 different states with an annual construction volume ranging from \$3 million to \$500 million also completed the questionnaire.

One hundred seventy-three designers and construction managers participated in the survey. Respondents included architects from 34 states with design responsibility for an annual construction volume ranging from \$1 million to over \$1 billion dollars with an average of \$204 million. Construction managers from 32 states responded. Their annual construction volume ranged from \$1 million to over \$5 billion with an average of \$450 million.

The largest survey samplings included contractors and subcontractors who were located in 42 and 39 different states respectively. The annual volume of the respondents from both categories ranged from \$1 million to greater than \$1 billion. However, the size of the firms averaged \$91 million for contractors and \$24 million for subcontractors.

Considering the length of the questionnaire (four pages with 87 questions), the geographical representation, range of organizational size, and amount of participation should be considered exceptional. This level of participation enhances the validity of the findings.

FINDINGS AND ANALYSIS

Organization and Statistical Analysis

Survey respondents were asked to provide input in five categories including 1) retainage practices on their current projects, 2) respondent evaluation of various retainage practices, 3) assessment of retainage abuse, 4) the impact of retainage on project pricing, and 5) alternative retainage practices. To facilitate an organized and comprehensive presentation of the findings of this study, each of these five categories will be analyzed systematically and then collectively summarized at the conclusion of this study.

With over 1,000 respondents and a survey instrument containing 87 questions, approximately 90,000 data points were collected. The statistical analysis of the data included the calculation of descriptive statistics, means testing, and the testing of paired samples. All statistical testing of the data was performed to a level of significance of .05.

Current Retainage Practices

Subsequent to the section of the questionnaire soliciting general information on the organization, respondents were asked to indicate the retained percentages applicable on their projects and the frequency that they encountered alternative approaches. Table 2: Retainage Percentages by Category of Owner, tabulates the project frequency that owners utilized each of the itemized retained percentages.

As shown in Table 2, federal and state agencies imposed 10% retainage terms on only about one-fifth of their projects (20% & 16% respectively) whereas private owners withheld 10% retainage on more than half (56%) of their projects. Conversely, 63% of the federal respondents held no retainage while only 19% of the state and 15% of the private owners did not withhold retainage.

Table 2: Retained Percentages by Category of Owner

Retained Percentage	% @ Comp.	Fed (16)	State (78)	Private (18)
10% for the contract duration	10.0%	20%	16%	56%
10% till 50%, then 5% on the remainder	7.5%	7%	2%	3%
10% till 50%, then 0% on the remainder	5.0%	3%	22%	11%
5% for the contract duration	5.0%	6%	30%	15%
3.5% for the contract duration	3.5%		1%	
6% till 50% then 0% on the remainder.	3.0%		1%	
4% till 50% then 2% on the remainder	3.0%		1%	
5% till 50%, then 0% on the remainder	2.5%	1%	3%	
2.5% for the contract duration	2.5%		2%	
2.0% for the contract duration	2.0%		1%	
1.0% for the contract duration	1.0%		2%	
None	0%	63%	19%	15%
Average retained % during the project		3.26%	5.56%	7.59%

Table 2 also identifies the average percent retained over the life of their projects for each category of owner (assuming an equal distribution of contract billings). The average is 3.26% on Federal work, 5.56% on state projects, and 7.59% on private projects. Note that the average retained percentage increases as you move from federal work to projects at the state level. Also, private owners impose a significantly higher percentage of retainage than evidenced in public work.

These general trends, of increased retainage as you move to 'local' and private projects are quite evident in Figure 1. More than half of the projects for private owners had retainage of 10%. In addition, retainage of 5% or more at completion of the work was present on 85% of the private projects, 70% of the state projects, and only 36% of the Federal projects.

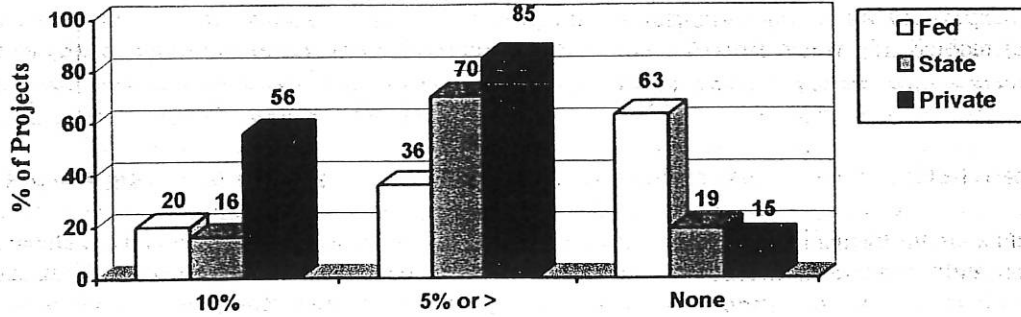


Figure 1: Retained Percentages

Architects, construction managers (CM), contractors, and subcontractors were also asked to provide input concerning the retained percentage on their projects. Table 3: Retained Percentages – Owner’s Agents & At-Risk Builders tabulates their response. As evidenced in Table 3, architects, CM’s, contractors and subcontractors were involved in a limited number of projects where no retainage was held (only 16%, 9%, 12%, and 12% respectively). Conversely, three-quarters or more of the projects for these participants had retainage of 5% or greater.

Table 3: Retained Percentages – Owner’s Agents & At-Risk Builders

Retained Percentage	% @ Comp.	Arch	CM	GC	Sub
10% for the contract duration	10.0%	30%	38%	37%	67%
10% till 50%, then 5% on the remainder	7.5%	17%	17%	8%	6%
10% till 50%, then 0% on the remainder	5.0%	20%	22%	20%	7%
5% for the contract duration	5.0%	9%	11%	19%	7%
5% till 50%, then 0% on the remainder	2.5%	3%	3%	3%	1%
2.5% for the contract duration	2.5%	1%			
1.0% for the contract duration	1.0%	4%		1%	
None	0%	16%	9%	12%	12%
Average retained % during the project		6.99%	8.00%	7.29%	8.27%

The average retained percentage during the life of the project ranged from 6.99% to 8.27% - a retainage rate similar to the average noted by private owners. This correlation is somewhat predictable because approximately 75% of all new work in the US is for the private sector. The most significant variation in the data collected from this group is the concentration of projects with 10% retainage. Two-thirds (67%) of the subcontractors’ projects have 10% retainage versus only approximately one third of the projects for the other categories in this grouping. A statistical comparison between general contractors and subcontractors supports the assertion that the retained percentage is greater for subcontractors.

Use of Alternative Retainage Practices

In the next section of the questionnaire, respondents were asked to indicate how often they encountered alternative retainage practices on their projects. These alternative practices are grouped into four general areas: 1) the substitution of financial instruments of guarantees, 2)

compensation or protection of retained funds, 3) early release of retainage, and 4) retainage limits. Response options for the frequency they encountered each alternative practice included Never (1), Almost Never (2), Seldom (3), Sometimes (4), Often (5), Almost Always (6), and Always (7). Table 4 tabulates the mean response on each alternative practice.

Table 4: Use of Alternative Practices

	Mean
Substitution of Financial Instruments or Guarantees	
Substitution of securities in lieu of retainage.	1.49
Substitution of a Letter of Credit in lieu of retainage.	1.33
Substitution of a bond in lieu of retainage.	1.48
Elimination of retainage with a Payment & Performance Bond	1.50
Compensation or Protection of Retained Funds	
Payment of interest on the retained funds.	1.44
Retainage deposited in an escrow account.	1.73
Early Release of Retainage	
Line item release of retainage.	2.27
Retainage released on work completed early in the project.	2.43
Release of final retainage prior to occupancy.	2.17
Retainage Limits	
Limits on the amount of subcontractor retainage.	2.41

The mean response for the alternatives allowing the substitution of a financial instrument or guarantee ranged from 1.33 to 1.50 (Never to Almost Never). Respondents indicated substitution of a letter of credit, securities, or a retainage bond was almost never practiced on their projects. Additionally, the elimination of retainage with a Payment and Performance bond was again almost never allowed. Evidence of its low acceptance is that only 3.2% of the respondents noted that it was *often* allowed on their projects.

Retainage alternatives that offered compensation or protection of the earned funds again were rarely encountered. The mean response for the payment of interest and the use of escrow accounts indicates that these alternatives are 'Almost Never' used. Eighty-one percent of the respondents indicated that interest was never paid on retained funds and only 5.3% of the respondents' projects often employed the use of escrow accounts.

Alternatives offering the early release of retainage had slightly more application as evidenced by the higher mean scores. They were still seldom utilized, but approximately 10% of the respondents' projects had line item release of retainage and/or release of retainage for work completed early in the project. Similarly, 15% of the projects often had limits on the amount of subcontractor retainage.

Assessment of Retainage Practices

The survey questionnaire had two sections, containing a combined 34 questions, soliciting respondent assessment of retainage practices. These questions were structured to provide respondent input on 1) the perceived owner benefits and detriments of retainage, 2) the influence retainage has on contractor and subcontractor performance, 3) the influence retainage has on project relationships, 4) the financial impact that retainage has on contractors and subcontractors,

and 5) the perceived fairness of retainage practice. The mean response for each question was calculated and statistical comparisons were evaluated. A summary of the findings is presented in the following sections:

Owner Benefits / Detriments

In the first category, Owner Benefits/Detriments, owners, architects and construction managers (hereafter referred to as Owners/Agents) had general agreement on the benefits and detriments of retainage. The trio felt retainage provided financial protection for the owner and was not employed primarily to provide a source of interest free financing for the owner (a position most strongly voiced by the owners). However, Owner/Agents were neutral on whether retainage provided a buffer for overvaluation of the work installed, maybe in part because they believe that retainage encourages front-end loading.

Similar to the position held by Owners/Agents, contractors and subcontractors believe that retainage encourages front-end loading. In addition, they believe that retainage does not provide a 'buffer' against overvaluation. However, subcontractors feel strongly that retainage does not provide financial protection for the owner and that the primary reason owners withhold retainage is to provide interest free financing whereas, general contractors as a group are neutral on this issue. However, when the contractors that self-perform a majority of their work are analyzed separately, the data reveals sentiments for this group approaching those of the subcontracting community.

The effect of retainage on competition and pricing is also split. Owners/Agents do not believe that contractors and subcontractors are less likely to pursue a project if retainage is being withheld. However, that is not an opinion shared by Construction Managers at-Risk (CM at-Risk), General Contractors (GC), or Subcontractors as noted in Table 5.

Table 5: The Effect of Retainage on Competition and Pricing

Question	CM at-Risk	GC	Sub
Are you more likely to pursue contracts where no retainage is held? (% selecting Yes)	65%	58%	85%
Would your price be lower if no retainage was held? (% selecting Yes)	60%	50%	71%
How much lower would your price be?	2.4%	2.2%	3.6%

Over 65% of CM at-Risk, 58% of the GC's, and 85% of the subcontractors indicated that they would be more likely to pursue projects where no retainage was withheld. In addition, 60% of the CM's at-Risk, 50% of the GC's, and 71% of the subcontractors noted that their price would be lower if no retainage were held. When asked to quantify how much lower, CM's at-Risk advised 2.4%, GC's 2.2%, and subcontractors indicated 3.6%. "Owners would be amazed how much smoother and cost effective a project gets built when you eliminate retainage," stated one respondent. In deference to the opinion of owners and their agents, the financial protection that owners believe retainage provides has a price – reduced competition and increased project cost.

Influence on Contractor and Subcontractor Performance

Owners, architects, and construction managers (CM) marginally believe that retainage motivates performance and are neutral as to whether or not retainage is needed as an incentive to obtain quality work. However, the trio strongly believes that retainage encourages the correction of defects, expedites submission of closeout documents, and is necessary to get punchlist items completed. In essence, they view retainage as providing effective leverage to correct deficiencies and closeout a project as opposed to having a substantial impact on performance during the construction period. We have "no other alternative. As an owner, project completion can only be achieved by withholding retainage" was the sentiment shared by several of the respondents.

At-risk contractors (CM's at-Risk and GC's) and subcontractors do not believe that retainage is an effective incentive to obtain quality work. However, they are split on the effect that retainage has on the correction of deficiencies and project closeout. Similar to Owners/Agents, at-risk contractors believe that retainage encourages timely correction of defects and expedites closeout documentation while subcontractors do not. Additionally, at-risk contractors are neutral concerning whether retainage is necessary to get punchlist items finalized while subcontractors do not think it is effective to ensure completion.

Influence on Project Relationships

Owners and their agents (architects, and CM's) do not believe that the use of retainage indicates a lack of trust or promotes adversarial relationships. Similarly, they do not think that reducing, or eliminating retainage, facilitates project relationships or encourages the alignment of project goals. The only subset of this group not in conformance with these findings is 'Federal' owners. The majority of these Federal respondents do not withhold retainage and they feel that the elimination of retainage has had a favorable impact on project relationships – an opinion shared by at-risk contractors and subcontractors. In contrast to Owners/Agents, at-risk contractors and subcontractors believe that the reduction, or elimination of retainage, encourages the alignment of project goals and subcontractors feel that its use indicates a lack of trust and promotes adversarial relationships.

Financial Impact on Contractor/Subcontractor

Owners and their agents do not believe that retainage reduces contractor profit, increases contractor financial failures, nor places a severe financial burden on contractors or subcontractors. Conversely, at-risk contractors and subcontractors judge that retainage reduces profitability, and poses a severe financial burden, especially upon subcontractors who strongly believe that its use increases financial failures.

Owners and their agents do not feel that the collection of retainage diverts contractors' attention nor impacts their ability to take on new work, which is in stark contrast to the opinion voiced by subcontractors. Interestingly, at-risk contractors strongly believe that reducing subcontractor retainage increases contractor risk - a position shared by owners, architects, and CM's but strongly opposed by subcontractors. In addition, at-risk contractors believe that statutes limiting subcontractor retainage would discourage them from working with unfamiliar subcontracting firms. In essence, they appear to support ownership's position that retainage affords a level of financial protection. This finding is not surprising since at-risk contractors would have little downside for withholding retainage. Typically, any subcontractor price escalation for retainage would just be passed through to the owner.

Fairness of Retainage

Owners and CM's at-risk, along with subcontractors think that subcontractors typically bear the burden of retainage. Architects, along with at-risk contractors, and subcontractors believe that withholding retainage unfairly treats good performers the same as poor performers. Owners and CM's are neutral on this issue.

Summary of Opinions on Retainage Practice

There are basically two camps with frequently contrasting opinions on the impact, or influence, of retainage practices. One vantage point is that of the party withholding the retainage - ownership and their agents (architect and construction managers). In the other camp are the parties on whom retainage is being withheld - construction managers at-risk, general contractors, and subcontractors (at-risk builders).

Owners and their agents (Owners/Agents) believe that retainage affords needed financial protection without reducing competition or increasing project cost. However, this position may be difficult to defend considering a vast majority of those pricing the work (at-risk contractors and subcontractors) judge that the use of retainage reduces their willingness to pursue a project and increases their pricing from 2.2% to 3.6%.

Again in stark contrast to at-risk builders, Owners/Agents do not think that withholding retainage impacts contractor profitability, imposes a financial burden, or adversely impacts a contractor's ability to take on new work. In essence Owners/Agents are suggesting that withholding earned funds (retainage) does not have financial consequences on the parties whose funds are being held - a position that again may be difficult to support.

Owners/Agents believe retainage practice is fair and they don't think its use adversely impacts relationships or the alignment of project goals. A rare divergence of position within this group is that architects share the contractors' and subcontractors' belief that withholding retainage unfairly treats good performers the same as poor performers. Conversely, at-risk builders and subcontractors feel the practice of retainage is unfair and they (as well as federal owners) submit that a reduction, or elimination, of retainage has a favorable impact on project relationships - a correlation that appears more logical than the Owners/Agents' position.

Lastly, Owners/Agents and at-risk contractors believe that retainage provides little or no incentive to obtain quality work. However, they believe retainage affords some level of financial protection and its use encourages timely correction of defects and expedites closeout documentation.

Retainage Abuse

The questionnaire also had a section addressing retainage abuse. The questions within this section were grouped into three sub-categories: 1) Timely & Full Payment of Retainage, 2) Owner Abuse, and 3) Contractor Abuse. The findings are presented in that order.

Timely & Full Payment of Retainage

Owners and their agents strongly believe that retainage is paid in full on each project. However, construction managers at-risk, general contractors, and subcontractors (at-risk builders) state that they receive 100% of their retainage on only 89.6%, 93.8%, and 89.6% of their projects respectively. There apparently is a disagreement on the definition of *paid in full*. In addition, there is a wide divide on the timeliness of payment. Owners, architects, and construction managers submit that retainage is paid promptly upon completion, whereas at-risk contractors and subcontractors claim it is not. Here it appears there is a disagreement on the definition of *prompt payment*.

To aid in the assessment of the timeliness of payment, at-risk contractors and subcontractors were asked to provide specific information on the collection of retainage. Their responses are tabulated in Table 6: Retainage Collection Period. Construction managers at-risk claimed the collection of final retainage ranged from 15-180 days with an average collection period of 98 days after completion of the work. General contractors indicated their collection period ranged from 30-400 days with an average of 99 days, and for subcontractors it ranged from 30-400 days with an average of 167 days to collect final retainage after completion of the work. The longer period for subcontractors may be attributed, at least in part, to 1) general contractors typically releasing subcontractor retainage only after receipt from the owner and 2) as noted earlier by the respondents, the release of retainage on work completed early in the project is seldom incorporated into contracts.

The at-risk builders were also asked the longest period they have waited for final retainage on a project. Construction manager's at-risk ranged from 45-1000 days with an average of 620 days, contractors ranged from 45-1825 days with an average of 365 days, and subcontractors ranged from 60-2500 days with an average of 529 days to collect final retainage.

Table 6: Retainage Collection Period

Retainage Collection Item	CM @ Risk		GC's		Subcontractors	
	Range	Ave	Range	Ave	Range	Ave
Days after completion to collect final retainage	15-180	98	30-400	99	30-900	167
Longest wait for final retainage (in days)	45-1500	620	45-1825	365	60-2500	529

When the parties were asked if slow payment of retainage was a serious problem, at-risk contractors, subcontractors, and even construction managers indicated it was a concern. The degree of concern for slow payment progressively ranged from construction managers' at risk 'slightly' agreeing that slow payment is a serious problem, to general contractors' with moderate agreement, to subcontractors' voicing strong support of the statement with an average response of 6.80 on a 7-point scale. Surprisingly, owners and architects were neutral on this issue. Even they did not believe that slow final payment of retainage *was not* a serious problem.

Contractor Abuse

Subcontractors view contractor abuse of their retainage as a widespread problem – a view not shared by the other parties. Subcontractors are also alone in their belief that contractors often withhold a greater amount of retainage on subcontractors than is withheld by the owner on the contractor. However, private owners, architects, construction managers, CM's at-risk, and even general contractors concur that "contractors often use retainage as leverage to resolve subcontractor claims or changes for extra work" – a view strongly supported by subcontractors.

Owner Abuse

The divide between Owners/Agents and at-risk builders surfaces again when addressing owner abuse of retainage. Owners, architects and construction managers do not think 1) owner abuse of retainage is widespread, 2) that owners use retainage to induce settlement on unfavorable terms, or 3) that retainage is held for poor performance outside the contractors' responsibility or control. Conversely, construction managers at risk, general contractors, and especially subcontractors view owner abuse as widespread and that owners often use these particular abusive tactics. Interestingly, even architects and construction managers concur with at-risk builders that "retainage is often used as leverage by the Owner to resolve claims or changes for extra work". A number of the at-risk builders shared sentiments similar to one respondent who noted that "our company contracts with municipalities and they have no incentive to pay retainage. In fact, it is to their advantage to withhold it as long as possible."

Retainage Alternatives

The last section of the questionnaire solicited input from the respondents on alternatives to traditional retainage practices. They were questioned on their support or opposition to certain practices including the reduction or elimination of retainage, substitution of financial instruments or guarantees, compensation or protection of retained funds, early release of retainage, and prompt payment and retainage legislation. A summary of their input is as follows.

Reducing or Eliminating Retainage

Owners and their agents do not support the elimination of retainage or its reduction to 2 percent or less. However, owners and construction managers are neutral on a reduction of retainage to 5 percent or less. Of the trio, only architects expressed a lack of support for the reduction to 5 percent. Conversely, at-risk builders have a different viewpoint. They support the reduction of retainage and its elimination on contractors. However, none of the parties, including CM's at-risk and GC's, support the elimination of retainage on subcontractors. Only subcontractors strongly support this concept.

Substitution of Financial Instruments or Guarantees

Owners and architects are opposed to all of the noted options permitting the substitution of financial instruments or guarantees for retainage. They do not support the substitution of securities, retainage bonds, or a letter of credit. They, along with construction managers, also do not support the elimination of retainage where a payment and performance bond is provided.

While CM's at-risk are neutral on all the options, general contractors and subcontractors support the substitution of a retainage bond, and the elimination of retainage if a P&P bond is provided. Both are neutral on the substitution of securities and only subcontractors expressed weak support

for the substitution of a letter of credit. In general, at-risk builders are not enthusiastic about swapping credit instruments, but favor the substitution of bonds.

Compensation or Protection of Retained Funds

At risk builders strongly support payment of interest on retained funds and the use of escrow accounts. Contractors and subcontractors would also like to see the Certificate of Occupancy withheld until retainage is paid.

Owners and their agents do not support the payment of retainage prior to receipt of the Certificate of Occupancy. Owners also do not support the payment of interest on retained funds while their agents are neutral on this issue. However, owners do not oppose the use of escrow accounts and both of their agents support its use.

Early Release of Retainage

Only subcontractors support the release of their retainage even if the owner has not released the retainage to the contractor. CM's and at-risk builders support line item release of retainage while owners and architects are neutral on this approach. However, all parties support the release of retainage for subcontractors completing work early in the project. A procedure suggested by one respondent was to "release the subcontractor's retainage when the following trade is able to initiate work for that portion of the project."

Prompt Payment and Retainage Legislation

At-risk builders support statutes limiting the maximum percentage of retainage that can be withheld while owners and their agents are neutral on this matter. However, Owners, architects, CM's, CM's at-risk, general contractors, and subcontractors support statutes requiring the prompt payment of retainage.

Additional Alternatives offered by the Respondents

Additional alternatives to traditional retainage practices offered by the respondents fall into six general categories. These include the selection of quality team members, variations on its application to work packages, providing the opportunity to price retainage policy, application of retainage for non-performance, the use of retainage as an incentive, and the withholding or allocation of funds for project closeout activities.

Involve Quality Team Members: A number of the respondents, including some owners, shared the opinion of one subcontractor that *"the best alternative to retainage is for owners and contractors to do their due diligence and only select quality contractors."* An often-repeated suggestion was that owners should "prequalify contractors based on their size and experience and then award projects based on a combination of price and contractor rating". Many felt that if quality contractors and subcontractors were involved in the construction process, retainage would be unnecessary. "There is really no need for retainage if contractors are pre-qualified before being invited to bid" noted one respondent.

Retainage Incentives: Closely aligned with the involvement of quality builders was the suggestion to establish a retainage policy that provided performance incentives, rather than universal punishment. "First of all hire contractors that you can trust from previous experience. Pay them fair and insist on quality and schedule and only give them future work if they perform" was a

common theme. Respondent suggestions include tying contractor performance to future work and providing incentives for customer satisfaction and when the contracting team meets customer goals or objectives. "Establish a retainage policy that reinforces positive behavior rather than use it as negative reinforcement".

Retainage for Non-Performance: Many of the at-risk builders suggested that retainage be held only for non-performance. They suggested that retainage be based on the value of work installed, but not accepted. Another often repeated suggestion was to impose retainage (5-10%) only if the contractor falls behind schedule or is in non-conformance with the contract terms and make release of retainage contingent on the elimination of the non-performing conditions. As noted by one respondent, "most contracts state payment can be withheld for incomplete or deficient work. Start enforcing this provision. That would give you a better handle on your project." Another sentiment shared by several was "retainage policy should not be used as a substitute for good management practices."

Price Retainage Policy: Several respondents suggested that owners give contractors and subcontractors the opportunity to price a project with and without retainage. "They (Owners) should request an add or deductive alternate during bidding for optional retainage terms" offered one respondent.

Selective Application of Retainage: Other alternatives were suggested regarding the application of retainage. Several contractors suggested no retainage on general contractor self-performed work or project materials. In essence they were recommending withholding retainage only on the contractor's fee and their subcontractors. Another often repeated suggestion was to withhold retainage on only labor and stored materials and one respondent suggested reduced retainage for recycled products to encourage their use.

Retainage for Project "Closeout": Some of the respondents suggested in lieu of retainage that the schedule of values include an additional line item for final completion. Others suggested that owners require a bid item of 'demobilization' of at least 1.5% to be paid at the end of the project and/or line items for closeout materials, CO, substantial completion, and final completion.

Lastly, one respondent suggested that owners consider a "down payment up front of the same percentage as retainage held on the back end." For example, if a retainage is ten percent, then the owner should provide a "10% upfront payment of the contract amount at commencement to facilitate cash flow. Then hold 10% until the completion of the project."

Summary

There are a number of areas where Owners and their agents are at odds with at-risk contractors and subcontractors regarding alternative retainage practices. However, there are several issues where support of alternative practice is widespread, or at least there is no significant resistance by the parties to change.

While there is not a consensus regarding the elimination of retainage, there is also no resistance for a reduction of retainage to 5%. Owners/Agents do not support the substitution of financial instruments or guarantees while at-risk builders are also not enthusiastic about swapping credit instruments, but favor the substitution of bonds. The payment of interest on retained funds and the use of escrow accounts are favored by at-risk builders. Owners oppose payment of interest while their agents are neutral, but neither owners, nor their agents, are opposed to the use of escrow accounts. All parties support the release of retainage for subcontractors completing work

early in the project. None of the parties oppose statutes limiting the maximum retainage percentage. Additionally, owners and their agents along with contractors and subcontractors, support statutes requiring the prompt payment of retainage.

CONCLUSIONS AND RECOMMENDATIONS

There are essentially two camps, with often contrasting positions on the impact, or influence, of retainage practice. Owners and their agents essentially believe that retainage provides needed financial protection with no adverse consequences for the owner while at-risk builders submit that retainage is an unnecessary practice that affords the owner little, or no, protection while placing a severe financial burden on contractors and subcontractors. However, based on the findings of this study, both of these positions may be difficult to defend.

Financial protection for the owner is certainly a legitimate concern when you consider the high risk nature of construction and the fact that owners are extending payment during construction for a partially completed 'product'. However, owners primarily view the protection that retainage affords as materializing only when the project nears completion. Owners and their agents do not believe that retainage provides a financial buffer for overvaluation of the work during construction, in part because they believe that retainage encourages front-end loading. In addition, they view retainage as having marginal impact on contractor performance and believe it provides minimal incentive to ensure quality work. This limited impact on performance may be in part because at-risk builders, as well as architects, believe that retainage treats good and poor performers the same, thereby providing minimal incentive to perform. However, as the project nears completion, owners and their agents firmly believe that retainage encourages the correction of defects, expedites closeout documentation, and ensures completion of the punchlist. In essence, they view retainage as providing effective leverage for the correction of deficiencies and closeout of the project as opposed to providing financial protection or having a substantial impact on performance during the construction period.

However, the perceived protection that retainage provides has a price. Retainage by its definition is the withholding of the funds for portions of the work already completed. Retained funds represent revenue that has been earned by contractors and subcontractors in performance of the work. In essence, retainage requires builders to provide partial funding for the project during construction. For owners and their agents to maintain that the owner has use of this financing at zero cost is neither logical, nor supported by this and earlier studies. The findings of this study support the assertion that retainage policy influences a contractor's and subcontractor's willingness to bid, as well as the price for their portion of the work. Retainage reduces competition and increases the cost of a project – a position in harmony with economic theory. General contractors submit the increase in contract price is 2.2% while subcontractors claim it is 3.6%. However, the actual impact would be relatively easy to assess if owners did as suggested by respondents in this study who recommended that owners adopt a policy requiring contractors and subcontractors to price the project's retainage policy upon submission of their bid. If Owners implemented this approach, the actual impact of retainage policy – the price owners are paying for any perceived or actual financial protection – could be ascertained for each project.

An additional impact of retainage is its negative influence on project relationships. At-risk builders feel that eliminating, or reducing, retainage facilitates project relationships and encourages the alignment of project goals. In contrast, owners and their agents do not believe the implementation of retainage has an adverse influence on the contracting team. However, the only subset of the owners group that has extensive experience with 'zero' retainage projects are

representatives of federal agencies and they support the at-risk builders' position. The majority of these federal agents believe the elimination of retainage has a favorable impact on project relationships. As the construction industry continues to evolve toward an operating environment where effective Owner-Architect-Contractor relationships are essential to reach project objectives, retainage policy may take on added significance.

Contributing to the adverse impact that retainage may have on project relationships is perceived retainage abuse. At-risk contractors and subcontractors assert slow payment of retainage is a serious problem. They submit that they do not receive full payment of retainage on approximately 10% of their projects and sometimes have to wait one to two years after completion of the work for receipt. Even construction managers, as owners' agents, view slow payment of retainage as a concern and surprisingly, owners themselves didn't claim it was *not* a serious problem. Compounding this problem is that contractors and owners use retainage to induce settlement. Contractors use it as leverage against subcontractors to induce settlement on unfavorable terms. And even the owners' agents (architects and CM's) concur with at-risk builders that retainage is often used as leverage by the Owner to resolve contractor claims or changes for extra work.

To facilitate financial protection, enhance performance, and improve project relationships Owners may want to reevaluate retainage policy and align it with the suggestions of some of the respondents. To provide financial protection to ensure project completion owners could prequalify project participants and require contractors to establish line items on the schedule of values for closeout and demobilization activities. In addition, funds could be withheld for defective work – a contractual right that most owners already possess. To encourage performance owners could adopt a policy that gives at-risk builders an incentive to perform, rather than negative reinforcement. Retainage could be withheld only if the contractor falls behind schedule or is not meeting its contractual obligations. It may be in an owner's best interest to adopt the federal government's philosophy that "*retainage should not be used as a substitute for good contract management, and the contracting officer should not withhold funds without cause*".

Despite the polarization on retainage policy the continuing efforts of the American Subcontractors Association (ASA), the American General Contractors of America (AGC), and the Associated Specialty Contractors (ASC) at the Federal and State level have yielded results. Federal agencies are more likely to embrace a zero retainage policy and the average retained percentage on public work, at both the Federal and State level, is significantly lower than the average of 7.6% on private work. However, this disparity may lessen in the future because, as evidenced by this study, even private owners do not oppose reducing retainage to 5%.

This study found additional evidence that the industry is moving toward a more balanced approach to retainage policy that addresses the legitimate needs and concerns of the parties. While alternatives to *traditional* retainage practice still have limited application, support is present on several fronts. This study confirmed that all of the parties support the release of retainage for work completed early in the life of the project and legislation to ensure prompt payment. Additionally, none of the parties oppose statutes limiting the maximum percentage of retainage. This study also found that the Owners' agents (along with at-risk builders) support the use of escrow accounts and do not oppose the payment of interest on retained funds. Changing attitudes coupled with legislative initiatives affecting both the public and private sector are reinforcing, and in some cases mandating, the acceptance of alternatives to *traditional* retainage practice.

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Foundation of the American Subcontractors Association, Inc.

1004 Duke Street

Alexandria, VA 22314-3588

Telephone: 703-684-3450 Fax: 703-836-3482

Email: info@contractorsknowledgenetwork.org

Web: www.contractorsknowledgenetwork.org

Senate Commerce Committee

2-1-05

Attachment

4-145

State	Applicable Statutes	State to Prime Contractor	Prime Contractor to Subcontractor	Subcontractor to Lower Tiers	Interest Rate	Comments	Cases Citing Applicable Statutes
U.S. Government	31 U.S.C. §§3901 et seq.; FAR 52.232-27.	30 days.	7 days following receipt of payment.	7 days.	Rate determined by the Treasury Department for Contract Disputes Act. Interest compounded monthly, FAR 32.907-1(d).		<i>Ocean Technology v. United States</i> , 19 Cl.Ct. 288 (1990).
Alabama	Ala. Code §41-16-3.	30 days.	7 days or as agreed.	7 days or as agreed.	"the legal amount currently charged by the state."	If the amount of payment is in dispute, the state must notify the contractor of the dispute within 15 days of receiving the invoice.	None.
Alaska	Alaska Stat. §§ 36.90.200 - 36.90.290, § 45.45.010.	30 days (21 days for Federal Grant projects).	8 days.	8 days.	10.5% per year (if not received by 21st day after due date).		None.
Arizona	Ariz. Rev. Stat. §§ 34-221, 15-213, 28-6924, 28-6926, 41-2576, 41-2577.	14 days.	7 days.	7 days.	1% per month.	Other payment terms may be agreed in written subcontract but such terms cannot "materially alter" the rights of any contractor, subcontractor or material supplier to receive prompt and timely payment.	None.
Arkansas	Ark. Code Ann. §19-4-1411.	Maximum of 15 working days; in some instances a maximum of 10 working days.	None.	None.	8% per year.		None.
California	Bus. & Prof. Code §7108.5; Civil Code §3262.5; Pub. Cont. Code §7107; Pub. Cont. Code §10261.5; Pub. Cont. Code §10262.5; Pub. Cont. Code §10853; Pub. Cont. §9202.	30 days.	10 days.	10 days.	10% per year (from state); 2% late fee from contractors to subs.	Prevailing party is entitled to attorney fees and court costs.	None.
Colorado	Colo. Rev. Stat. §§24-91-101 - 24-91-103.5.	7 days.	7 days.	7 days.	15% per year or contract rate, whichever is higher.		<i>Alfred Brown Co. v. Johnson-Gibbons & Reed Western Paving - Kemper</i> , 695 P.2d 746 (Colo. App. 1984); <i>Town of Alma v. Azco Const., Inc.</i> , 10 P.3d 1256 (Colo. 2000).
Connecticut	Conn. Gen. Stat. §§4a-71 - 4a-75, 49-41c.	45 days (or date specified in contract).	30 days.	30 days.	1% per month.		<i>Gresh Painting Co. v. Continental Ins. Co.</i> , No. 64326, 1993 LEXIS 3388 (Conn. Super. Ct. 1993).
Delaware	Del. Code Ann. tit. 29, §6516.	7 days to certify invoice, plus 21 days to pay (unless otherwise agreed).	21 days (unless otherwise agreed).	None.	Not more than 2% over the prime interest rate.		None.

Senate Commerce Committee

2-1-05

Attachment 4-46

State	Applicable Statutes	State to Prime Contractor	Prime Contractor to Subcontractor	Subcontractor to Lower Tiers	Interest Rate	Comments	Cases Citing Applicable Statutes
D.C.	D.C. Code Ann. §§ 2-221.01 - 2-221.06 (2001 ed.).	30 calendar days (or the date specified in contract).	7 days.	7 days.	1% per month (if not received by 15th day after due date).	Unpaid interest after a 30-day period is added to principal and interest accrues on new amount. Agency must notify contractor of deficiency in invoice within 15 days of receipt.	<i>Dist. of Columbia v. Pierce Associates, Inc.</i> , 527 A.2d 306, 307 n.1 (D.C. Cir. 1987); <i>General Railway Signal Co. v. Washington Metro. Area Transit Authority</i> , 875 F.2d 320, 327 (D.C. Cir. 1989); <u>cert. denied</u> , 110 S.Ct. 1524, 494 U.S. 1056, 108 L.Ed.2d 764; <i>Bemberg v. District of Columbia</i> , 758 A.2d 518 (2000).
Florida	FDOT: Fla. Stat. § 337.141; see also, Fla. Stat. § 215.422. Other State Agencies: Fla. Stat. § 287.0585. Local Governments: Fla. Stat. § 218.70 et. seq.	FDOT: 75 days of final field acceptance or 30 days after settlement of a claim. Other State Agencies: None. Local Governments: 20 business days (if no agent approval) 25 business days (if agent approval).	FDOT: None. Other State Agencies: 7 working days after receipt of payment. Local Governments: 15 days.	FDOT: None. Other State Agencies: None. Local Governments: 15 days.	FDOT: Statutory rate (6% for 2003) Other State Agencies: .5% per day up to 15% of total due. Local Governments: 1% per month	FDOT: If a contractor fails to submit all documents required for final payment within two years after final acceptance of the work or within one year after the offer by the department of final payment, whichever occurs later, any amount owed will be considered to be forfeited. Other State Agencies: This provision may be excluded in contract between contractor and subcontractor.	<i>FDOT: Department of Transportation v. MCC of Florida, Inc.</i> , 540 So. 2d 834 (Fla. 3d DCA 1988); <i>Department of Transportation v. Hawkins Bridge Company</i> , 457 So. 2d 525 (Fla. 1st DCA 1984) rev. den. 467 So. 2d 999. Other State Agencies: None. Local Governments: None.
Georgia	Ga. Code Ann. §§13-11-1 - 13-11-11.	15 days.	10 days.	10 days.	1% per month.	Prevailing party is entitled to reasonable attorney fees. Provisions became effective Jan. 1, 1995.	
Hawaii	Haw. Rev. Stat. §§ 103-10 - 103-10.5.	30 days.	10 days.	None (but see Private Prompt Pay Law).	Prime rate plus 2%, up to 12% per year.	Where time of payment is contingent upon receipt of federal funds federal approval, solicitation of bids must clearly state such conditions.	None.
Idaho	Idaho Code §§67-2302, 63-3045; I.R.C. §1274(d).	60 days.	None.	None.	Rate of interest as specified in Idaho Code § 63-3045 (2% plus the rate determined under I.R.C. § 1274(d)).	If a contractor prevails in an administrative or judicial action to collect interest, the state will be required to pay any reasonable attorney fees.	None.
Illinois	State Government: Ill. Ann. Stat. Ch. 30, para. 540/0.01 - 540/7. Local Government: Ill. Ann. Stat. Ch. 50, para. 505/1 - 505/9.	State: Within 60 days of the date of approval. Local: Within 30 days of the date of approval.	State and Local: 15 days. Local:	State and Local: 15 days.	State and Local: 1% per month to prime; 2% per month to subs.	State: For interest of at least \$5 but less than \$50, the contractor initiates a written request. Local: Time periods may be extended by contract.	State: <i>Hyde Park Medical Lab. v. Court of Claims of Illinois</i> , 632 N.E. 2d 307 (Ill. Ct. Cl. 1994). Local: <i>Shaw Industries v. Community College District No. 515</i> , 741 N.E.2d 642 (First Dist. 2001); <i>Superior Structures v. City of Sesser</i> , 660 N.E.2d 1362 (Fifth Dist. 1996).
Indiana	Ind. Code Ann. §§5-17-5-1 - 5-17-5-5, 8-23-9-14.	35 days (or date specified in contract).	35 days.	None.	1% per month.	Unpaid interest after any 30-day period will be added to principal and interest will accrue on new amount.	None.

Senate Commerce Committee

2-1-05

Attachment 4-147

State	Applicable Statutes	State to Prime Contractor	Prime Contractor to Subcontractor	Subcontractor to Lower Tiers	Interest Rate	Comments	Cases Citing Applicable Statutes
Kansas	Iowa Code §§ 421.40, 573.12 - 573.15A Kan. Stat. Ann. §§ 75-6401 - 75-6407.	60 days (14 days for approved progress payments unless a time period greater than 14 days is specified in the contract, not to exceed 30 days). 30 days.	7 days. None.	None. None.	1% per month. 1.5% per month* (if not received by 45th day).	Unpaid interest accrues after a 30-day period; it is added to principal and interest accrues on new amount. *Contractor must request interest payment in writing within four months to receive.	<i>Economy Forms Corp. v. City of Cedar Rapids</i> , 340 N.W. 2d 259 (Iowa 1983); <i>Northwest Limestone Co. v. Iowa Dept. of Transp.</i> , 499 N.W. 2d 8 (Iowa 1993). <i>D-1 Constructors, Ltd. v. Unified School District No. 229</i> , 788 P.2d 289, 291 (Kan. Ct. App. 1990).
Kentucky	Ky. Rev. Stat. Ann. §§ 45.451 - 45.458.	30 working days.	None.	None.	1% per month.		None.
Louisiana	La. Rev. Stat. Ann. §§ , 9:2784, 38:2191, 48:251.5 (highway).	Per contract, but final payment due 45 days after receipt of a "clear lien certificate."	14 days (Private Prompt Pay Law).	14 days (Private Prompt Pay Law).	Legal interest (highway only). For subcontracts, see Private Prompt Pay Law.	For highway, attorney fees for mandamus action. For others, reasonable attorney fees where final payment is late. Louisiana Procurement Code (§§ 39:1551 et seq.) does not apply to construction (39:1554.B).	See Private Prompt Pay Law.
Maine	Me. Rev. Stat. Ann. tit. 5, §§ 1551 et seq.	25 days (or within 15 days of date specified in contract).	See private prompt pay act.	See private prompt pay act.	"Reasonable" amount normally charged by contractor (often 1.5% per month).	If late fee interest unpaid after 30 days, then unpaid amount is added to principal amount of debt and additional interest accrues on new total.	None.
Maryland	Md. Code Ann. State Fin. & Proc. §§ 15-101 - 15-108; § 15-226.	30 days.	10 days.	10 days.	9% per year.	Interest begins to run on the 31 st day after day on which payment is due under invoice or, if later, day agency receives an invoice. Agency is not liable for interest unless, within 30 days after date on agency check paying past due amount, contractor submits an invoice for the interest.	None.

Senate Commerce Committee

2-1-05

Attachment A-148

State	Applicable Statutes	State to Prime Contractor	Prime Contractor to Subcontractor	Subcontractor to Lower Tiers	Interest Rate	Comments	Cases Citing Applicable Statutes
Massachusetts	Mass. Ann. Laws ch. 29 §§ 20C, 29C; Mass. Ann. Laws ch. 30 §§ 39F, 39K.	30 days (15 days for cities, counties, towns and other public bodies); 65 days for final payment.	"forthwith"	None.	3% per day above the rediscount rate charged by the Federal Reserve.	If a contractor fails to pay its subcontractors, the subcontractors have the right to go to the state for payment.	<i>Mosaic Tile Co. v. Rusco Products of Mass., Inc.</i> , 215 N.E.2d 171 (1966) (Section 39F does not apply to a retainage held by a contractor under a contract with a subcontractor; it does however apply to a retainage held by the state); <i>Pioneer Steel Erectors, Inc. v. Commonwealth</i> , 181 N.E.2d 670 (1962); <i>Joseph Rugo, Inc. v. Commonwealth</i> , 234 N.E.2d 910 (1968); <i>Alpert v. Commonwealth</i> , 258 N.E.2d 755 (1970); <i>Bayer & Mingolla Ind., Inc. v. A.J. Orlando Contracting Co.</i> , 370 N.E.2d 1381 (1978); <i>Associated General Contractors, Inc. v. Altschuler</i> , 361 F. Supp. 1293 (1973); <i>A. Bonfatti & Co. v. Rockport</i> , 429 N.E.2d 75 (Mass. App. 1981); <i>Thomas O'Connor & Co., Inc. v. City of Medford</i> , 448 N.E.2d 1276 (Mass App. 1983); <i>Acme Plastering Co., Inc. v. Boston Housing Authority</i> , 490 N.E.2d 445 (Mass.App. 1986). None.
Michigan	Mich. Comp. Laws §§125.1561 - 125.1565.	30 days after architect/engineer certifies work is complete or 15 days after contracting agency receives funds.	None.	None.	Contractor may include a "reasonable" interest penalty in next payment request.		
Minnesota	Minn. Stat. §§16A.124 - 16A.1245, 15.71-74, 137.36, 471.425.	30 days.	10 days.	10 days.	1.5% per month (or according to terms of contract).	The minimum monthly interest penalty for bills in excess of \$100 is \$10, prevailing claimant entitled to attorney's fees.	None.
Mississippi	Miss. Code §§ 31-5-25, 31-5-27.	60 days.	15 days.	15 days.	1% per month (state); .5% per day up to 15% of payment (GCs & subs).		<i>City of Mound Bayou v. Roy Collins Construction Co., Inc.</i> , 499 So. 2d 1354, 1361 (Miss. 1986) (section 31-5-25, as amended, was inapplicable to an action that arose before the statute became effective); <i>Stanton & Associates, Inc. v. Bryant Constr. Co.</i> , 464 So. 2d 499, 502 (Miss. 1985). None.
Missouri	Mo. Ann. Stat. §34.057.	30 days.	15 days.	15 days.	1.5% per month.	For any frivolous or bad faith claim, claimant must pay reasonable expenses and attorney fees. (Court determines whether claim is frivolous.)	None.

Senate Commerce Committee

2-7-85
Attachment H-49

State	Applicable Statutes	State to Prime Contractor	Prime Contractor to Subcontractor	Subcontractor to Lower Tiers	Interest Rate	Comments	Cases Citing Applicable Statutes
Montana	Mont. Code Ann. §§ 28-2-2101 to 28-2-2110, compare 17-8-241 to 17-8-244.	30 days.	3 working days.	3 working days.	1.5% per month, however, only if the invoice provided notice that interest would be claimed, and acceptance of payment releases any claim for interest.	Prevailing party is entitled to attorney fees and costs; arbitrator "may" also award fees and costs.	None.
Nebraska	Neb. Rev. Stat. § 81-2401 to 81-2408, 45-104.01.	45 days.	None.	None.	statutory rate based on average short term borrowing rate for the federal government during July of the previous year plus 3%, see 45-104.02	The Prompt Payment Act does not apply to claims subject to a good faith dispute of which contractor had written notice at the time payments are due; contracts related to highway or road construction, reconstruction, or maintenance; and claims, contracts, or projects that are to be paid for exclusively with federal funds.	None.
Nevada	Nev. Rev. Stat. Ann. §§338.400 - 338.645.	30 days.	10 days.	10 days.	State: rate equal to the rate quoted by at least three financial institutions as the highest rate paid on a CD with a duration of approximately 90 days. GCs and subs: lowest daily prime rate at the three largest U.S. banking institutions plus 2%.	Attorney fees shall be awarded to a "prevailing party" in an action or arbitration to recover amounts due under the Public Prompt Pay Law. A public body may, by contract, vary the terms for the award of attorney fees.	None.
New Hampshire	None.	None.	None.	None.	None.		Not applicable.
New Jersey	N.J. Rev. Stat. §§52:32-32 - 52:32-41.	60 days.	10 days.	10 days.	Set by State Treas. based on interest rate for new loans maturing in 5 years (state); prime rate + 1% (GCs & subs).	Any interest penalties under \$5 will not be paid.	None.
New Mexico	N.M. Stat. Ann. 1978, §§ 57-28-1 - 57-28-11.	21 days.	7 days.	7 days.	1.5% per month or fraction thereof.	In any action to enforce prompt payment the court may award costs and reasonable attorney fees.	None.
New York	N.Y. State Fin. Law §§ 139-f, 1798; N.Y. Pub. Auth. Law §2880; N.Y. Gen. Mun. Law § 106-b; Procurement Policy Board Rules of the City of New York § 5-07.	30 days; N.Y. City PPB Rules extend time to 45 days for change order work.	15 days.	15 days.	Rate of the federal short-term rate plus three percentage points, but not less than 6% per year.		None.
North Carolina	N.C. Gen. Stat. §§143-134.1 - 143-135.	45 days.	7 days.	None.	1% per month.		<i>Davidson & Jones, Inc. v. North Carolina Dept. of Admin.</i> , 317 S.E.2d 718 (1984).

Senate Commerce Committee

2-1-05

Attachment 4-150

State	licable utes	State to Prime Contractor	Prime Contractor to Subcontracto r	Subcontractor to Lower Tiers	In t Rate	Comments	Cases Citing Applicable Statutes
North Dakota	N.D. Cent. Code §§13-01.1-01 - 13- 01.1-06.	45 days (if not specified in contract).	45 days.	45 days.	1.75% per month (or percentage specified in contract).	Unpaid interest is compounded every 45 days.	<i>Johnson v. North Dakota Workers Comp. Bureau</i> , 428 N.W.2d 514 (N.D. 1988) (The term "business" does not include legal services rendered to workers' compensation claimants; therefore, the prompt payment provisions do not require the Bureau to pay interest on attorney fees); <i>Olander Contracting Co. v. Gail Wachter Investments</i> , 643 N.W.2d 29 (N.D. 2002) (Interest is due to the business if it prevails in litigation as well as by means of settlement of a dispute).
Ohio	Ohio Rev. Code Ann. §§126.30, 1343.03(A), 4113.61.	30 days (or days specified in contract).	10 days.	10 days.	(State) one-twelfth of the rate per year prescribed by O.R.C. § 5703.47 (\$ 126.30) or 10% (\$ 1343.03(A)). (Contractors) 18% per year.	Prevailing party is entitled to attorney fees.	<i>Solomon v. Excel Marketing, Inc.</i> (Clark County, 1996), 114 Ohio App.3d 20. <i>Valentine Concrete, Inc. v. Ohio Dept. of Admin. Serv.</i> , 609 N.E.2d 645 (1991); <i>State, ex rel. Celebrezze v. Tele- Comm., Inc.</i> , 601 N.E.2d 234 (1990). Unreported Decisions: <i>Masiongale Electrical-Mechanical, Inc., v. Construction One, Inc.</i> , (Franklin County, 2002) No. 02AP-138, 02-LW-3739; <i>Robert W. Setterlin & Sons, d/b/a WS Building Company v. North Market Development Authority, Inc.</i> (Franklin County, 1999) No. 99AP-141, 99-LW-5991. None.
Oklahoma	Okla. Stat. tit. 62, §§ 41.4a - 41.4d, tit. 61, §§113.1 - 113.3.	45 days (30 days for lump sum public construction contracts).	None.	None.	Based on mean rate of 30-day time deposits of state funds for last quarter of prior year. (.75% per month for final payment.)		
Oregon	Or. Rev. Stat. §§ 279.435, 279.445.	Within 30 days of request or within 15 days after approval by state (whichever is earlier).	10 days.	10 days.	Three times Fed. Reserve discount rate. No interest is specified for contractors or subs.	Whenever a contractor brings an action to collect interest, the prevailing party shall be entitled to costs and reasonable attorney fees.	<i>Coats v. ODOT</i> , 927 P.2d 108 (Or. App. 1996) (Attorneys fees and costs on action to "collect interest" are not available where action is brought to collect both principal and interest); <i>Valley Inland Pac. Const. v. Clack Water Dist.</i> , 603 P.2d 1381 (Or. App. 1979) (plaintiff was entitled to interest rate in effect at time of contract, rather than the rate in effect at time of judgment); <i>Gilbert Pacific Corp. v. Dept. of Transp.</i> , 822 P.2d 729 (Or. App. 1991) (Trial court was incorrect to award interest under version of statute in effect at time of contract, rather than amended version in effect at time of breach.)
Pennsylvan ia	62 Pa. Con. Stat. §§ 3931 et seq.	Per contract, else, 45 days.	14 days.	14 days.	State Treas. rate.	Prevailing party is entitled to 1% penalty plus attorney fees if non-prevailing party acted in bad faith.	None.

Senate Commerce Committee

2-1-05

Attachment 4-151

State	Applicable Statutes	State to Prime Contractor	Prime Contractor to Subcontractor	Subcontractor to Lower Tiers	Interest Rate	Comments	Cases Citing Applicable Statutes
Rhode Island	R.I. Gen. Laws §§42-11.1-1 - 42-11.1-16, 37-13-5.	30 days.	10 days.	Contractors and subcontractors are required to pay any charge for trucking or material furnished for use on the contract within 90 days.	Prime interest rate reported on money market page of <i>Wall Street Journal</i> on first business day of each month.	Unpaid interest will compound monthly.	None.
South Carolina	S.C. Code Ann. §§ 29-6-10 - 29-6-60.	21 days.	7 days.	7 days.	1% per month.	Notice of Prompt Pay required with request.	None.
South Dakota	S.D. Codified Laws Ann. §§ 5-26-1 - 5-26-8.	45 days (or date specified in contract).	30 days.	None.	1.5% per month (beginning on 30th day).	Unpaid interest is compounded every 60 days.	None.
Tennessee	Tenn. Code Ann. §§ 12-4-701 - 12-4-707.	45 days (if no date or other provision for payment is specified by contract).	30 days.	30 days.	1.5% per month (beginning on the day after payment is due).	Interest that is unpaid at the end of each 60-day period or at the end of any specified period provided by contract shall be added to the principal amount of the debt and shall thereafter accumulate interest.	None.
Texas	Tex. Govt. Code Ann. §§ 2251.001 - 2251.043.	30 days (if not specified in contract); 45 days for governing body that meets once a month.	10 days.	10 days.	1% per month.	Prevailing party is entitled to attorney fees.	
Utah	Utah Code Ann. §§ 15-6-1 - 15-6-6.	60 days (or date specified in contract).	30 days.	30 days.	(State) 2% above the rate paid by I.R.S. on refund claims, compounded every 60 days. (GCs & subs) 15.5% per year.	Subs can arguably collect costs of collection and attorney fees under the private prompt pay law.	<i>Vali Convalescent and Care Inst. v. Div. of Health Care Financing</i> , 797 P.2d 438 (Utah App. Ct. 1990). (Section 15-6-4 precluded payment of interest pursuant to § 15-6-3 because prompt payment provisions do not apply when failure to pay in a timely manner is the result of a dispute between agency and the business.)
Vermont	Vt. Stat. Ann. tit. 9, §§4001 - 4009, tit. 12, §2903.	20 days after end of billing period or 20 days after delivery of invoice.	7 days.	7 days.	12% per year.	Prevailing party is entitled to reasonable attorney fees and expenses.	None.
Virginia	Va. Code Ann. §§ 2.2-4347 - 2.2-4356.	30 days (for state agency); 45 days (for localities) (or date specified in contract).	7 days.	7 days.	Interest rate in regard to state to contractor is equal to corporate loan prime rate of U.S. commercial banks as reported in the <i>Wall Street Journal</i> or 1% per month for contractors to subcontractors as well as localities to contractors.	Notice of unacceptable invoice must be sent within 15 days of receipt of invoice or goods/services (20 days for localities)	<i>W.M. Schlosser Co. v. Bd. of Supervisors of Fairfax County</i> , 428 S.E.2d 919, 921 (Va. 1993).

Senate Commerce Committee

9-1-05

Attachment 4-152

State	Applicable Statutes	State to Prime Contractor	Prime Contractor to Subcontractor	Subcontractor to Lower Tiers	Interest Rate	Comments	Cases Citing Applicable Statutes
Washington	Wash. Rev. Code §§ 39.76.010 -- 39.76.40, 39.04.250, 19.52.025.	30 days (or date specified in contract).	10 days.	10 days.	1% per month, or at least \$1 per month.	Prevailing party is entitled to reasonable attorney fees.	<i>Thompson v. School Dist. No. 41, 892 P.2d 760 (Wa. App. 1995) (Failure to properly withhold funds entitles contractor to interest and attorneys' fees); Fiorito Bros., Inc. v. Dept. of Transportation, 771 P.2d 1166 (Wa. App. 1989) (A contracting party that seeks payment for additional work not specified in a public contract is not entitled to recover prejudgment interest under RCW 39.76.010, which provides for the payment of interest on amounts due on a written contract that the public body has not paid in a timely way.)</i> None.
West Virginia	W.Va. Code §§ 7-5-7 and 8-13-22d (localities), 11-10-17a (interest rate). For state agency contracts entered between 3/1/1969 and 7/1/1991, see § 14-3-1.	60 days for localities.	None.	None.	Rate determined by state tax commissioner as the average predominant prime rate quoted by commercial banks to large businesses as determined, in turn, by the board of governors of the Federal Reserve System.	The prompt payment act for state government expired in 1991.	None.
Wisconsin	Wis. Stat. §§16.528; 16.53(2) (rejection of invoice), 66.0135 (local), 71.82(1)(a) (interest rate).	30 days (or date specified in contract).	7 days.	7 days.	12% per year, compounded monthly.	Prevailing party is entitled to reasonable attorney fees in an action to recover interest.	None.
Wyoming	Wyo. Stat. §§16-6-601 --16-6-602.	45 days.	None.	None.	1.5% per month.		None.

Senate Commerce Committee

2-1-05

Attachment 4-153

State	Applicable Statutes	State to Prime Contractor	Prime Contractor to Subcontractor	Subcontractor to Lower Tiers	Interest Rate	Comments	Cases Citing Applicable Statutes
Alabama	Ala. Code. §§ 8-29-1 to 8-29-4.	30 days or as agreed.	7 days or as agreed.	7 days or as agreed.	1% per month.	The party in whose favor a judgment is rendered shall be entitled to recover payment of reasonable attorneys' fees, court costs and reasonable expenses.	None.
Arizona	Ariz. Rev. Stat. § 32-1129 to 32-1129.06	7 days after estimate certified and approved.	7 days.	7 days.	1.5% per month	Owner may "opt out" of prompt pay if the contract identifies in a "clear and conspicuous manner" such other billing or payment cycle; and (b) each page of the plans, including bid plans and construction plans, includes in clear and conspicuous type an opt-out legend as set forth in the statute. In addition, an unpaid subcontractor may file a complaint with the Arizona Registrar of Contractors. Prevailing party is entitled to attorney fees and court costs.	None.
California	Cal. Bus. & Prof. Code § 7108.5; Cal. Civil Code § 3260-3260.1	30 days (retainage to be paid within 45 days of completion).	10 days.	10 days.	2% per month	Reasonable attorney fees awarded if party unreasonably withheld payment and refused to put amount of requested payment plus interest in escrow. 10% damages for bad faith withholding.	None.
Connecticut	Conn. Gen. Stat. §§ 42-1581 to 42-158c	15 days unless otherwise agreed.	15 days unless otherwise agreed.	15 days unless otherwise agreed.	1% per month if 10 days notice of failure to comply with statute is provided by registered or certified mail.	Attorney fees per contract. If not provided, attorney fees only recoverable for payments "wrongfully withheld" not subject to a "good faith" dispute.	None.
Delaware	Del. Code title 6 §§ 3501-09.	Per contract.	Up to 30 days if contractually provided, else 15 (§§ 3506(a)(1), 3507(d)).	None.	Legal rate compounded every 30 days.	Statutory rate (6% per year for 2003).	<i>Griffin Dewatering Corp. v. B.W. Knox Constr. Corp.</i> , -- A.2d - (Del. Super. Ct., May 14, 2001).
Florida	Fla. Stat. § 715.12; see also § 713.346.	14 days after it's due under contract.	14 days.	14 days.	Statutory rate (6% per year for 2003).	Prevailing party is entitled to reasonable attorney fees.	None.
Georgia	Ga. Code §§ 13-11-1 to 13-11-11.	15 days.	10 days.	10 days.	1% per month.	This statute is part of the licensing law and there is no express provision for a private right of action.	None.
Hawaii	Hawaii Rev. Stat. § 444-25.	None.	60 days of proper invoice, or 30 days after receipt of contingent funds.	60 days of proper invoice, or 30 days after receipt of contingent funds.	1% per month.		None.

Senate Commerce Committee

2-1-05

Attachment H-15H

State	Applicable Statutes	State to Prime Contractor	Prime Contractor to Subcontractor	Subcontractor to Lower Tiers	Interest Rate	Comments	Cases Citing Applicable Statutes
Louisiana	La. Rev. Stat. § 9:2784	None.	14 days.	14 days.	.5% per day (up to 15% of total due)	Prevailing party is entitled to attorney fees. For claims "without merit," claimant must pay costs and fees for defense.	<i>U.S. ex rel. Cal's A/C and Elec. v. Famous Const. Corp.</i> , 220 F.3d 326 (5 th Cir. 2000); <i>Contractors Supply & EQ-Orleans v. J. Calderera & Co., Inc.</i> , 734 So.2d 755 (La.App.5 Cir. 1999); <i>Big D Dirt Services, Inc. v. Westwood, Inc.</i> , 653 So.2d 604 (La.App.3 Cir. 1995).
Maine	Me. Rev. Stat. Ann Title 10 §§ 1111 et seq.	As agreed; or 20 days from end of billing period or 20 days from delivery of invoice, whichever is later.	7 days after receipt of payment or 7 days after receipt of invoice, whichever is later.	7 days after receipt of payment or 7 days after receipt of invoice, whichever is later.	Interest under 14 M.R.S.A. §1602-A(2) from day following due date; penalty of 1% per month for wrongfully withheld payments.	Substantially prevailing party entitled to attorney fees and expenses.	<i>Jenkins, Inc., v. Walsh Brothers, Inc.</i> , 2002 ME 168, 810 A.2d 929 (Me. 2002); <i>Jenkins, Inc., v. Walsh Brothers, Inc.</i> , 2001 ME 98, 776 A.2d 1229 (Me. 2001); <i>The Carvel Company v. Spencer Press, Inc.</i> , 1998 ME 74, 708 A.2d 1033 (Me. 1998).
Maryland	Md. Code, Real Property §§ 9-301 - 9-304	30 days from earlier of date on which occupancy permit granted or owner/owner's agent takes possession (if date is specified in contract, then 7 days).	7 days.	7 days.	Not specified.	Attorneys' fees to prevailing party if the court decides that the undisputed payment was withheld in bad faith.	<i>Capitol Indem. Corp. v. Mountbatten Sur. Co.</i> , 2001 WL 21334 (D.Md. 2001).
Minnesota	Minn. Stat. §337.10.	None. Must make payments monthly, unless contract requires otherwise.	10 days.	10 days.	1.5% per month (or according to terms of contract).	The minimum monthly interest penalty for bills in excess of \$100 is \$10, prevailing claimant entitled to attorney's fees. Statute does not apply to certain types of residential construction.	None.
Mississippi	Miss. Code §§ 87-7-3 (GC), 87-7-5 (Subs).	60 days.	15 days.	15 days.	1% per month (owner); 5% per day up to 15% of payment (GC & subs).	None.	None.
Montana	Mont. Code Ann. §§ 28-2-2101 to 28-2-2110.	30 days.	3 working days.	3 working days.	1.5% per month, however, only if the invoice provided notice that interest would be claimed, and acceptance of payment releases any claim for interest.	Prevailing party is entitled to attorney fees and costs; arbitrator "may" also award fees and costs.	None.
Nevada	Nev. Rev. Stat. §§ 624.606 - 624.630.	21 days (or time specified in contract).	10 days.	10 days.	Rate equal to the prime rate at the largest bank in the state as determined by the commissioner of financial institutions on the January 1 or July 1 immediately preceding the date of the contract, plus 2%.	A contractor or subcontractor may be awarded reasonable attorney fees if it terminates the contract, or may have attorney fees awarded against it if it terminated without reasonable cause.	None.

Senate Commerce Committee

2-1-05

Attachment 4-155

State	licable utes	State to Prime Contractor	Prime Contractor to Subcontracto r	Subcontractor to Lower Tiers	Int ^{erest} Rate	Comments	Cases Citing Applicable Statutes
New Jersey	N.J. Stat. §§ 2A:30A-1, 30A-2.	None.	10 days or as otherwise agreed in writing.	10 days or as otherwise agreed in writing.	Prime rate plus 1%.		None.
New Mexico	N.M. Stat. Ann. 1978, §§ 57-28-1 - 57-28-11.	21 days.	7 days.	7 days.	1.5% per month or fraction thereof.	In any action to enforce prompt payment the court may award costs and reasonable attorney fees.	None.
New York	N.Y. General Business Law §§ 756 et seq.	30 days (or time specified in contract).	7 days (or time specified in contract).	7 days (or time specified in contract).	1% per month (or as specified in contract).	Terms of contract "supersede the provisions of this [prompt pay law]." Contractor or subcontractor may suspend on 10 days notice for nonpayment. Subcontractors may require owner to provide notice within 5 days of any payment to contractor.	None.
North Carolina	N.C. Gen. Stat. §§ 22C-1 to 22C-6.	None.	7 days.	7 days.	1% per month	Payment by owner to a contractor is not a condition precedent for payment to a subcontractor, and payment by a contractor to a subcontractor is not a prerequisite for payment to other subcontractors (prompt payment provisions do not apply to residential contractors).	Statesville Roofing & Heating Co., Inc. v. Duncan, 702 F.Supp. 118 (W.D.N.C. 1988).
Ohio	Ohio Rev. Code §§ 4113.61 (1998).	None.	10 days.	10 days.	18% per year.	Prevailing party is entitled to attorney fees.	Solomon v. Excel Marketing, Inc. (Clark County, 1996), 114 Ohio App.3d 20. Unreported Decisions: Masiongale Electrical-Mechanical, Inc., v. Construction One, Inc., (Franklin County, 2002) No. 02AP-138, 02-LW-3739; Robert W. Setterlin & Sons, d/b/a WS Building Company v. North Market Development Authority, Inc. (Franklin County, 1999) No. 99AP-141, 99-LW-5991.
Pennsylvania	1994 Pa. Laws 7, codified as 73 P.S. §§ 501-516.	20 days (or time specified in contract).	14 days.	14 days.	1% per month (or rate specified by contract). Interest begins to accrue on the eighth day after the date payment was due from the owner. Interest begins to accrue the date after payment was due from the contractor.	Prevailing party is entitled to reasonable attorney fees.	None.
South Carolina	S.C. Code §§ 29-6-10 - 29-6-60.	21 days.	7 days.	7 days.	1% per month.	May be waived by conspicuous bolded provision in contract. Notice must be provided to general contractor in pay application.	None.
Tennessee	Tennessee Code §§ 66-34-101 - 66-34-703.	Time provided in contract.	Time provided in contract.	Time provided in contract.	Owner: Interest specified in contract. General contractor: Pro rata share of interest received by general contractor.	Payments held in trust. Attorney fees may be awarded against party acting in bad faith. Statute requires written contract. Act cannot be waived by contract	Trinity v. McKinnon Bridge Co., 7 S.W.3d 159 (Tenn. Ct. App. 2002).

Senate Commerce Committee

2-1-05

Attachment 4-156

State	licable tutes	State to Prime Contractor	Prime Contractor to Subcontracto r	Subcontractor to Lower Tiers	In' st Rate	Comments	Cases Citing Applicable Statutes
Texas	Tex. Prop. Code §§ 28.001 - 28.010.	35 days.	7 days.	7 days.	1.5% per month.	Reasonable attorney fees as the court determines is equitable or just.	<i>National Environ. Serv. v. Homeplace Homes</i> , 961 S.W. 2d 632 (Tex. App. - San Antonio 1998, no writ).
Utah	Utah Code § 58-55- 603.	None.	30 days.	30 days.	1% per month.	Reasonable costs of collection and attorney's fees also due.	<i>Zions First Nat'l Bank v. Christiansen Bros.</i> , 66 F.3d 1560 (10 th Cir. 1995).
Vermont	Vt. Stat. Ann. tit. 9, §§ 4001 - 4009, tit. 12, § 2903.	20 days after end of billing period or 20 days after delivery of invoice.	7 days.	7 days.	12% per year.	Prevailing party is entitled to reasonable attorney fees and expenses.	None.

Senate Commerce Committee

2-1-05

Attachment 4-157

AIA DOCUMENT A401-1997

Standard Form of Agreement Between Contractor and Subcontractor

GENERAL INFORMATION

PURPOSE. AIA Document A401-1997 is intended for use in establishing the contractual relationship between the Contractor and Subcontractor. This document, when completed, will adopt by reference AIA Document A201 and a pre-existing Prime Contract between the Contractor and Owner. The completed A401-1997 document will thus form an agreement whereby the duties and responsibilities of the Contractor under the Prime Contract pass to the Subcontractor with respect to a portion of the work designated in the completed A401-1997 document.

RELATED DOCUMENTS. This document has been prepared for use with a Prime Contract which may be based upon the latest editions of one or more of the AIA A-Series documents, especially those that relate to and adopt AIA Document A201, General Conditions of the Contract for Construction. If another general conditions will be used, A401-1997 will have to be modified to refer to that general conditions instead of to AIA Document A201.

DISPUTE RESOLUTION—MEDIATION AND ARBITRATION. This document contains provisions for mediation and arbitration of claims and disputes. Mediation is a non-binding process, but is mandatory under the terms of this agreement. Arbitration is mandatory under the terms of this agreement and binding in most states and under the Federal Arbitration Act. In a minority of states, arbitration provisions relating to future disputes are not enforceable but the parties may agree to arbitrate after the dispute arises. Even in those states, under certain circumstances (for example, in a transaction involving interstate commerce), arbitration provisions may be enforceable under the Federal Arbitration Act.

The AIA does not administer dispute resolution processes. To submit disputes to mediation or arbitration or to obtain copies of the applicable mediation or arbitration rules, write to the American Arbitration Association or call (800) 778-7879. The American Arbitration Association may also be contacted at <http://www.adr.org>.

WHY USE AIA CONTRACT DOCUMENTS? AIA contract documents are the product of a consensus-building process aimed at balancing the interests of all parties on the construction project. The documents reflect actual industry practices, not theory. They are state-of-the-art legal documents, regularly revised to keep up with changes in law and the industry—yet they are written, as far as possible, in everyday language. Finally, AIA contract documents are flexible: they are intended to be modified to fit individual projects, but in such a way that modifications are easily distinguished from the original, printed language.

For further information on AIA's approach to drafting contract documents, see AIA Document M120, Document Drafting Principles.

USE OF NON-AIA FORMS. If a combination of AIA documents and non-AIA documents is to be used, particular care must be taken to achieve consistency of language and intent among documents.

LETTER FORMS OF AGREEMENT. Letter forms of agreement are generally discouraged by the AIA, as is the performance of a part or the whole of the Work on the basis of oral agreements or understandings. The standard AIA agreement forms have been developed through more than 100 years of experience and have been tested repeatedly in the courts. In addition, the standard forms have been carefully coordinated with other AIA documents.

STANDARD FORMS. Most AIA documents published since 1906 have contained in their titles the words "Standard Form." The term "standard" is not meant to imply that a uniform set of contractual requirements is mandatory for AIA members or others in the construction industry. Rather, the AIA standard documents are intended to be used as fair and balanced baselines from which the parties can negotiate their bargains. As such, the documents have won general acceptance within the construction industry and have been uniformly interpreted by the courts. Within an industry



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spanning 50 states—each free to adopt different, and perhaps contradictory, laws affecting that industry—AIA documents form the basis for a generally consistent body of construction law.

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CHANGES FROM THE PREVIOUS EDITION

A401-1997 revises the 1987 edition of A401 to reflect changes made in AIA Document A201-1997. It incorporates alterations proposed by subcontractors, architects and other interested parties. The following are some of the significant changes made to the contents from the 1987 edition of A401.

ARTICLE 1: A new paragraph has been added adopting A201 by a specific reference. It is also provided that the Subcontract may be amended only by a written Modification.

ARTICLE 3: The Contractor is now required to furnish information to enable the Subcontractor to enforce mechanic's lien rights. If the Contractor makes or defends a claim against the Owner relating to the Subcontractor's Work, the Contractor must make information relating to that claim available to the Subcontractor. Time limits and information requirements are prescribed for Contractor's claims for services and materials provided to the Subcontractor.

ARTICLE 4: The Contractor has the explicit authority to reject Work of the Subcontractor. Hazardous materials provisions have been expanded to cover materials other than asbestos and PCB, and indemnification of the Subcontractor under these provisions has been broadened.

ARTICLE 6: Mediation is added as a precursor to arbitration.

ARTICLE 7: The Contractor is now permitted to terminate the Subcontract for convenience. Procedures and rights of the Subcontractor are set out for situations in which the Prime Contract is terminated for the convenience of the Owner.

ARTICLE 9: It is explicitly noted that time is of the essence of the Subcontract with respect to the obligations of both the Contractor and Subcontractor.

ARTICLE 11: In the absence of a payment bond in the full amount of the Contract Sum, payments received by the Contractor for the Subcontractor's Work are held by the Contractor for the Subcontractor. Written notice is required if the Contractor disapproves the Subcontractor's application for payment.

ARTICLE 13: On request of the Subcontractor, the Contractor is required to provide copies of property and equipment policies. To the extent required property insurance is not in effect for the full value of the Subcontractor's Work, the Subcontractor may purchase such insurance and be reimbursed by the Contractor.

ARTICLE 15: The Contractor and Subcontractor waive consequential damages (i.e., indirect damages) arising out of the Subcontract.

USING THE A401 FORM

MODIFICATIONS. Users are encouraged to consult with an attorney before completing an AIA document. Particularly with respect to contractor's licensing laws, duties imposed by building codes, interest charges, arbitration and indemnification, this document may require modification with the assistance of legal counsel to fully comply with state or local laws regulating these matters.

Generally, necessary modifications may be accomplished by writing or typing the appropriate terms in the blank spaces provided on the form or by special conditions or amendments adopted by reference. The form may also be modified by striking out language directly on the original printed form. Care must be taken in making these kinds of deletions, however. Under NO circumstances should printed language be struck out in such a way as to render it illegible (as, for example, with blocking tape, correction fluid or X's that completely obscure the text). This may raise suspicions of concealment or suggest that the completed and signed document has been tampered with. Handwritten changes should be initialed by both parties to the contract.

It is definitely not recommended practice to retype the standard document. Besides being outside the limited license for reproduction granted under these instructions, retyping can introduce typographical errors and cloud the legal



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Standard Form of Agreement Between Contractor and Subcontractor

AGREEMENT made as of the _____ day of _____ in the year _____
(In words, indicate day, month and year)

_____ day of _____

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

BETWEEN the Contractor:
(Name, address and other information)

This document has been approved and endorsed by the American Subcontractors Association and the Associated Specialty Contractors, Inc.

and the Subcontractor:
(Name, address and other information)

The Contractor has made a contract for construction dated _____

With the Owner:
(Name, address and other information)

For the following Project:
(Include detailed description of Project, location and address)

which Contract is hereinafter referred to as the Prime Contract and which provides for the furnishing of labor, materials, equipment and services in connection with the construction of the Project. A copy of the Prime Contract, consisting of the Agreement Between Owner and Contractor (from which compensation amounts may be deleted) and the other Contract Documents enumerated therein has been made available to the Subcontractor.



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The Architect for the Project is:
(Name, address and other information)

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2-1-05

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ARTICLE 1 THE SUBCONTRACT DOCUMENTS

1.1 The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein; (3) Modifications issued subsequent to the execution of the Agreement between the Owner and Contractor; whether before or after the execution of this Agreement; (4) other documents listed in Article 16 of this Agreement; and (5) Modifications to this Subcontract issued after execution of this Agreement. These form the Subcontract, and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein. The Subcontract represents the entire and integrated agreement between the parties hereto and supercedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Subcontract Documents, other than Modifications issued subsequent to the execution of this Agreement, appears in Article 16.

1.2 Except to the extent of a conflict with a specific term or condition contained in the Subcontract Documents, the General Conditions governing this Subcontract shall be the edition of AIA Document A201, General Conditions of the Contract for Construction, current as of the date of this Agreement.

1.3 The Subcontract may be amended or modified only by a Modification. The Subcontract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and the Subcontractor, (2) between the Owner and the Subcontractor, or (3) between any persons or entities other than the Contractor and Subcontractor.

1.4 The Subcontractor shall be furnished copies of the Subcontract Documents upon request, but the Contractor may charge the Subcontractor for the reasonable cost of reproduction.

ARTICLE 2 MUTUAL RIGHTS AND RESPONSIBILITIES

2.1 The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of the edition of AIA Document A201 current as of the date of this Agreement apply to this Agreement pursuant to Paragraph 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor which the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor which the Contractor, under such documents, has against the Owner, insofar as applicable to this Subcontract. Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern.

2.2 The Contractor may require the Subcontractor to enter into agreements with Sub-subcontractors performing portions of the Work of this Subcontract by which the Subcontractor and the Sub-subcontractor are mutually bound, to the extent of the Work to be performed by the Sub-subcontractor, assuming toward each other all obligations and responsibilities which the Contractor and Subcontractor assume toward each other and having the benefit of all rights, remedies and redress each against the other which the Contractor and Subcontractor have by virtue of the provisions of this Agreement.



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ARTICLE 3 CONTRACTOR

3.1 SERVICES PROVIDED BY THE CONTRACTOR

3.1.1 The Contractor shall cooperate with the Subcontractor in scheduling and performing the Contractor's Work to avoid conflicts or interference in the Subcontractor's Work and shall expedite written responses to submittals made by the Subcontractor in accordance with Paragraph 4.1 and Article 5. As soon as practicable after execution of this Agreement, the Contractor shall provide the Subcontractor copies of the Contractor's construction schedule and schedule of submittals, together with such additional scheduling details as will enable the Subcontractor to plan and perform the Subcontractor's Work properly. The Subcontractor shall be notified promptly of subsequent changes in the construction and submittal schedules and additional scheduling details.

3.1.2 The Contractor shall provide suitable areas for storage of the Subcontractor's materials and equipment during the course of the Work. Additional costs to the Subcontractor resulting from relocation of such facilities at the direction of the Contractor, except as previously agreed upon, shall be reimbursed by the Contractor.

3.1.3 Except as provided in Article 14, the Contractor's equipment will be available to the Subcontractor only at the Contractor's discretion and on mutually satisfactory terms.

3.2 COMMUNICATIONS

3.2.1 The Contractor shall promptly make available to the Subcontractor information, including information received from the Owner, which affects this Subcontract and which becomes available to the Contractor subsequent to execution of this Subcontract.

3.2.2 The Contractor shall not give instructions or orders directly to the Subcontractor's employees or to the Subcontractor's Sub-subcontractors or material suppliers unless such persons are designated as authorized representatives of the Subcontractor.

3.2.3 The Contractor shall permit the Subcontractor to request directly from the Architect information regarding the percentages of completion and the amount certified on account of Work done by the Subcontractor.

3.2.4 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Contractor, a subcontractor or anyone directly or indirectly employed by them (other than the Subcontractor), the Contractor shall, prior to harmful exposure of the Subcontractor's employees to such substance, give written notice of the chemical composition thereof to the Subcontractor in sufficient detail and time to permit the Subcontractor's compliance with such laws.

3.2.5 The Contractor shall furnish to the Subcontractor within 30 days after receipt of a written request, or earlier if so required by law, information necessary and relevant for the Subcontractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property, usually referred to as the site, on which the Project is located and the Owner's interest therein.

3.2.6 If the Contractor asserts or defends a claim against the Owner which relates to the Work of the Subcontractor, the Contractor shall make available to the Subcontractor information relating to that portion of the claim which relates to the Work of the Subcontractor.

3.3 CLAIMS BY THE CONTRACTOR

3.3.1 Liquidated damages for delay, if provided for in Paragraph 9.3 of this Agreement, shall be assessed against the Subcontractor only to the extent caused by the Subcontractor or any person or entity for whose acts the Subcontractor may be liable, and in no case for delays or causes arising outside the scope of this Subcontract.



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3

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2-1-05

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- 3.3.2 The Contractor's claims for services or materials provided the Subcontractor shall require:
- 1 seven days' prior written notice except in an emergency;
 - 2 written compilations to the Subcontractor of services and materials provided and charges for such services and materials no later than the fifteenth day of the following month.

3.4 CONTRACTOR'S REMEDIES

3.4.1 If the Subcontractor defaults or neglects to carry out the Work in accordance with this Agreement and fails within three working days after receipt of written notice from the Contractor to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, after three days following receipt by the Subcontractor of an additional written notice, and without prejudice to any other remedy the Contractor may have, make good such deficiencies and may deduct the reasonable cost thereof from the payments then or thereafter due the Subcontractor.

ARTICLE 4 SUBCONTRACTOR

4.1 EXECUTION AND PROGRESS OF THE WORK

4.1.1 The Subcontractor shall supervise and direct the Subcontractor's Work, and shall cooperate with the Contractor in scheduling and performing the Subcontractor's Work to avoid conflict, delay in or interference with the Work of the Contractor, other subcontractors or Owner's own forces.

4.1.2 The Subcontractor shall promptly submit Shop Drawings, Product Data, Samples and similar submittals required by the Subcontract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Contractor or other subcontractors.

4.1.3 The Subcontractor shall submit to the Contractor a schedule of values allocated to the various parts of the Work of this Subcontract, aggregating the Subcontract Sum, made out in such detail as the Contractor and Subcontractor may agree upon or as required by the Owner, and supported by such evidence as the Contractor may require. In applying for payment, the Subcontractor shall submit statements based upon this schedule.

4.1.4 The Subcontractor shall furnish to the Contractor periodic progress reports on the Work of this Subcontract as mutually agreed, including information on the status of materials and equipment which may be in the course of preparation, manufacture or transit.

4.1.5 The Subcontractor agrees that the Contractor and the Architect will each have the authority to reject Work of the Subcontractor which does not conform to the Prime Contract. The Architect's decisions on matters relating to aesthetic effect shall be final and binding on the Subcontractor if consistent with the intent expressed in the Prime Contract.

4.1.6 The Subcontractor shall pay for all materials, equipment and labor used in connection with the performance of this Subcontract through the period covered by previous payments received from the Contractor, and shall furnish satisfactory evidence, when requested by the Contractor, to verify compliance with the above requirements.

4.1.7 The Subcontractor shall take necessary precautions to protect properly the Work of other subcontractors from damage caused by operations under this Subcontract.

4.1.8 The Subcontractor shall cooperate with the Contractor, other subcontractors and the Owner's own forces whose Work might interfere with the Subcontractor's Work. The



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Subcontractor shall participate in the preparation of coordinated drawings in areas of congestion, if required by the Prime Contract, specifically noting and advising the Contractor of potential conflicts between the Work of the Subcontractor and that of the Contractor, other subcontractors or the Owner's own forces.

4.2 LAWS, PERMITS, FEES AND NOTICES

4.2.1 The Subcontractor shall give notices and comply with laws, ordinances, rules, regulations and orders of public authorities bearing on performance of the Work of this Subcontract. The Subcontractor shall secure and pay for permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Subcontractor's Work, the furnishing of which is required of the Contractor by the Prime Contract.

4.2.2 The Subcontractor shall comply with Federal, state and local tax laws, social security acts, unemployment compensation acts and workers' compensation acts insofar as applicable to the performance of this Subcontract.

4.3 SAFETY PRECAUTIONS AND PROCEDURES

4.3.1 The Subcontractor shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with safety measures initiated by the Contractor and with applicable laws, ordinances, rules, regulations and orders of public authorities for the safety of persons and property in accordance with the requirements of the Prime Contract. The Subcontractor shall report to the Contractor within three days an injury to an employee or agent of the Subcontractor which occurred at the site.

4.3.2 If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Subcontractor, the Subcontractor's Sub-subcontractors or anyone directly or indirectly employed by them, the Subcontractor shall, prior to harmful exposure of any employees on the site to such substance, give written notice of the chemical composition thereof to the Contractor in sufficient detail and time to permit compliance with such laws by the Contractor, other subcontractors and other employers on the site.

4.3.3 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Subcontractor, the Subcontractor shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Contractor in writing. When the material or substance has been rendered harmless, the Subcontractor's Work in the affected area shall resume upon written agreement of the Contractor and Subcontractor. The Subcontract Time shall be extended appropriately and the Subcontract Sum shall be increased in the amount of the Subcontractor's reasonable additional costs of demobilization, delay and remobilization, which adjustments shall be accomplished as provided in Article 5 of this Agreement.

4.3.4 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Subcontractor, the Subcontractor's Sub-subcontractors, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Subparagraph 4.3.3 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom and provided that such damage, loss or expense is not due to the sole negligence of a party seeking indemnity.



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5

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Attachment 4-164

4.4 CLEANING UP

4.4.1 The Subcontractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations performed under this Subcontract. The Subcontractor shall not be held responsible for unclean conditions caused by other contractors or subcontractors.

4.4.2 As provided under Subparagraph 3.3.2, if the Subcontractor fails to clean up as provided in the Subcontract Documents, the Contractor may charge the Subcontractor for the Subcontractor's appropriate share of cleanup costs.

4.5 WARRANTY

4.5.1 The Subcontractor warrants to the Owner, Architect and Contractor that materials and equipment furnished under this Subcontract will be of good quality and new unless otherwise required or permitted by the Subcontract Documents, that the Work of this Subcontract will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Subcontract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Subcontractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Subcontractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. This warranty shall be in addition to and not in limitation of any other warranty or remedy required by law or by the Subcontract Documents.

4.6 INDEMNIFICATION

4.6.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 4.6.

4.6.2 In claims against any person or entity indemnified under this Paragraph 4.6 by an employee of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Subparagraph 4.6.1 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor or the Subcontractor's Sub-subcontractors under workers' compensation acts, disability benefit acts or other employee benefit acts.

4.7 REMEDIES FOR NONPAYMENT

4.7.1 If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to any other available remedies, upon seven additional days' written notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate adjustment, be increased by the amount of the Subcontractor's reasonable costs of demobilization, delay and remobilization.



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2-1-05
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ARTICLE 5 CHANGES IN THE WORK

5.1 The Owner may make changes in the Work by issuing Modifications to the Prime Contract. Upon receipt of such a Modification issued subsequent to the execution of the Subcontract Agreement, the Contractor shall promptly notify the Subcontractor of the Modification. Unless otherwise directed by the Contractor, the Subcontractor shall not thereafter order materials or perform Work which would be inconsistent with the changes made by the Modifications to the Prime Contract.

5.2 The Subcontractor may be ordered in writing by the Contractor, without invalidating this Subcontract, to make changes in the Work within the general scope of this Subcontract consisting of additions, deletions or other revisions, including those required by Modifications to the Prime Contract issued subsequent to the execution of this Agreement, the Subcontract Sum and the Subcontract Time being adjusted accordingly. The Subcontractor, prior to the commencement of such changed or revised Work, shall submit promptly to the Contractor written copies of a claim for adjustment to the Subcontract Sum and Subcontract Time for such revised Work in a manner consistent with requirements of the Subcontract Documents.

5.3 The Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes in accordance with the Subcontract Documents. A claim which will affect or become part of a claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor not less than two working days preceding the time by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

ARTICLE 6 MEDIATION AND ARBITRATION

6.1 MEDIATION

6.1.1 Any claim arising out of or related to this Subcontract, except claims as otherwise provided in Subparagraph 4.1.5 and except those waived in this Subcontract, shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

6.1.2 The parties shall endeavor to resolve their claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to this Subcontract and the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

6.1.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

6.2 ARBITRATION

6.2.1 Any claim arising out of or related to this Subcontract, except claims as otherwise provided in Subparagraph 4.1.5 and except those waived in this Subcontract, shall be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 6.1.



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2-1-09

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6.2.2 Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. Demand for arbitration shall be filed in writing with the other party to this Subcontract and with the American Arbitration Association, and a copy shall be filed with the Architect.

6.2.3 A demand for arbitration shall be made within the time limits specified in the conditions of the Prime Contract as applicable, and in other cases within a reasonable time after the claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim would be barred by the applicable statute of limitations.

6.2.4 **Limitation on Consolidation or Joinder.** Except by written consent of the person or entity sought to be joined, no arbitration arising out of or relating to the Subcontract shall include, by consolidation or joinder or in any other manner, any person or entity not a party to the Subcontract under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that (1) such person or entity is substantially involved in a common question of fact or law, (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, (3) the interest or responsibility of such person or entity in the matter is not insubstantial, and (4) such person or entity is not the Architect, the Architect's employee, the Architect's consultant, or an employee or agent of any of them. This agreement to arbitrate and any other written agreement to arbitrate with an additional person or persons referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

6.2.5 **Claims and Timely Assertion of Claims.** The party filing a notice of demand for arbitration must assert in the demand all claims then known to that party on which arbitration is permitted to be demanded.

6.2.6 **Judgment on Final Award.** The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 7 TERMINATION, SUSPENSION OR ASSIGNMENT OF THE SUBCONTRACT

7.1 TERMINATION BY THE SUBCONTRACTOR

7.1.1 The Subcontractor may terminate the Subcontract for the same reasons and under the same circumstances and procedures with respect to the Contractor as the Contractor may terminate with respect to the Owner under the Prime Contract, or for nonpayment of amounts due under this Subcontract for 60 days or longer. In the event of such termination by the Subcontractor for any reason which is not the fault of the Subcontractor, Sub-subcontractors or their agents or employees or other persons performing portions of the Work under contract with the Subcontractor, the Subcontractor shall be entitled to recover from the Contractor payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

7.2 TERMINATION BY THE CONTRACTOR

7.2.1 If the Subcontractor persistently or repeatedly fails or neglects to carry out the Work in accordance with the Subcontract Documents or otherwise to perform in accordance with this Subcontract and fails within seven days after receipt of written notice to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, after seven days following receipt by the Subcontractor of an additional written notice and without prejudice to any other remedy the Contractor may have, terminate the Subcontract and finish the Subcontractor's Work by whatever method the Contractor may deem expedient. If the



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unpaid balance of the Subcontract Sum exceeds the expense of finishing the Subcontractor's Work and other damages incurred by the Contractor and not expressly waived, such excess shall be paid to the Subcontractor. If such expense and damages exceed such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

7.2.2 If the Owner terminates the Contract for the Owner's convenience, the Contractor shall deliver written notice to the Subcontractor.

7.2.3 Upon receipt of written notice of termination, the Subcontractor shall:

- .1 cease operations as directed by the Contractor in the notice;
- .2 take actions necessary, or that the Contractor may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing Sub-subcontracts and purchase orders and enter into no further Sub-subcontracts and purchase orders.

7.2.4 In case of such termination for the Owner's convenience, the Subcontractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

7.3 SUSPENSION BY THE CONTRACTOR FOR CONVENIENCE

7.3.1 The Contractor may, without cause, order the Subcontractor in writing to suspend, delay or interrupt the Work of this Subcontract in whole or in part for such period of time as the Contractor may determine. In the event of suspension ordered by the Contractor, the Subcontractor shall be entitled to an equitable adjustment of the Subcontract Time and Subcontract Sum.

7.3.2 An adjustment shall be made for increases in the Subcontract Time and Subcontract Sum, including profit on the increased cost of performance, caused by suspension, delay or interruption. No adjustment shall be made to the extent:

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Subcontractor is responsible;
- .2 that an equitable adjustment is made or denied under another provision of this Subcontract.

7.4 ASSIGNMENT OF THE SUBCONTRACT

7.4.1 In the event of termination of the Prime Contract by the Owner, the Contractor may assign this Subcontract to the Owner, with the Owner's agreement, subject to the provisions of the Prime Contract and to the prior rights of the surety, if any, obligated under bonds relating to the Prime Contract. In such event, the Owner shall assume the Contractor's rights and obligations under the Subcontract Documents. If the Work of the Prime Contract has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted.

7.4.2 The Subcontractor shall not assign the Work of this Subcontract without the written consent of the Contractor, nor subcontract the whole of this Subcontract without the written consent of the Contractor, nor further subcontract portions of this Subcontract without written notification to the Contractor when such notification is requested by the Contractor.



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2-105
Attachment 4-168

ARTICLE 8 THE WORK OF THIS SUBCONTRACT

8.1 The Subcontractor shall execute the following portion of the Work described in the Subcontract Documents, including all labor, materials, equipment, services and other items required to complete such portion of the Work, except to the extent specifically indicated in the Subcontract Documents to be the responsibility of others.

(Insert a precise description of the Work of this Subcontract, referring where appropriate to numbers of Drawings, sections of Specifications and pages of Addenda, Modifications and accepted Alternates.)

ARTICLE 9 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

9.1 The Subcontractor's date of commencement is the date from which the Contract Time of Paragraph 9.3 is measured; it shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Contractor.

(Insert the date of commencement, if it differs from the date of this Agreement or, if applicable, state that the date will be fixed in a notice to proceed.)

9.2 Unless the date of commencement is established by a notice to proceed issued by the Contractor, or the Contractor has commenced visible Work at the site under the Prime Contract, the Subcontractor shall notify the Contractor in writing not less than five days before commencing the Subcontractor's Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

9.3 The Work of this Subcontract shall be substantially completed not later than *(Insert the calendar date or number of calendar days after the Subcontractor's date of commencement. Also insert any requirements for earlier Substantial Completion of certain portions of the Subcontractor's Work, if not stated elsewhere in the Subcontract Documents.)*

, subject to adjustments of this Subcontract Time as provided in the Subcontract Documents. *(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)*

9.4 With respect to the obligations of both the Contractor and the Subcontractor, time is of the essence of this Subcontract.

9.5 No extension of time will be valid without the Contractor's written consent after claim made by the Subcontractor in accordance with Paragraph 5.3.



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2-1-05

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ARTICLE 10 SUBCONTRACT SUM

10.1 The Contractor shall pay the Subcontractor in current funds for performance of the Subcontract the Subcontract Sum of Dollars (\$ _____), subject to additions and deductions as provided in the Subcontract Documents.

10.2 The Subcontract Sum is based upon the following alternates, if any, which are described in the Subcontract Documents and have been accepted by the Owner and the Contractor:
(Insert the numbers or other identification of accepted alternates.)

10.3 Unit prices, if any, are as follows:

ARTICLE 11 PROGRESS PAYMENTS

11.1 Based upon applications for payment submitted to the Contractor by the Subcontractor, corresponding to applications for payment submitted by the Contractor to the Architect, and certificates for payment issued by the Architect, the Contractor shall make progress payments on account of the Subcontract Sum to the Subcontractor as provided below and elsewhere in the Subcontract Documents. Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor and Subcontractor for Work properly performed by their contractors and suppliers shall be held by the Contractor and Subcontractor for those contractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor or Subcontractor for which payment was made to the Contractor by the Owner or to the Subcontractor by the Contractor, as applicable. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor or Subcontractor, shall create any fiduciary liability or tort liability on the part of the Contractor or Subcontractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor or Subcontractor for breach of the requirements of this provision.

11.2 The period covered by each application for payment shall be one calendar month ending on the last day of the month, or as follows:

11.3 Provided an application for payment is received by the Contractor not later than the day of a month, the Contractor shall include the Subcontractor's Work covered by that application in the next application for payment which the Contractor is entitled to submit to the Architect. **The Contractor shall pay the Subcontractor each progress payment within three working days after the Contractor receives payment from the Owner.** If the Architect does not issue a certificate for payment or the Contractor does not receive payment for any cause which is not the fault of the Subcontractor, the Contractor shall pay the Subcontractor, on demand, a progress payment computed as provided in Paragraphs 11.7, 11.8 and 11.9.



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2-1-05
Attachment 4-170

11.4 If an application for payment is received by the Contractor after the application date fixed above, the Subcontractor's Work covered by it shall be included by the Contractor in the next application for payment submitted to the Architect.

11.5 Each application for payment shall be based upon the most recent schedule of values submitted by the Subcontractor in accordance with the Subcontract Documents. The schedule of values shall allocate the entire Subcontract Sum among the various portions of the Subcontractor's Work and be prepared in such form and supported by such data to substantiate its accuracy as the Contractor may require. This schedule, unless objected to by the Contractor, shall be used as a basis for reviewing the Subcontractor's applications for payment.

11.6 Applications for payment submitted by the Subcontractor shall indicate the percentage of completion of each portion of the Subcontractor's Work as of the end of the period covered by the application for payment.

11.7 Subject to the provisions of the Subcontract Documents, the amount of each progress payment shall be computed as follows:

11.7.1 Take that portion of the Subcontract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Subcontractor's Work by the share of the total Subcontract Sum allocated to that portion of the Subcontractor's Work in the schedule of values, less that percentage actually retained, if any, from payments to the Contractor on account of the Work of the Subcontractor. Pending final determination of cost to the Contractor of changes in the Work which have been properly authorized by the Contractor, amounts not in dispute shall be included to the same extent provided in the Prime Contract, even though the Subcontract Sum has not yet been adjusted;

11.7.2 Add that portion of the Subcontract Sum properly allocable to materials and equipment delivered and suitably stored at the site by the Subcontractor for subsequent incorporation in the Subcontractor's Work or, if approved by the Contractor, suitably stored off the site at a location agreed upon in writing, less the same percentage retainage required by the Prime Contract to be applied to such materials and equipment in the Contractor's application for payment;

11.7.3 Subtract the aggregate of previous payments made by the Contractor; and

11.7.4 Subtract amounts, if any, calculated under Subparagraph 11.7.1 or 11.7.2 which are related to Work of the Subcontractor for which the Architect has withheld or nullified, in whole or in part, a certificate of payment for a cause which is the fault of the Subcontractor.

11.8 Upon the partial or entire disapproval by the Contractor of the Subcontractor's application for payment, the Contractor shall provide written notice to the Subcontractor. When the basis for the disapproval has been remedied, the Subcontractor shall be paid the amounts withheld.

11.9 SUBSTANTIAL COMPLETION

11.9.1 When the Subcontractor's Work or a designated portion thereof is substantially complete and in accordance with the requirements of the Prime Contract, the Contractor shall, upon application by the Subcontractor, make prompt application for payment for such Work. Within 30 days following issuance by the Architect of the certificate for payment covering such substantially completed Work, the Contractor shall, to the full extent allowed in the Prime Contract, make payment to the Subcontractor, deducting any portion of the funds for the Subcontractor's Work withheld in accordance with the certificate to cover costs of items to be completed or corrected by the Subcontractor. Such payment to the Subcontractor shall be the entire unpaid balance of the Subcontract Sum if a full release of retainage is allowed under the



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Senate Commerce Committee

2-1-05

Attachment 4-171

Prime Contract for the Subcontractor's Work prior to the completion of the entire Project. If the Prime Contract does not allow for a full release of retainage, then such payment shall be an amount which, when added to previous payments to the Subcontractor, will reduce the retainage on the Subcontractor's substantially completed Work to the same percentage of retainage as that on the Contractor's Work covered by the certificate.

ARTICLE 12 FINAL PAYMENT

12.1 Final payment, constituting the entire unpaid balance of the Subcontract Sum, shall be made by the Contractor to the Subcontractor when the Subcontractor's Work is fully performed in accordance with the requirements of the Subcontract Documents, the Architect has issued a certificate for payment covering the Subcontractor's completed Work and the Contractor has received payment from the Owner. If, for any cause which is not the fault of the Subcontractor, a certificate for payment is not issued or the Contractor does not receive timely payment or does not pay the Subcontractor within three working days after receipt of payment from the Owner, final payment to the Subcontractor shall be made upon demand.

(Insert provisions for earlier final payment to the Subcontractor, if applicable.)

12.2 Before issuance of the final payment, the Subcontractor, if required, shall submit evidence satisfactory to the Contractor that all payrolls, bills for materials and equipment, and all known indebtedness connected with the Subcontractor's Work have been satisfied.

ARTICLE 13 INSURANCE AND BONDS

13.1 The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability:

13.2 Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Subcontractor's Work until date of final payment and termination of any coverage required to be maintained after final payment to the Subcontractor.

13.3 Certificates of insurance acceptable to the Contractor shall be filed with the Contractor prior to commencement of the Subcontractor's Work. These certificates and the insurance policies required by this Article 13 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final application for payment as required in Article 12. If any information concerning reduction of coverage is not furnished by the insurer, it shall be furnished by the Subcontractor with reasonable promptness according to the Subcontractor's information and belief.



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Senate Commerce Committee

2-1-05

13.4 The Contractor shall furnish to the Subcontractor satisfactory evidence of insurance required of the Contractor under the Prime Contract.

13.5 The Contractor shall promptly, upon request of the Subcontractor, furnish a copy or permit a copy to be made of any bond covering payment of obligations arising under the Subcontract.

13.6 Performance Bond and Payment Bond:
(If the Subcontractor is to furnish bonds, insert the specific requirements here.)

13.7 PROPERTY INSURANCE

13.7.1 When requested in writing, the Contractor shall provide the Subcontractor with copies of the property and equipment policies in effect for the Project. The Contractor shall notify the Subcontractor if the required property insurance policies are not in effect.

13.7.2 If the required property insurance is not in effect for the full value of the Subcontractor's Work, then the Subcontractor shall purchase insurance for the value of the Subcontractor's Work, and the Subcontractor shall be reimbursed for the cost of the insurance by an adjustment in the Subcontract Sum.

13.7.3 Property insurance for the Subcontractor's materials and equipment required for the Subcontractor's Work, stored off site or in transit and not covered by the Project property insurance, shall be paid for through the application for payment process.

13.8 WAIVERS OF SUBROGATION

13.8.1 The Contractor and Subcontractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Owner, the Architect, the Architect's consultants, separate contractors, and any of their subcontractors, sub-subcontractors, agents and employees for damages caused by fire or other causes of loss to the extent covered by property insurance provided under the Prime Contract or other property insurance applicable to the Work, except such rights as they may have to proceeds of such insurance held by the Owner as a fiduciary. The Subcontractor shall require of the Subcontractor's Sub-subcontractors, agents and employees, by appropriate agreements, written where legally required for validity, similar waivers in favor of the parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

ARTICLE 14 TEMPORARY FACILITIES AND WORKING CONDITIONS

14.1 The Contractor shall furnish and make available to the Subcontractor the following temporary facilities, equipment and services; these shall be furnished at no cost to the Subcontractor unless otherwise indicated below:



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2-1-05

Attachment 4-173

14.2 Specific working conditions:

(Insert any applicable arrangements concerning working conditions and labor matters for the Project.)

ARTICLE 15 MISCELLANEOUS PROVISIONS

15.1 Where reference is made in this Subcontract to a provision of another Subcontract Document, the reference refers to that provision as amended or supplemented by other provisions of the Subcontract Documents.

15.2 Payments due and unpaid under this Subcontract shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

(Insert rate of interest agreed upon, if any.)

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's, Contractor's and Subcontractor's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)

15.3 Retainage and any reduction thereto is as follows:

15.4 The Contractor and Subcontractor waive claims against each other for consequential damages arising out of or relating to this Subcontract, including without limitation, any consequential damages due to either party's termination in accordance with Article 7.

ARTICLE 16 ENUMERATION OF SUBCONTRACT DOCUMENTS

16.1 The Subcontract Documents, except for Modifications issued after execution of this Subcontract, are enumerated as follows:

16.1.1 This executed 1997 edition of the Standard Form of Agreement Between Contractor and Subcontractor, AIA Document A401-1997;

16.1.2 The Prime Contract, consisting of the Agreement between the Owner and Contractor dated as first entered above and the other Contract Documents enumerated in the Owner-Contractor Agreement;



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Senate Commerce Committee

2-1-05

Attachment 4-174

16.1.3 The following Modifications to the Prime Contract, if any, issued subsequent to the execution of the Owner-Contractor Agreement but prior to the execution of this Agreement:

Modification Date

16.1.4 Other Documents, if any, forming part of the Subcontract Documents are as follows:
(List any additional documents that are intended to form part of the Subcontract Documents. Requests for proposal and the Subcontractor's bid or proposal should be listed here only if intended to be part of the Subcontract Documents.)

This Agreement entered into as of the day and year first written above.

CONTRACTOR (Signature)

SUBCONTRACTOR (Signature)

(Printed name and title)

(Printed name and title)



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2-1-05

Attachment 4-175

interpretation given to a standard clause when blended with modifications, thereby eliminating one of the principal advantages of the standard form documents. By merely reviewing the modifications to be made to a standard form document, parties familiar with that document can quickly understand the essence of the proposed relationship. Commercial exchanges are greatly simplified and expedited, good-faith dealing is encouraged, and otherwise latent clauses are exposed for scrutiny. In this way, contracting parties can more confidently and fairly measure their risks.

COVER PAGE

Date: The date represents the date the Agreement becomes effective. It may be the date that an oral agreement was reached, the date the Agreement was originally submitted to the other party, the date authorizing action was taken or the date of actual execution. It will be the date from which the Contract Time is measured unless a different date is inserted under Paragraph 9.1.

Parties: Parties to this Agreement should be identified using the full legal name under which the Agreement is to be executed, including a designation of the legal status of both parties (sole proprietorship, partnership, joint venture, unincorporated association, limited partnership or corporation [general, limited liability, closed or professional], etc.). Where appropriate, a copy of the resolution authorizing the individual to act on behalf of the firm or entity should be attached. Other information may be added, such as telephone numbers and electronic addresses.

Prime Contract: The date of the Agreement between the Owner and Contractor should be entered.

Owner: The name and address of the Owner should be the same as used on the Prime Contract.

Project Description: The proposed Project should be described in sufficient detail to identify (1) the official name or title of the facility, (2) the location of the site, if known, (3) the proposed building type and usage, and (4) the size, capacity or scope of the Project, if known.

Architect: As in the other Contract Documents, the Architect's full legal or corporate titles should be used.

ARTICLE 8—THE WORK OF THIS SUBCONTRACT

Insert a precise description of the Work of this Subcontract.

ARTICLE 9—DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

The following items should be included as appropriate:

PARAGRAPH 9.1: The date of commencement of the Work should be inserted if it is different from the date of the Agreement. It should not be earlier than the date of execution of the Agreement. Enter either the specific date of commencement of the Work or if a notice to proceed is to be used, enter the sentence, "The date of commencement shall be stipulated by the notice to proceed."

PARAGRAPH 9.3: The time within which Substantial Completion of the Work is to be achieved may be expressed as a number of days (preferably calendar days) or as a specified date. Any requirements for earlier Substantial Completion of portions of the Work should be entered here if not specified elsewhere in the Contract Documents.

Also insert any provisions for liquidated damages relating to failure to complete on time. Liquidated damages are not a penalty to be inflicted on the Subcontractor, but must bear an actual and reasonably estimable relationship to the Contractor's loss if construction is not completed on time. If liquidated damages are to be assessed because delayed construction will result in actual loss to the Contractor, the amount of damages due for each day lost should be entered in the Agreement.

If a provision for liquidated damages is included, it should be carefully drafted by an attorney. Such a provision may be based on the following sample language:

"The Subcontractor and the Subcontractor's surety, if any, shall be liable for and shall pay the Contractor the sums hereinafter stipulated as liquidated damages for each calendar day of delay until the Work is substantially complete:
Dollars(\$.)"

For further information on liquidated damages, penalties and bonus provisions, see AIA Document A511, Guide to Supplementary Conditions.

ARTICLE 10—SUBCONTRACT SUM

PARAGRAPH 10.1: Enter the Subcontract Sum payable to the Subcontractor.

PARAGRAPH 10.2: Identify any alternates described in the Subcontract Documents and accepted by the Owner and the Contractor. If decisions on alternates are to be made subsequent to execution of A401-1997, attach a schedule showing the amount of each alternate and the date it expires.

PARAGRAPH 10.3: Enter any unit prices, cash allowances or cash contingency allowances.



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Senate Commerce Committee

2-1-05

Attachment 4-176

If unit prices are not covered in greater detail elsewhere in the Subcontract Documents, the following provision for unit prices is suggested:

"The unit prices listed below shall determine the value of extra Work or changes in the Work, as applicable. They shall be considered complete and shall include all material and equipment, labor, installation costs, overhead and profit. Unit prices shall be used uniformly for additions or deductions."

ARTICLE 11—PROGRESS PAYMENTS

PARAGRAPH 11.2 Insert the time period covered by each application for payment if it differs from the one given.

PARAGRAPH 11.3 Insert the time schedule for presenting applications for payment.

The last day upon which Work may be included in an application should normally be no less than 14 days prior to the payment date, in consideration of the 7 days required for the Architect's evaluation of the Contractor's application and issuance of a certificate for payment and the time subsequently accorded the Owner to make Payment in Article 9 of A201. The Contractor may prefer that the Subcontractor's applications be submitted a few additional days prior to the preparation of the Contractor's application.

Due dates for payment should be acceptable to both the Contractor and Subcontractor. They should allow sufficient time for the Contractor to prepare an Application for Payment, for the Architect to certify payment, and for the Owner to make payment. They should also be in accordance with the time limits established by this Article and Article 9 of A201.

ARTICLE 12—FINAL PAYMENT

Insert provisions for earlier final payment to the Subcontractor, if applicable. When final payment is requested, the Architect should ascertain that all claims have been settled or should define those which remain unsettled. The Architect should obtain the Contractor's certification required by Article 9 of A201 and must determine that, to the best of Architect's knowledge and belief and according to the Architect's final inspection, the requirements of the subcontract have been fulfilled. The Contractor may also require satisfactory evidence from the Subcontractor that all known indebtedness related to the Subcontractor's work has been paid.

ARTICLE 13—INSURANCE AND BONDS

PARAGRAPH 13.1 Insert types of coverage and limits of liability to be maintained by the Subcontractor.

PARAGRAPH 13.6 If the Subcontractor is to furnish a performance bond and a payment bond, insert specific requirements such as amounts, the date the bonds are required to be delivered and the forms on which the bonds are to be written. See AIA Document A312, Performance Bond and Payment Bond, which may be modified for a contractor-subcontractor relationship.

ARTICLE 14—TEMPORARY FACILITIES AND WORKING CONDITIONS

PARAGRAPH 14.1 List temporary facilities, equipment and services to be furnished by the Contractor to the Subcontractor. These are to be furnished free of charge unless otherwise indicated in this Paragraph.

PARAGRAPH 14.2 Insert any applicable arrangements concerning working conditions and labor for the Project.

ARTICLE 15—MISCELLANEOUS PROVISIONS

PARAGRAPH 15.2 Enter any agreed-upon interest rate due on overdue payments.

PARAGRAPH 15.3 Indicate the percent retainage, if any, to be withheld when computing the amount of each progress payment, as well as any provisions for reduction of retainage.

ARTICLE 16—ENUMERATION OF SUBCONTRACT DOCUMENTS

A detailed enumeration of all Subcontract Documents must be made in this Article.

EXECUTION OF THE AGREEMENT.

The persons executing the Agreement should indicate the capacity in which they are acting (i.e., president, secretary, partner, etc.) and the authority under which they are executing the Agreement. Where appropriate, a copy of the resolution authorizing the individual to act on behalf of the firm or entity should be attached.



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2-1-05
Attachment 4-177

ARTICLE 1 GENERAL PROVISIONS

1.1 BASIC DEFINITIONS

1.1.1 THE CONTRACT DOCUMENTS

The Contract Documents consist of the Agreement between Owner and Contractor (hereinafter the Agreement), Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of the Contract, other documents listed in the Agreement and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include other documents such as bidding requirements (advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor's bid or portions of Addenda relating to bidding requirements).

1.1.2 THE CONTRACT

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor, (3) between the Owner and Architect or (4) between any persons or entities other than the Owner and Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.

1.1.3 THE WORK

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

1.1.4 THE PROJECT

The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner or by separate contractors.

1.1.5 THE DRAWINGS

The Drawings are the graphic and pictorial portions of the Contract Documents showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.

1.1.6 THE SPECIFICATIONS

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equipment, systems, standards and workmanship for the Work, and performance of related services.

1.1.7 THE PROJECT MANUAL

The Project Manual is a volume assembled for the Work which may include the bidding requirements, sample forms, Conditions of the Contract and Specifications.

1.2 CORRELATION AND INTENT OF THE CONTRACT DOCUMENTS

1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are



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Senate Commerce Commit

2-1-05

Attachment 4-178

complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the indicated results.

1.2.2 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

1.2.3 Unless otherwise stated in the Contract Documents, words which have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

1.3 CAPITALIZATION

1.3.1 Terms capitalized in these General Conditions include those which are (1) specifically defined, (2) the titles of numbered articles and identified references to Paragraphs, Subparagraphs and Clauses in the document or (3) the titles of other documents published by the American Institute of Architects.

1.4 INTERPRETATION

1.4.1 In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

1.5 EXECUTION OF CONTRACT DOCUMENTS

1.5.1 The Contract Documents shall be signed by the Owner and Contractor. If either the Owner or Contractor or both do not sign all the Contract Documents, the Architect shall identify such unsigned Documents upon request.

1.5.2 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

1.6 OWNERSHIP AND USE OF DRAWINGS, SPECIFICATIONS AND OTHER INSTRUMENTS OF SERVICE

1.6.1 The Drawings, Specifications and other documents, including those in electronic form, prepared by the Architect and the Architect's consultants are Instruments of Service through which the Work to be executed by the Contractor is described. The Contractor may retain one record set. Neither the Contractor nor any Subcontractor, Sub-subcontractor or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications and other documents prepared by the Architect or the Architect's consultants, and unless otherwise indicated the Architect and the Architect's consultants shall be deemed the authors of them and will retain all common law, statutory and other reserved rights, in addition to the copyrights. All copies of Instruments of Service, except the Contractor's record set, shall be returned or suitably accounted for to the Architect, on request, upon completion of the Work. The Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants, and copies thereof furnished to the Contractor, are for use solely with respect to this Project. They are not to be used by the Contractor or any Subcontractor, Sub-subcontractor or material or equipment supplier on other projects or for additions to this Project outside the scope of the Work without the specific written consent of the Owner, Architect and the Architect's consultants. The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are authorized to use and reproduce applicable portions of the Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants appropriate to and for use in



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Senate Commerce Committee

2-1-05

Attachment 4-179

the execution of their Work under the Contract Documents. All copies made under this authorization shall bear the statutory copyright notice, if any, shown on the Drawings, Specifications and other documents prepared by the Architect and the Architect's consultants. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Architect's or Architect's consultants' copyrights or other reserved rights.

ARTICLE 2 OWNER

2.1 GENERAL

2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Owner shall designate in writing a representative who shall have express authority to bind the Owner with respect to all matters requiring the Owner's approval or authorization. Except as otherwise provided in Subparagraph 4.2.1, the Architect does not have such authority. The term "Owner" means the Owner or the Owner's authorized representative.

2.1.2 The Owner shall furnish to the Contractor within fifteen days after receipt of a written request, information necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein.

2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER

2.2.1 The Owner shall, at the written request of the Contractor, prior to commencement of the Work and thereafter, furnish to the Contractor reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. Furnishing of such evidence shall be a condition precedent to commencement or continuation of the Work. After such evidence has been furnished, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

2.2.2 Except for permits and fees, including those required under Subparagraph 3.7.1, which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

2.2.3 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the Work.

2.2.4 Information or services required of the Owner by the Contract Documents shall be furnished by the Owner with reasonable promptness. Any other information or services relevant to the Contractor's performance of the Work under the Owner's control shall be furnished by the Owner after receipt from the Contractor of a written request for such information or services.

2.2.5 Unless otherwise provided in the Contract Documents, the Contractor will be furnished, free of charge, such copies of Drawings and Project Manuals as are reasonably necessary for execution of the Work.

2.3 OWNER'S RIGHT TO STOP THE WORK

2.3.1 If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents as required by Paragraph 12.2 or persistently fails to carry out Work in



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Senate Commerce

2-1-05

Attachment 4-180



3.9 SUPERINTENDENT

3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case.

3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES

3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.

3.10.2 The Contractor shall prepare and keep current, for the Architect's approval, a schedule of submittals which is coordinated with the Contractor's construction schedule and allows the Architect reasonable time to review submittals.

3.10.3 The Contractor shall perform the Work in general accordance with the most recent schedules submitted to the Owner and Architect.

3.11 DOCUMENTS AND SAMPLES AT THE SITE

3.11.1 The Contractor shall maintain at the site for the Owner one record copy of the Drawings, Specifications, Addenda, Change Orders and other Modifications, in good order and marked currently to record field changes and selections made during construction, and one record copy of approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to the Architect and shall be delivered to the Architect for submittal to the Owner upon completion of the Work.

3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES

3.12.1 Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

3.12.3 Samples are physical examples which illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

3.12.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. The purpose of their submittal is to demonstrate for those portions of the Work for which submittals are required by the Contract Documents the way by which the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents. Review by the Architect is subject to the limitations of Subparagraph 4.2.7. Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents. Submittals which are not required by the Contract Documents may be returned by the Architect without action.

3.12.5 The Contractor shall review for compliance with the Contract Documents, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by



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Senate Commerce Committee

21-05
Attachment 4-181

Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

3.6 TAXES

3.6.1 The Contractor shall pay sales, consumer, use and similar taxes for the Work provided by the Contractor which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

3.7 PERMITS, FEES AND NOTICES

3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit and other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work which are customarily secured after execution of the Contract and which are legally required when bids are received or negotiations concluded.

3.7.2 The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities applicable to performance of the Work.

3.7.3 It is not the Contractor's responsibility to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations. However, if the Contractor observes that portions of the Contract Documents are at variance therewith, the Contractor shall promptly notify the Architect and Owner in writing, and necessary changes shall be accomplished by appropriate Modification.

3.7.4 If the Contractor performs Work knowing it to be contrary to laws, statutes, ordinances, building codes, and rules and regulations without such notice to the Architect and Owner, the Contractor shall assume appropriate responsibility for such Work and shall bear the costs attributable to correction.

3.8 ALLOWANCES

3.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities to whom the Contractor has reasonable objection.

3.8.2 Unless otherwise provided in the Contract Documents:

1. allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;
2. Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum but not in the allowances;
3. whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect
 - (1) the difference between actual costs and the allowances under Clause 3.8.2.1 and
 - (2) changes in Contractor's costs under Clause 3.8.2.2.

3.8.3 Materials and equipment under an allowance shall be selected by the Owner in sufficient time to avoid delay in the Work.



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Senate Commerce Committee

2-1-05

Attachment 4-182

3.2.3 If the Contractor believes that additional cost or time is involved because of clarifications or instructions issued by the Architect in response to the Contractor's notices or requests for information pursuant to Subparagraphs 3.2.1 and 3.2.2, the Contractor shall make Claims as provided in Subparagraphs 4.3.6 and 4.3.7. If the Contractor fails to perform the obligations of Subparagraphs 3.2.1 and 3.2.2, the Contractor shall pay such costs and damages to the Owner as would have been avoided if the Contractor had performed such obligations. The Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents or for differences between field measurements or conditions and the Contract Documents unless the Contractor recognized such error, inconsistency, omission or difference and knowingly failed to report it to the Architect.

3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any resulting loss or damage.

3.3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors.

3.3.3 The Contractor shall be responsible for inspection of portions of Work already performed to determine that such portions are in proper condition to receive subsequent Work.

3.4 LABOR AND MATERIALS

3.4.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

3.4.2 The Contractor may make substitutions only with the consent of the Owner, after evaluation by the Architect and in accordance with a Change Order.

3.4.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

3.5 WARRANTY

3.5.1 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract



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The American Institute
of Architects

Senate Commerce Committee

2-1-05
Attachment 4-183

accordance with the Contract Documents, the Owner may issue a written order to the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Subparagraph 6.1.3.

2.4 OWNER'S RIGHT TO CARRY OUT THE WORK

2.4.1 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may after such seven-day period give the Contractor a second written notice to correct such deficiencies within a three-day period. If the Contractor within such three-day period after receipt of such second notice fails to commence and continue to correct any deficiencies, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including Owner's expenses and compensation for the Architect's additional services made necessary by such default, neglect or failure. Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

ARTICLE 3 CONTRACTOR

3.1 GENERAL

3.1.1 The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Contractor" means the Contractor or the Contractor's authorized representative.

3.1.2 The Contractor shall perform the Work in accordance with the Contract Documents.

3.1.3 The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons other than the Contractor.

3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

3.2.1 Since the Contract Documents are complementary, before starting each portion of the Work, the Contractor shall carefully study and compare the various Drawings and other Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Subparagraph 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, any errors, inconsistencies or omissions discovered by the Contractor shall be reported promptly to the Architect as a request for information in such form as the Architect may require.

3.2.2 Any design errors or omissions noted by the Contractor during this review shall be reported promptly to the Architect, but it is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional unless otherwise specifically provided in the Contract Documents. The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations, but any nonconformity discovered by or made known to the Contractor shall be reported promptly to the Architect.



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Senate Commerce Committee

2-1-05

Attachment

4-184

the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors. Submittals which are not marked as reviewed for compliance with the Contract Documents and approved by the Contractor may be returned by the Architect without action.

3.12.6 By approving and submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents that the Contractor has determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

3.12.7 The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Architect.

3.12.8 The Work shall be in accordance with approved submittals except that the Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Architect in writing of such deviation at the time of submittal and (1) the Architect has given written approval to the specific deviation as a minor change in the Work, or (2) a Change Order or Construction Change Directive has been issued authorizing the deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Architect's approval thereof.

3.12.9 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Architect on previous submittals. In the absence of such written notice the Architect's approval of a resubmission shall not apply to such revisions.

3.12.10 The Contractor shall not be required to provide professional services which constitute the practice of architecture or engineering unless such services are specifically required by the Contract Documents for a portion of the Work or unless the Contractor needs to provide such services in order to carry out the Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. The Contractor shall not be required to provide professional services in violation of applicable law. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of the Contractor by the Contract Documents, the Owner and the Architect will specify all performance and design criteria that such services must satisfy. The Contractor shall cause such services or certifications to be provided by a properly licensed design professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to the Architect. The Owner and the Architect shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals, provided the Owner and Architect have specified to the Contractor all performance and design criteria that such services must satisfy. Pursuant to this Subparagraph 3.12.10, the Architect will review, approve or take other appropriate action on submittals only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents.



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2-1-05

Attachment 4-185

3.13 USE OF SITE

3.13.1 The Contractor shall confine operations at the site to areas permitted by law, ordinances, permits and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

3.14 CUTTING AND PATCHING

3.14.1 The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly.

3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the Owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or a separate contractor the Contractor's consent to cutting or otherwise altering the Work.

3.15 CLEANING UP

3.15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

3.15.2 If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and the cost thereof shall be charged to the Contractor.

3.16 ACCESS TO WORK

3.16.1 The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located.

3.17 ROYALTIES, PATENTS AND COPYRIGHTS

3.17.1 The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of copyrights and patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents or where the copyright violations are contained in Drawings, Specifications or other documents prepared by the Owner or Architect. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a copyright or a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Architect.

3.18 INDEMNIFICATION

3.18.1 To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Paragraph 11.3, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be



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2-1-05

Attachment 4-186

construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.

3.18.2 In claims against any person or entity indemnified under this Paragraph 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Subparagraph 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

ARTICLE 4 ADMINISTRATION OF THE CONTRACT

4.1 ARCHITECT

4.1.1 The Architect is the person lawfully licensed to practice architecture or an entity lawfully practicing architecture identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Architect" means the Architect or the Architect's authorized representative.

4.1.2 Duties, responsibilities and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the Owner, Contractor and Architect. Consent shall not be unreasonably withheld.

4.1.3 If the employment of the Architect is terminated, the Owner shall employ a new Architect against whom the Contractor has no reasonable objection and whose status under the Contract Documents shall be that of the former Architect.

4.2 ARCHITECT'S ADMINISTRATION OF THE CONTRACT

4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents, and will be an Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the one-year period for correction of Work described in Paragraph 12.2. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified in writing in accordance with other provisions of the Contract.

4.2.2 The Architect, as a representative of the Owner, will visit the site at intervals appropriate to the stage of the Contractor's operations (1) to become generally familiar with and to keep the Owner informed about the progress and quality of the portion of the Work completed, (2) to endeavor to guard the Owner against defects and deficiencies in the Work, and (3) to determine in general if the Work is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since these are solely the Contractor's rights and responsibilities under the Contract Documents, except as provided in Subparagraph 3.3.1.

4.2.3 The Architect will not be responsible for the Contractor's failure to perform the Work in accordance with the requirements of the Contract Documents. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractors, or their agents or employees, or any other persons or entities performing portions of the Work.



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Senate Commerce Committee

2-1-05

Attachment 4-187

4.2.4 Communications Facilitating Contract Administration. Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate with each other through the Architect about matters arising out of or relating to the Contract. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner.

4.2.5 Based on the Architect's evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

4.2.6 The Architect will have authority to reject Work that does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable, the Architect will have authority to require inspection or testing of the Work in accordance with Subparagraphs 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons or entities performing portions of the Work.

4.2.7 The Architect will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Contractor or separate contractors, while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Paragraphs 3.3, 3.5 and 3.12. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

4.2.8 The Architect will prepare Change Orders and Construction Change Directives, and may authorize minor changes in the Work as provided in Paragraph 7.4.

4.2.9 The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion, will receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor, and will issue a final Certificate for Payment upon compliance with the requirements of the Contract Documents.

4.2.10 If the Owner and Architect agree, the Architect will provide one or more project representatives to assist in carrying out the Architect's responsibilities at the site. The duties, responsibilities and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.

4.2.11 The Architect will interpret and decide matters concerning performance under, and requirements of, the Contract Documents on written request of either the Owner or Contractor.



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CONSTRUCTION

Senate Commerce

2-1-05



Attachment 4-188 2

The Architect's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If no agreement is made concerning the time within which interpretations required of the Architect shall be furnished in compliance with this Paragraph 4.2, then delay shall not be recognized on account of failure by the Architect to furnish such interpretations until 15 days after written request is made for them.

4.2.12 Interpretations and decisions of the Architect will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and initial decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions so rendered in good faith.

4.2.13 The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

4.3 CLAIMS AND DISPUTES

4.3.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

4.3.2 Time Limits on Claims. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party.

4.3.3 Continuing Contract Performance. Pending final resolution of a Claim except as otherwise agreed in writing or as provided in Subparagraph 9.7.1 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

4.3.4 Claims for Concealed or Unknown Conditions. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.



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2-1-05

Attachment

4-189

4.3.5 Claims for Additional Cost. If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.6.

4.3.6 If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Architect, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Architect, (4) failure of payment by the Owner, (5) termination of the Contract by the Owner, (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with this Paragraph 4.3.

4.3.7 CLAIMS FOR ADDITIONAL TIME

4.3.7.1 If the Contractor wishes to make Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay only one Claim is necessary.

4.3.7.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction.

4.3.8 Injury or Damage to Person or Property. If either party to the Contract suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

4.3.9 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

4.3.10 Claims for Consequential Damages. The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

- 1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- 2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Subparagraph 4.3.10 shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.

4.4 RESOLUTION OF CLAIMS AND DISPUTES

4.4.1 Decision of Architect. Claims, including those alleging an error or omission by the Architect but excluding those arising under Paragraphs 10.3 through 10.5, shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a



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GENERAL CONDITIONS
OF THE CONTRACT FOR
CONSTRUCTION

Senate Commerce
2-1-05

Attachment 4-190

condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect. The Architect will not decide disputes between the Contractor and persons or entities other than the Owner.

4.4.2 The Architect will review Claims and within ten days of the receipt of the Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Architect is unable to resolve the Claim if the Architect lacks sufficient information to evaluate the merits of the Claim or if the Architect concludes that, in the Architect's sole discretion, it would be inappropriate for the Architect to resolve the Claim.

4.4.3 In evaluating Claims, the Architect may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Architect in rendering a decision. The Architect may request the Owner to authorize retention of such persons at the Owner's expense.

4.4.4 If the Architect requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of such request, and shall either provide a response on the requested supporting data, advise the Architect when the response or supporting data will be furnished or advise the Architect that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Architect will either reject or approve the Claim in whole or in part.

4.4.5 The Architect will approve or reject Claims by written decision, which shall state the reasons therefor and which shall notify the parties of any change in the Contract Sum or Contract Time or both. The approval or rejection of a Claim by the Architect shall be final and binding on the parties but subject to mediation and arbitration.

4.4.6 When a written decision of the Architect states that (1) the decision is final but subject to mediation and arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days' period shall result in the Architect's decision becoming final and binding upon the Owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceedings unless the decision is acceptable to all parties concerned.

4.4.7 Upon receipt of a Claim against the Contractor or at any time thereafter, the Architect or the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Architect or the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

4.4.8 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the Claim by the Architect, by mediation or by arbitration.

4.5 MEDIATION

4.5.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5 shall, after initial decision by the Architect or 30 days after submission of the Claim to the Architect, be



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Senate Commerce Committee

Attachment 4-191

subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

4.5.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to the Contract and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

4.5.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

4.6 ARBITRATION

4.6.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5.

4.6.2 Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect.

4.6.3 A demand for arbitration shall be made within the time limits specified in Subparagraphs 4.4.6 and 4.6.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.

4.6.4 Limitation on Consolidation or Joinder. No arbitration arising out of or relating to the Contract shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a Claim not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.



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2-1-05

Attachment

4-192

4.6.5 Claims and Timely Assertion of Claims. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

4.6.6 Judgment on Final Award. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 5 SUBCONTRACTORS

5.1 DEFINITIONS

5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

5.1.2 A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect will promptly reply to the Contractor in writing stating whether or not the Owner or the Architect, after due investigation, has reasonable objection to any such proposed person or entity. Failure of the Owner or Architect to reply promptly shall constitute notice of no reasonable objection.

5.2.2 The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

5.2.4 The Contractor shall not change a Subcontractor, person or entity previously selected if the Owner or Architect makes reasonable objection to such substitute.

5.3 SUBCONTRACTUAL RELATIONS

5.3.1 By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the



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Senate Commerce Committee

21-05
Attachment 4-193

Subcontractor's Work, which the Contractor, by these Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS

5.4.1 Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner provided that:

- .1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Paragraph 14.2 and only for those subcontract agreements which the Owner accepts by notifying the Subcontractor and Contractor in writing; and
- .2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

5.4.2 Upon such assignment, if the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted for increases in cost resulting from the suspension.

ARTICLE 6 CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS

6.1.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar to these including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided in Paragraph 4.3.

6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate contractors and the Owner in reviewing their construction schedules when directed to do so. The Contractor shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate contractors and the Owner until subsequently revised.

6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights which apply to the



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The American Institute
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Senate Commerce Committee

Attachment

2-1-05
4-194

Contractor under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6 and Articles 10, 11 and 12.

6.2 MUTUAL RESPONSIBILITY

6.2.1 The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to report shall constitute an acknowledgment that the Owner's or separate contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

6.2.3 The Owner shall be reimbursed by the Contractor for costs incurred by the Owner which are payable to a separate contractor because of delays, improperly timed activities or defective construction of the Contractor. The Owner shall be responsible to the Contractor for costs incurred by the Contractor because of delays, improperly timed activities, damage to the Work or defective construction of a separate contractor.

6.2.4 The Contractor shall promptly remedy damage wrongfully caused by the Contractor to completed or partially completed construction or to property of the Owner or separate contractors as provided in Subparagraph 10.2.5.

6.2.5 The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Subparagraph 3.14.

6.3 OWNER'S RIGHT TO CLEAN UP

6.3.1 If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Architect will allocate the cost among those responsible.

ARTICLE 7 CHANGES IN THE WORK

7.1 GENERAL

7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.



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Attachment 2-1-05
4-195

7.2 CHANGE ORDERS

7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:

- 1 change in the Work;
- 2 the amount of the adjustment, if any, in the Contract Sum; and
- 3 the extent of the adjustment, if any, in the Contract Time.

7.2.2 Methods used in determining adjustments to the Contract Sum may include those listed in Subparagraph 7.3.3.

7.3 CONSTRUCTION CHANGE DIRECTIVES

7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

- 1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- 2 unit prices stated in the Contract Documents or subsequently agreed upon;
- 3 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
- 4 as provided in Subparagraph 7.3.6.

7.3.4 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

7.3.5 A Construction Change Directive signed by the Contractor indicates the agreement of the Contractor therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

7.3.6 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the Architect on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, and also under Clause 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Subparagraph 7.3.6 shall be limited to the following:

- 1 costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;
- 2 costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- 3 rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;



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Attachment 4-196

- .4 costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and
- .5 additional costs of supervision and field office personnel directly attributable to the change.

7.3.7. The amount of credit to be allowed by the Contractor to the Owner for a deletion or change which results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

7.3.8 Pending final determination of the total cost of a Construction Change Directive to the Owner, amounts not in dispute for such changes in the Work shall be included in Applications for Payment accompanied by a Change Order indicating the parties' agreement with part or all of such costs. For any portion of such cost that remains in dispute, the Architect will make an interim determination for purposes of monthly certification for payment for those costs. That determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a claim in accordance with Article 4.

7.3.9 When the Owner and Contractor agree with the determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.

7.4 MINOR CHANGES IN THE WORK

7.4.1 The Architect will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

ARTICLE 8 TIME

8.1 DEFINITIONS

8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

8.1.2 The date of commencement of the Work is the date established in the Agreement.

8.1.3 The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 9.8.

8.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

8.2 PROGRESS AND COMPLETION

8.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

8.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor and Owner. The date of commencement of the Work shall not be changed by the effective date of such insurance. Unless the date of commencement is established by the Contract Documents or a notice to proceed given



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Senate Commerce Committee

21-05
 Attachment 4-197

by the Owner, the Contractor shall notify the Owner in writing not less than five days or other agreed period before commencing the Work to permit the timely filing of mortgages, mechanic's liens and other security interests.

8.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

8.3 DELAYS AND EXTENSIONS OF TIME

8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending mediation and arbitration, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Paragraph 4.3.

8.3.3 This Paragraph 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

ARTICLE 9 PAYMENTS AND COMPLETION

9.1 CONTRACT SUM

9.1.1 The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

9.2 SCHEDULE OF VALUES

9.2.1 Before the first Application for Payment, the Contractor shall submit to the Architect a schedule of values allocated to various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

9.3 APPLICATIONS FOR PAYMENT

9.3.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment for operations completed in accordance with the schedule of values. Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as the Owner or Architect may require, such as copies of requisitions from Subcontractors and material suppliers, and reflecting retainage if provided for in the Contract Documents.

9.3.1.1 As provided in Subparagraph 7.3.8, such applications may include requests for payment on account of changes in the Work which have been properly authorized by Construction Change Directives, or by interim determinations of the Architect, but not yet included in Change Orders.

9.3.1.2 Such applications may not include requests for payment for portions of the Work for which the Contractor does not intend to pay to a Subcontractor or material supplier, unless such Work has been performed by others whom the Contractor intends to pay.



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OF THE CONTRACT FOR
CONSTRUCTION

Senate Commerce Committee

Attachment 2-1-05
4-198

9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment suitably stored off the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include the costs of applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

9.4 CERTIFICATES FOR PAYMENT

9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Subparagraph 9.5.1.

9.4.2 The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's evaluation of the Work and the data comprising the Application for Payment, that the Work has progressed to the point indicated and that, to the best of the Architect's knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to correction of minor deviations from the Contract Documents prior to completion and to specific qualifications expressed by the Architect. The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment, or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

9.5 DECISIONS TO WITHHOLD CERTIFICATION

9.5.1 The Architect may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Subparagraph 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Subparagraph 9.4.1. If the Contractor and Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's



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Senate Commerce Committee

2-1-05
Attachment 4-199

opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Subparagraph 3.3.2, because of:

- .1 defective Work not remedied;
- .2 third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the Contractor;
- .3 failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;
- .4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- .5 damage to the Owner or another contractor;
- .6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- .7 persistent failure to carry out the Work in accordance with the Contract Documents.

9.5.2 When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

9.6 PROGRESS PAYMENTS

9.6.1 After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents, and shall so notify the Architect.

9.6.2 The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's portion of the Work, the amount to which said Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of such Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in a similar manner.

9.6.3 The Architect will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Architect and Owner on account of portions of the Work done by such Subcontractor.

9.6.4 Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor except as may otherwise be required by law.

9.6.5 Payment to material suppliers shall be treated in a manner similar to that provided in Subparagraphs 9.6.2, 9.6.3 and 9.6.4.

9.6.6 A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

9.6.7 Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor for Work properly performed by Subcontractors and suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor for which payment was made by the Owner. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor, shall create any fiduciary liability or tort liability on the part of the Contractor for breach of trust or shall entitle any person or entity to an award of punitive damages against the Contractor for breach of the requirements of this provision.



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Senate Commerce

21-05

Attachment 4-200

9.7 FAILURE OF PAYMENT

9.7.1 If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Architect or awarded by arbitration, then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.

9.8 SUBSTANTIAL COMPLETION

9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

9.8.2 When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected prior to final payment. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents.

9.8.3 Upon receipt of the Contractor's list, the Architect will make an inspection to determine whether the Work or designated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work or designated portion thereof for its intended use, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. In such case, the Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion.

9.8.4 When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

9.8.5 The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate. Upon such acceptance and consent of surety, if any, the Owner shall make payment of retainage applying to such Work or designated portion thereof. Such payment shall be adjusted for Work that is incomplete or not in accordance with the requirements of the Contract Documents.

9.9 PARTIAL OCCUPANCY OR USE

9.9.1 The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Clause 11.4.1.5 and authorized by public authorities having jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage, if any, security, maintenance, heat, utilities, damage to the Work and insurance, and



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Senate Commerce Committee

2-1-05

Attachment 4-201

have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Subparagraph 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect.

9.9.2 Immediately prior to such partial occupancy or use, the Owner, Contractor and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

9.9.3 Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

9.10 FINAL COMPLETION AND FINAL PAYMENT

9.10.1 Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Subparagraph 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

9.10.2 Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

9.10.3 If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that



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OF THE CONTRACT FOR
CONSTRUCTION

Senate Commerce

2-1-05

Attachment 4-202



portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

9.10.4 The making of final payment shall constitute a waiver of Claims by the Owner except those arising from:

- .1 liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;
- .2 failure of the Work to comply with the requirements of the Contract Documents; or
- .3 terms of special warranties required by the Contract Documents.

9.10.5 Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

ARTICLE 10 PROTECTION OF PERSONS AND PROPERTY

10.1 SAFETY PRECAUTIONS AND PROGRAMS

10.1.1 The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

10.2 SAFETY OF PERSONS AND PROPERTY

10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

- .1 employees on the Work and other persons who may be affected thereby;
- .2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and
- .3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

10.2.2 The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

10.2.3 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

10.2.4 When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Clauses 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Clauses 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 3.18.



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Senate Commerce Committee

2-1-05
Attachment 4-203

10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

10.2.7 The Contractor shall not load or permit any part of the construction or site to be loaded so as to endanger its safety.

10.3 HAZARDOUS MATERIALS

10.3.1 If reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and report the condition to the Owner and Architect in writing.

10.3.2 The Owner shall obtain the services of a licensed laboratory to verify the presence or absence of the material or substance reported by the Contractor and, in the event such material or substance is found to be present, to verify that it has been rendered harmless. Unless otherwise required by the Contract Documents, the Owner shall furnish in writing to the Contractor and Architect the names and qualifications of persons or entities who are to perform tests verifying the presence or absence of such material or substance or who are to perform the task of removal or safe containment of such material or substance. The Contractor and the Architect will promptly reply to the Owner in writing stating whether or not either has reasonable objection to the persons or entities proposed by the Owner. If either the Contractor or Architect has an objection to a person or entity proposed by the Owner, the Owner shall propose another to whom the Contractor and the Architect have no reasonable objection. When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. The Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Contractor's reasonable additional costs of shut-down, delay and start-up, which adjustments shall be accomplished as provided in Article 7.

10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Subparagraph 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) and provided that such damage, loss or expense is not due to the sole negligence of a party seeking indemnity.

10.4 The Owner shall not be responsible under Paragraph 10.3 for materials and substances brought to the site by the Contractor unless such materials or substances were required by the Contract Documents.

10.5 If, without negligence on the part of the Contractor, the Contractor is held liable for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall indemnify the Contractor for all cost and expense thereby incurred.

10.6 EMERGENCIES

10.6.1 In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or



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OF THE CONTRACT FOR
Senate Commerce

2-1-05

Attachment 4-204



extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Paragraph 4.3 and Article 7.

ARTICLE 11 INSURANCE AND BONDS

11.1 CONTRACTOR'S LIABILITY INSURANCE

11.1.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

- .1 claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed;
- .2 claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;
- .3 claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;
- .4 claims for damages insured by usual personal injury liability coverage;
- .5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
- .6 claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;
- .7 claims for bodily injury or property damage arising out of completed operations; and
- .8 claims involving contractual liability insurance applicable to the Contractor's obligations under Paragraph 3.18.

11.1.2 The insurance required by Subparagraph 11.1.1 shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.

11.1.3 Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. These certificates and the insurance policies required by this Paragraph 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment as required by Subparagraph 9.10.2. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness in accordance with the Contractor's information and belief.

11.2 OWNER'S LIABILITY INSURANCE

11.2.1 The Owner shall be responsible for purchasing and maintaining the Owner's liability insurance.

11.3 PROJECT MANAGEMENT PROTECTIVE LIABILITY INSURANCE

11.3.1 Optionally, the Owner may require the Contractor to purchase and maintain Project Management Protective Liability insurance from the Contractor's usual sources as primary coverage for the Owner's, Contractor's and Architect's vicarious liability for construction operations under the Contract. Unless otherwise required by the Contract Documents, the Owner



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Senate Commerce Committee

Attachment

2-1-05

4-205

shall reimburse the Contractor by increasing the Contract Sum to pay the cost of purchasing and maintaining such optional insurance coverage, and the Contractor shall not be responsible for purchasing any other liability insurance on behalf of the Owner. The minimum limits of liability purchased with such coverage shall be equal to the aggregate of the limits required for Contractor's Liability Insurance under Clauses 11.1.1.2 through 11.1.1.5.

11.3.2 To the extent damages are covered by Project Management Protective Liability insurance, the Owner, Contractor and Architect waive all rights against each other for damages, except such rights as they may have to the proceeds of such insurance. The policy shall provide for such waivers of subrogation by endorsement or otherwise.

11.3.3 The Owner shall not require the Contractor to include the Owner, Architect or other persons or entities as additional insureds on the Contractor's Liability Insurance coverage under Paragraph 11.1.

11.4 PROPERTY INSURANCE

11.4.1 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance written on a builder's risk "all-risk" or equivalent policy form in the amount of the initial Contract Sum, plus value of subsequent Contract modifications and cost of materials supplied or installed by others, comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Paragraph 9.10 or until no person or entity other than the Owner has an insurable interest in the property required by this Paragraph 11.4 to be covered, whichever is later. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Project.

11.4.1.1 Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's and Contractor's services and expenses required as a result of such insured loss.

11.4.1.2 If the Owner does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance which will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor in writing, then the Owner shall bear all reasonable costs properly attributable thereto.

11.4.1.3 If the property insurance requires deductibles, the Owner shall pay costs not covered because of such deductibles.

11.4.1.4 This property insurance shall cover portions of the Work stored off the site, and also portions of the Work in transit.

11.4.1.5 Partial occupancy or use in accordance with Paragraph 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial



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OF THE CONTRACT FOR
CONSTRUCTION

Senate Commerce

2-1-05

Attachment 4-206



occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

11.4.2 Boiler and Machinery Insurance. The Owner shall purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall be named insureds.

11.4.3 Loss of Use Insurance. The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.

11.4.4 If the Contractor requests in writing that insurance for risks other than those described herein or other special causes of loss be included in the property insurance policy, the Owner shall, if possible, include such insurance, and the cost thereof shall be charged to the Contractor by appropriate Change Order.

11.4.5 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Subparagraph 11.4.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

11.4.6 Before an exposure to loss may occur, the Owner shall file with the Contractor a copy of each policy that includes insurance coverages required by this Paragraph 11.4. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or allowed to expire, and that its limits will not be reduced, until at least 30 days' prior written notice has been given to the Contractor.

11.4.7 Waivers of Subrogation. The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Paragraph 11.4 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.



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Senate Commerce Committee

2-1-05

Attachment 4-207

11.4.8 A loss insured under Owner's property insurance shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Subparagraph 11.4.10. The Contractor shall pay Subcontractors their just shares of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their Sub-subcontractors in similar manner.

11.4.9 If required in writing by a party in interest, the Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Owner's duties. The cost of required bonds shall be charged against proceeds received as fiduciary. The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or in accordance with an arbitration award in which case the procedure shall be as provided in Paragraph 4.6. If after such loss no other special agreement is made and unless the Owner terminates the Contract for convenience, replacement of damaged property shall be performed by the Contractor after notification of a Change in the Work in accordance with Article 7.

11.4.10 The Owner as fiduciary shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Owner's exercise of this power; if such objection is made, the dispute shall be resolved as provided in Paragraphs 4.5 and 4.6. The Owner as fiduciary shall, in the case of arbitration, make settlement with insurers in accordance with directions of the arbitrators. If distribution of insurance proceeds by arbitration is required, the arbitrators will direct such distribution.

11.5 PERFORMANCE BOND AND PAYMENT BOND

11.5.1 The Owner shall have the right to require the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract.

11.5.2 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall permit a copy to be made.

ARTICLE 12 UNCOVERING AND CORRECTION OF WORK

12.1 UNCOVERING OF WORK

12.1.1 If a portion of the Work is covered contrary to the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if required in writing by the Architect, be uncovered for the Architect's examination and be replaced at the Contractor's expense without change in the Contract Time.

12.1.2 If a portion of the Work has been covered which the Architect has not specifically requested to examine prior to its being covered, the Architect may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be at the Owner's expense. If such Work is not in accordance with the Contract Documents, correction shall be at the Contractor's expense unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs.



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Attachment 2-1-05
4-208

12.2 CORRECTION OF WORK

12.2.1 BEFORE OR AFTER SUBSTANTIAL COMPLETION

12.2.1.1 The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or completed. Costs of correcting such rejected Work, including additional testing and inspections and compensation for the Architect's services and expenses made necessary thereby, shall be at the Contractor's expense.

12.2.2 AFTER SUBSTANTIAL COMPLETION

12.2.2.1 In addition to the Contractor's obligations under Paragraph 3.5, if, within one year after the date of Substantial Completion of the Work or designated portion thereof or after the date for commencement of warranties established under Subparagraph 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. The Owner shall give such notice promptly after discovery of the condition. During the one-year period for correction of Work, if the Owner fails to notify the Contractor and give the Contractor an opportunity to make the correction, the Owner waives the rights to require correction by the Contractor and to make a claim for breach of warranty. If the Contractor fails to correct nonconforming Work within a reasonable time during that period after receipt of notice from the Owner or Architect, the Owner may correct it in accordance with Paragraph 2.4.

12.2.2.2 The one-year period for correction of Work shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual performance of the Work.

12.2.2.3 The one-year period for correction of Work shall not be extended by corrective Work performed by the Contractor pursuant to this Paragraph 12.2.

12.2.3 The Contractor shall remove from the site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

12.2.4 The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or separate contractors caused by the Contractor's correction or removal of Work which is not in accordance with the requirements of the Contract Documents.

12.2.5 Nothing contained in this Paragraph 12.2 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the one-year period for correction of Work as described in Subparagraph 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.



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12.3 ACCEPTANCE OF NONCONFORMING WORK

12.3.1 If the Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

Senate Commerce Committee

Attachment 2-1-05
4-2009



ARTICLE 13 MISCELLANEOUS PROVISIONS

13.1 GOVERNING LAW

13.1.1 The Contract shall be governed by the law of the place where the Project is located.

13.2 SUCCESSORS AND ASSIGNS

13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Except as provided in Subparagraph 13.2.2, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

13.2.2 The Owner may, without consent of the Contractor, assign the Contract to an institutional lender providing construction financing for the Project. In such event, the lender shall assume the Owner's rights and obligations under the Contract Documents. The Contractor shall execute all consents reasonably required to facilitate such assignment.

13.3 WRITTEN NOTICE

13.3.1 Written notice shall be deemed to have been duly served if delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if delivered at or sent by registered or certified mail to the last business address known to the party giving notice.

13.4 RIGHTS AND REMEDIES

13.4.1 Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

13.4.2 No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

13.5 TESTS AND INSPECTIONS

13.5.1 Tests, inspections and approvals of portions of the Work required by the Contract Documents or by laws, ordinances, rules, regulations or orders of public authorities having jurisdiction shall be made at an appropriate time. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so that the Architect may be present for such procedures. The Owner shall bear costs of tests, inspections or approvals which do not become requirements until after bids are received or negotiations concluded.

13.5.2 If the Architect, Owner or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection or approval not included under Subparagraph 13.5.1, the Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Architect of when and where tests and inspections are to be made so that the Architect may be present for such procedures. Such costs, except as provided in Subparagraph 13.5.3, shall be at the Owner's expense.



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OF THE CONTRACT FOR
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Senate Commerce Committee

Attachment 4-210

13.5.3 If such procedures for testing, inspection or approval under Subparagraphs 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, all costs made necessary by such failure including those of repeated procedures and compensation for the Architect's services and expenses shall be at the Contractor's expense.

13.5.4 Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect.

13.5.5 If the Architect is to observe tests, inspections or approvals required by the Contract Documents, the Architect will do so promptly and, where practicable, at the normal place of testing.

13.5.6 Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

13.6 INTEREST

13.6.1 Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD

13.7.1 As between the Owner and Contractor:

- .1 Before Substantial Completion. As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion;
- .2 Between Substantial Completion and Final Certificate for Payment. As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment; and
- .3 After Final Certificate for Payment. As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any Warranty provided under Paragraph 3.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Paragraph 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.



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ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

14.1 TERMINATION BY THE CONTRACTOR

14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, for any of the following reasons:

- .1 issuance of an order of a court or other public authority having jurisdiction which requires all Work to be stopped;
- .2 an act of government, such as a declaration of national emergency which requires all Work to be stopped;

Senate Commerce Committee

2-1-05

Attachment 4-211

- .3 because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Subparagraph 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or
- .4 the Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Subparagraph 2.2.1.

14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, repeated suspensions, delays or interruptions of the entire Work by the Owner as described in Paragraph 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

14.1.3 If one of the reasons described in Subparagraph 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Subparagraph 14.1.3.

14.2 TERMINATION BY THE OWNER FOR CAUSE

14.2.1 The Owner may terminate the Contract if the Contractor:

- .1 persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- .2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
- .3 persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or
- .4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

14.2.2 When any of the above reasons exist, the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

- .1 take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- .2 accept assignment of subcontracts pursuant to Paragraph 5.4; and
- .3 finish the Work by whatever reasonable method the Owner may deem expedient. Upon request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

14.2.3 When the Owner terminates the Contract for one of the reasons stated in Subparagraph 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.



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Senate Commerce Committee

2-1-05

Attachment 4-212

14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Architect, upon application, and this obligation for payment shall survive termination of the Contract.

14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE

14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Subparagraph 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent:

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of the Contract.

14.4 TERMINATION BY THE OWNER FOR CONVENIENCE

14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

14.4.2 Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall:

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

14.4.3 In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.



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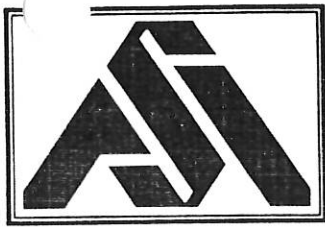
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2-1-05

Attachment

4-213



AMERICAN SUBCONTRACTORS ASSOCIATION

GREATER KANSAS CITY CHAPTER
P.O. BOX 6400 KANSAS CITY, KS 66106
(913) 384-1255 FAX (913) 384-1255
E-Mail: kcasa@kc.rr.com

My name is William R. Miller. As President of Building Erection Services Company, Inc, I am representing my company as well as the American Subcontractors Association.

The American Subcontractors Association chapter represents 70 subcontractors and suppliers who are actively engaged in the construction trade in Kansas. My own company, Building Erection Services Company, Inc. has offices located in Olathe and Topeka, Kansas, as well as in St. Joseph, Missouri. BESCO employs close to 200 men and women. I am here to speak to you in support of the Kansas Fairness in Construction Contracts Act, Senate Bill 33.

Unlike our neighboring state of Missouri, Kansas does not have state laws in place that require payment to General Contractors, Subcontractors and Suppliers for work and/or materials supplied for private construction projects. Senate Bill 33 provides equal payment protection for each party to the contract.

Senate Bill 33, Section 3 requires payment to the General Contractor within 30 days after a properly completed, undisputed and timely pay request is received. The Owner will have five days to verify that the billing is correct or notify the Contractor of any portion that is disputed. If any part is in dispute, the undisputed portion must be paid within the 30 day time period for payment. This prevents Owners from holding the entire payment over a disputed portion. The Contractor, in turn, must pay the Subcontractor within five days after receiving payment from the Contractor. Each party to the Contract is equally responsible for payment.

Requests for payment verification are usually determined by the standard Schedule of Values that is submitted to and approved by the Contractor and Owner. This Schedule of Values must be approved in advance of any billings to prevent front loading or billings in excess of the value of the work in place. In the event that payments are not made, the Contractor, Subcontractor and Supplier have the right in Section 5 to stop work or stop delivery of materials until payments are made without being in default of the Contract.

In Section 4, retainage by the owner is limited to 10%. Contractors and Subcontractors cannot withhold from their subcontractors more than the Owner has held. If Payment and Performance Bonds are provided by the Contractor, Subcontractor or Supplier, no retainage may be withheld. If retainage is withheld, and no bonds are provided, an alternative security in lieu of retainage may be provided. Alternative securities will provide the same protection to the Owner that retainage is intended to provide, yet help the Contractor, Subcontractor and Supplier with ASSURING cash flow to meet their own obligations to their employees. Retention is not a replacement for operating capital and is often held for more than one year. In that case, additional costs are incurred by subcontractors and suppliers because liens must be filed to protect the rights of each party, which adds more to the cost of doing business and creates animosity between the Owners and Contractors.

Section 4(c) provides for line item release of retention when completion is achieved. This allows early finishing Subcontractors and Suppliers to be paid when their work is finished, not having to wait for up to two years UNTIL FINAL PROJECT COMPLETION for final payment. This group includes those subcontractors and suppliers that that are part of the first phase of the project.



Senate Commerce Committee

2-1-05

Attachment 5-1

In the event that the terms of payment are not met, interest at the rate of 1.5% per month will accrue (no bank provides subcontractors free credit) and if litigation is necessary, the prevailing party will be reimbursed the reasonable cost of litigation.

Section 6 prohibits immunity for any party to the contract for damages to others resulting from delays caused in whole or in part by actions or omissions within the control of that party.

Section 7 requires venue in Kansas in the county where the project is located and under Kansas law. This prevents out of state Contractors from contractually requiring dispute resolution to take place in another state and circumvent Kansas law.

This legislation does not include residential properties of four units or less. This eliminates passage of title issues.

This letter is in favor of the above referenced Senate Bill for the following reasons:

Cash Flow: Subcontractors and Suppliers are required to pay their bills by a certain date including payroll, withholdings, fringe benefits, insurance, fuels, utilities and so on. Each of these has penalties for failure to pay by a set date. We should be entitled to be paid by a set date in order to meet our obligations and in turn allow those that we pay to meet theirs. Trickle down has to start at the top. Penalties need to be assessed if these dates are not met for work properly and timely completed. Accounts over 60 days are not collateral for working capital loans.

Retainage: Retainage was originally intended to protect the Owner from improperly performed work, defective material or equipment and untimely performance. Today, many Owners use retainage to partially finance the project, and contractors use retainage to finance their on-going operations. Many Owners actually occupy the project and conduct their business for months without having paid the retainage withheld from the subcontractors and suppliers that, in many cases have completed their work or supplied their equipment more than one year before. Retainage needs to be released when the work is completed for each subcontractor and not withheld if a bond is in place or alternative security is pledged.

This would serve to protect the Owner as it was originally intended to do, and at the same time eliminate the ability of the Owner to abuse the practice and also allow the retained funds to be used for operating capital. This release of retainage would also eliminate the need to file liens on the real property to protect the rights of collection of these retained funds. In too many instances, the retained funds are not there or are still unpaid months after the project is completed. A Clemson University Study shows that subcontractors wait on average 167 days for their retainage and 10.4% never receive the full amount they are owed. A brief summary of this study is included in your information book.

You will hear many voices of opposition from entities and professional associations with many reasons to avoid timely payment of their obligations. Some of the potential arguments you will hear are as follows:

- Inability to determine the amount of work in place.

This argument is without merit in that Subcontractors are typically required to provide a Schedule of Values to the Owners Representative before work starts as a measure of percentage of completion for billing purposes. This Schedule of Values must be approved prior to any pay requests. A sample is included in the information booklet.

- Not enough time to prepare for payment.

The Schedule of Values is a pre-determined measurement of work in place.

Senate Commerce Committee

2-1-05

Attachment 5-2

- Interference with Private Contracts.

Regulation is necessary because of the unequal bargaining position that the Subcontractor is in – after all, many owners and general contractors are global, multi-billion dollar corporations. A list of these is included for your review. The power of the purse forces the weaker to accept unfavorable and unfair contract terms. The Engineering News Record editorial included in the information booklet could not have said it better, "There is a point where contract terms and business practices become so egregious that government must address them on public policy grounds."

- 10% retainage is standard practice.

This is not true. Many contracts hold 10% for the first one half of the project and none for the remainder. Many federal contracts hold no retainage. If a subcontractor is bonded, which is required on most public work, retainage is redundant protection. A Belt and Suspenders.

- Kansas currently has a Prompt Pay Statute.

The current Prompt Pay Statute is on public work only and does not go past the General Contractor. It is of no benefit for subcontractors or suppliers.

- Increased Litigation.

This is contrary to a study by the Office of Judicial Administration. The statement from the director of budget states that this type of bill will reduce litigation in private construction that would reduce court case loads. A copy of this letter is in your information book.

- Business would not locate in Kansas if they were required to pay contractors.

We do not believe that legitimate businesses decide where they locate based upon laws that require them to pay their bills. Eighteen states have payment statutes and companies still locate and build there. A list of states that have payment protection is in your information booklet.

We believe that when you examine the pros and cons of the arguments, based upon their merits, you will vote in favor of Kansas SB33. This bill has no adverse financial impact on the State of Kansas.

Sincerely,

William R. Miller
President
Building Erection Services Co., Inc.

Senate Commerce Committee

2-1-05

Attachment

5-3

More specifically, 325 domestic firms and 50 involved in international work reported profits for 2003. Forty-nine firms reported a loss in 2003 (32 domestic and 17 international).

Looking at professional staffing, most (a total of 159) of the Top 400 contractors reported that their staffing in 2003 remained the same. A total of 147 contractors reported that they increased their staffing last year, while 60 reported a decrease in 2003 staffing.

Lastly, 203 (23.1%) of the Top 400 contractors reported higher backlogs in 2003. A total of 93 firms reported a backlog decrease; while 69 firms reported no change in backlog figures.

The table in the next column provides a detailed list of the contractors that qualified for membership in the "Billion Dollar Club" for 2003—along with each firm's 2003 ranking and its total construction contract revenue for the year.

Number 400 on the list is Wallick Construction Co. of Reynoldsburg, Ohio, which reported \$98.6 million in contract revenue in 2003. Wallick construction replaces IMC Construction of Malvern, Pennsylvania, as number 400. IMC moved up to number 359 in 2003.

2003 "Billion Dollar Club"

Rank	Firm	2003 Revenue (\$Billions)
1	Bechtel	13.212
2	Centex	8.985
3	KBR	8.030
4	Fluor Corp.	6.703
5	The Turner Corp	5.876
6	Skanska USA Inc.	5.625
7	Peter Kiewit Sons' Inc.	3.558
8	Bovis Lend Lease	3.153
9	Foster Wheeler Ltd.	2.723
10	The Shaw Group Inc.	2.678
11	The Clark Construction Group Inc.	2.485
12	Jacobs	2.277
13	Washington Group Intl. Inc.	2.136
14	Gilbane Building Co.	2.100
15	PCL Construction Enterprises Inc.	2.032
16	Structure Tone Inc.	1.882
17	The Whiting-Turner Contracting Co.	1.876
18	APAC Inc.	1.854
19	Hensel Phelps Construction Co.	1.798
20	The Walsh Group	1.725
21	Hunt Construction Group Inc.	1.650
22	Granite Construction Inc.	1.617
23	Swinerton Inc.	1.617
24	CB&I	1.612
25	J.E. DunnGroup	1.495
26	McCarthy Building Cos. Inc.	1.459
27	Perini Corp.	1.374
28	TIC Holdings Inc.	1.281
29	DPR Construction Inc.	1.271
30	Webcor Builders	1.267
31	Parsons	1.194
32	Austin Industries	1.193
33	M.A. Mortenson Co.	1.102
34	The Yates Cos. Inc	1.100
35	Barton Malow Inc.	1.079
36	Brasfield & Gorrie LLC	1.039
37	Walbridge Aldinger	1.015
38	Zachry Construction Corp.	1.006

Cases & Decisions

¶ 169

Anti-Subrogation Clause In Construction Agreement Applied To Both Builder And Manufacturer Of Storage Building

ANDERSON HAY & GRAIN CO., INC., v. UNITED DOMINION INDUSTRIES, INC., 76 P.3d 1205 (WASH. APP. 2003)

Contracts ⇌ 170(1), 205.15(4), 312(5), 318
 Products Liability ⇌ 42
 Subrogation ⇌ 35

The contract for construction of three steel hay storage buildings in Washington required the building

5

¶ 169

Senate Commerce Committee

2-1-05

Attachment 6-1

Contractual arrangements vary, but retainage typically ranges from five to ten percent of the value of work installed. The contract may permit a reduction in the retainage percentage upon reaching certain construction milestones, but the total amount of retained funds is generally not released until substantial completion of the entire project. Contractors typically 'pass' the owner's retainage requirements through to their subcontractors and vendors. Even if an owner does not hold retainage on the contractor, it is not uncommon for the contractor to withhold retainage from its subcontractors (McGreevy, 2002). The trend in the construction industry has been for general contractors to self-perform less of the actual work. As a result, the financial burden imposed by retaining funds for work completed has fallen disproportionately on subcontractors, especially those that finish their work early in the delivery period (OPPAGA, 2000).

OFFICE OF PROGRAM POLICY ANALYSIS & GOVERNMENT ACCOUNTABILITY

The practice of retainage is becoming an increasing hardship on contractors and subcontractors as profitability margins narrow. Robert Morris Associates (RMA) collects financial data from companies and compiles industry averages for comparison and benchmarking. In 1972 RMA noted that contractors earned approximately 6% profit on each dollar of revenue. By 1986 the profitability rate had declined to 3% and at the turn of the century it hovers around 2% of revenue. The financial situation is not much better for the subcontracting community where profitability now averages 3%-4% or less. Therefore, an owner retaining 10% on work installed is typically withholding up to five times the contractor's, or three times the subcontractors', profit on the project. This financial strain poses cash flow problems and has been linked to contractor failure (SCEG, 2002).

Evolution of Retainage Practice in the US

Due to the unique and fragmented structure of the construction industry, few individual contractors or subcontractors have the ability or influence to change retainage practices. As a result, national organizations representing industry members have taken the lead. These organizations include the Associated General Contractors of America (AGC), the Association of Builders and Contractors (ABC), the American Subcontractors Association (ASA), and the Associated Specialty Contractors (ASC). Each has a constituency that often times overlaps. AGC is an organization with over 33,000 members primarily consisting of general and specialty contractors. ABC is a national trade association representing over 23,000 members. Its primary membership also consists of contractors, subcontractors, and suppliers. ASA is a nonprofit trade association representing more than 6,000 subcontractors and specialty contractors in the construction industry, and ASC is an umbrella organization representing eight specialty contractor groups. Recognizing that Federal, State, and Local governments account for close to half of the expenditures for non-residential new work, much of the organizational focus has been on the public sector.

In the early 1980's, ASA and ASC were at the forefront of the effort to enhance the industry's payment practices (Semling, 1982). In 1983 the Office of Federal Procurement Policy urged that the general practice of holding 10% retainage on Federal work be limited to those cases where the practice was deemed necessary to ensure completion (Schweizer, 1983). This executive action applied to the contract between the government and the prime contractor. Five years later, the Prompt Payment Act Amendments of 1988 extended protection to subcontractors. This legislative action prohibited general contractors from retaining or withholding from a subcontractor more than the government retains from the contractor. In addition, it established minimum standards for the prompt release of retainage.

Senate Commerce² Committee

2-1-05

Attachment 7-1

The Current Federal Acquisition Regulation (F.A.R.) continues to support the government's shift in policy to a more equitable approach to retainage. Paragraph 32.103 of the regulation states "...Retainage should not be used as a substitute for good contract management, and the contracting officer should not withhold funds without cause. Determinations to retain and the specific amount to be withheld shall be made by the contracting officers on a case-by-case basis. Such decisions will be based on the contracting officer's assessment of past performance and the likelihood that such performance will continue."

Subsequent to FAR's policy shift, the retainage policy of the individual Federal agencies was in a state of flux with retainage practice varying from project to project and agency to agency. Policy ranged from a 'zero retainage' policy adopted by the Department of Defense to other agencies' continued use of the 'old Federal Standard' of 10% on the first half of the work and zero retainage held on the last half of the project if performance on the project was satisfactory.

However, the overall trend for both the Federal and State agencies since the early 1980's has been toward a reduction in the percentage of retained funds on new construction. This shift is largely due to the continuing efforts of the American Subcontractors Association, the Associated General Contractors of America, and the Associated Specialty Contractors. Currently, Federal agencies such as the Department of Defense, the General Services Administration, and the US Department of Transportation have 'zero' retainage policies and typically only withhold retainage if there is just cause.

Federal policy has also had an impact on State retainage policy, in particular for those projects utilizing Federal funding. One of the most significant actions involves the US Department of Transportation (USDOT). Responding to a 1995 ruling by the US Supreme Court in the Adarand case, the USDOT revised its Disadvantaged Business Enterprise (DBE) program in 1999. The new regulation required that States establish contract language that required their prime contractors on DOT-funded projects to promptly pay all subcontractors (DBE and non-DBE) final retainage upon satisfactory completion of the subcontractor's work. Payment was due the subcontractor even if the prime had not received payment from the state or final approval (acceptance) from the state for the subcontractor's work. Under this requirement, commonly referred to as the 'Pay Before Paid' requirement, the prime contractor could be financing up to 10% of the construction costs (Deery, 2001). Primes argued this new requirement reduced their leverage on subcontractors to correct defects and left them with little protection should the subcontractor not pay their suppliers or second tier subcontractors.

There was an outcry from contractors and their industry representatives to address the shortcomings of the 1999 regulation. In response the USDOT proposed new regulations in 2001 that were subsequently adopted in July 2003. The new (and current) regulation removes the prime's 'Pay Before Paid' requirement and essentially allow the states to adopt one of three methods to ensure prompt payment of subcontractor retainage:

- "... decline to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors" or
- "... decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed" or
- "... hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the

prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work.” (Ichniowski, 2003:1):

In 2001 the AASHTO Subcommittee on Construction surveyed the states to assess the impact of this USDOT regulation on state retainage policies for their state Department of Transportation (DOT) work. Of the 47 states participating in the survey, only seven, or 15%, had a zero retainage policy prior to the regulation change. However, by the date of the survey two years later, twenty-one states (45%) had a zero retainage policy for primes and/or subcontractors on DOT work. As expected, Federal policy had a significant impact on state retainage practices (AASHTO, 2001).

In addition to the modification of state law to comply with Federal regulations on USDOT funded work, most states have also adjusted their retainage statutes to reflect changes in the percentage withheld, payment timing, and/or implemented alternatives to conventional retainage practices. For some states these statutes apply only to certain departments, such as the State’s DOT projects, while others are applicable for all state work. While no state has taken the position of abolishing retainage, the trend has been toward a reduction in the percentage of funds withheld and/or policies more sensitive to the contractor’s cash flow concerns (ASA, 2003a; Stockenberg, 2001b).

Just in the past several years Maryland, Mississippi, and Arizona reduced the retainage percentage on all state work (ASA, 2003a). Legislative efforts in Utah capped subcontractor retainage to the amount being held by the owner and required retention to be released on portions of the building accepted for early occupancy. In addition, legislation to reduce or limit the retainage percentage has been introduced in Ohio, Oklahoma, Colorado, Florida, and Wisconsin (Pitts, 2003; Grimm, 2003; Stockenberg & Limbaugh, 2002). In Wisconsin the proposed legislation reduces retainage on all public work to 5% till 50% complete and zero thereafter - a considerable change from the requirement 30 years ago of 15% for the duration of the project (Fabishak, 2003).

Changes in retainage policy are not just limited to reductions in the percentage of retained funds. The State of Oklahoma was one of the first to allow contractors to avoid retainage altogether if they would post security such as a certificate of deposit or a letter of credit. Continuing with the trend to adopt ‘alternatives’ to the traditional retainage practices, Arizona and Maryland passed regulations permitting securities in lieu of retainage and recently Illinois enacted legislation allowing retainage to be placed in an interest-bearing account with the interest accruing to the subcontractor (ASA, 2003a; Gordan, 2001).

In 2001 New Mexico enacted one of the most ambitious retainage programs legislated up to that point in time. The statute limited GC and subcontractor retainage to 5%, required interest-bearing escrow accounts for retainage, mandated the release of retainage held on each ‘separately ascertainable item of the schedule of values’ upon substantial completion of that portion of the work, allowed for the substitution of securities, and established prompt payment requirements and penalties (Calvert, 2001).

The reassessment of state retainage policies is continuing. Connecticut and Oklahoma have current legislative proposals requiring the creation of an interest bearing escrow account for retainage and Oklahoma’s pending legislation requires the early release of retainage for subcontractors completing their work early on in the project. Ohio’s proposed legislation eliminates retainage on all public work and withholds the Certificate of Occupancy until the contractor provides certification that subcontractor retainage has been paid (Pitts, 2003; Ohio General Assembly, HB208).

Legislation for retainage policy has not been limited to public work. For example, Missouri and Montana limit retainage on private work to 10% and New York, as well as Montana, limit subcontractor retainage to the amount being held on the contractor by the owner for the subcontractor's portion of the work. In 2002 Missouri passed comprehensive legislation for private construction projects limiting retainage to 10%, permitting the substitution of securities for both the GC and subcontractors, line item release of retainage, established provisions requiring retainage to be held in a trust fund, mandated the release of retainage upon substantial completion, and established prompt payment guidelines for subcontractor retainage. In addition, New Mexico's recently enacted legislation reducing retainage to 5%, establishing requirements for prompt payment, and providing for the substitution of securities applies to both public and private construction. This evolution of retainage policy governing private work continues with Colorado and Ohio both having current legislative initiatives affecting retainage practice on private work (Stockenberg & Limbaugh, 2002; McGreevy, 2003; Calvert, 2001; Grimm, 2003; Stockenberg, 2003).

All but three states (New Hampshire, West Virginia, and Wyoming) have statutes regarding retainage covering public and/or private work. Forty states specify a retainage percentage. Of those states that specify a retainage percentage, thirteen retain 10% on the first 50% of the work but ten of these states hold no retainage (or return half of the 1st portion) on the 2nd half of the work so that at completion the combined percentage is 5% or less. One state withholds 8% and twenty-three states retain 5% while three states withhold less than 5%. In total, the amount withheld for retainage at completion is 5% or less for all but two states specifying a retained percentage. That equates to ninety-five percent requiring 5% or less compared to 20 years ago when the typical retained percentage was closer to 10%. In addition to addressing retainage amounts, 21 states permit securities, three allow bonds and one permits a letter of credit as a substitute for retainage and 16 require interest to be paid on retained funds. Federal and State legislation has continued down the path of increased regulation, reduced retainage rates, and the increased acceptance of retainage alternatives for both public and private work. (Croysdale, 2003; Stockenberg & Limbaugh, 2002; ASA, 2003a; McGreevy, 2002; Calvert, 2001; Grimm, 2003).

Industry Standards for Retainage

The retainage practices of the various departments within the Federal government are becoming more consistent while the policies of the states are trending toward reducing the amount of retained funds and the use of alternatives. However, there remains considerable variance in retainage practices throughout the industry, particularly in the private sector (ASA, 2003a).

The American Subcontractors Association, the Associated General Contractors of America, and the Associated Specialty Contractors generally support the reduction or elimination of retainage. However, standard industry contracts and subcontracts typically have provisions for retainage, but avoid specifying retainage percentages and support limited use of alternatives. For example, AGC's standard contract between the Owner and Contractor contemplates retainage at a rate agreed to by the parties and suggests no additional retention be held once the work is fifty percent complete. This standard contract permits early release of retainage for subcontractors that have completed their work and allows securities to be substituted for retainage with interest on the securities accruing to the contractor (AGC No. 200, 2000).

AGC's standard subcontract permits subcontractor retainage at a rate agreed to by the parties and provides for retainage reduction at completion and/or if the Owner reduces the retained percentage of the contractor (AGC No. 650, 1998).

The AIA 201 General Conditions, an industry standard, provides for contractor retainage but does not specify a percentage. The document requires the release of retainage to the general contractor upon substantial completion. It provides for early release of subcontractor retainage only in the event that the subcontractor's retainage is released to the contractor by the Owner (AIA A201, 1997).

In practice, the retainage policy for a project is typically negotiated between the parties and is inconsistent throughout the industry. To aid the development of standard retainage practices, improve the fairness of retainage policy, and increase the acceptance of retainage alternatives several industry organizations reached an agreement outlining suggested industry practice for retainage. In 2002 the Associated General Contractors of America (AGC), the American Subcontractors Association (ASA), and the Associated Specialty Contractors (ASC) approved a 'joint' position concerning retainage practice as follows:

- *Whenever possible, retainage should be eliminated or reduced.*
- *If the need for retainage cannot be eliminated, an acceptable alternative form of security in lieu of retainage may be used.*
- *If retainage is required, the percentage retained should be as low as possible.*
- *Where retainage is held, the percentage level should be the same for subcontractors as for the prime contractor.*
- *Early (including line item) release of retainage should be encouraged.*
- *Reduction in retainage and release of retained funds should not be delayed because work under change orders has not been completed.*
- *When retainage is used, retained amounts should be deposited in an escrow account which bears interest inuring to the contractor and subcontractor in their respective shares. (AGC/ASA/ASC, 2003)*

Impact of Retainage

Even though there has been considerable evolution of retainage policy, there remains a spirited debate on the merits of its practice. Proponents argue that it provides financial protection for the owner and ensures performance while imposing minimal financial hardship on contractors. Opponents submit retainage reduces competition and increases project cost, provides a financial disincentive for timely completion of the work, and places a severe financial hardship upon contractors and subcontractors.

Impact on Construction Cost

Proponents of a reduction or elimination of retainage argue that retainage reduces competition and increases the cost of construction. In 1999 the American Subcontractors Association (ASA, 1999) conducted a national survey of its membership on retainage practices. In that study they found that 91% of their membership are more likely to pursue a project if no retainage is withheld. Also 69% of the responding subcontractors indicated they would lower their bid by an average of 3.1% if the project did not require retainage. ASA's conclusion was that owners and contractors utilizing retainage on their project(s) reduced competition and increased price (Mendes, 2003). Studies by Meir (2002) and SECG (2002) found a similar relationship between payment and price.

and collective performance on the project. Its use tends to indicate a lack of trust promoting adversarial relationships while lowering or eliminating retainage improves the working relationship (Ahmad and Barnes, 1994). The elimination of retainage facilitates project partnering thereby encouraging the alignment of project goals, which is essential for performance improvement (Egan, 1998; Harrell, 2003).

SCEG (2002) contends "there is no evidence to link the existence of retentions to the elimination of defects or enhanced levels of performance" (SCEG, 2002:6). ASA's 1999 survey reached a similar conclusion. It found that retainage was not a motivating factor in the completion of the work for 80% of its membership.

In addition, opponents lament that retainage practices treat performing and non-performing contractors in the same manner thereby reducing its effectiveness. Many argue that retainage provides an incentive to delay completion of the work to minimize the contractor's financing cost. Opponents also submit that retainage is not an owner's only, or most effective, option to induce performance or correction of faulty work (SECG, 2002). They argue a more successful option is to withhold a portion of the progress payment(s) until the specific performance problems are remedied (ASA, 2003a; Lathrop & Gage, 2002).

Financial Impact on Contractors and Subcontractors

ASA's 1999 study found that 92% of the respondents noted retainage a serious problem facing their firm. Many of the respondents harbored a great deal of frustration concerning collection of retainage. **Having these funds tied up for months, if not years, increased their cost of doing business, reduced their ability to take on additional work, and diverted management's efforts toward collection efforts. It also exposed the firm to the risk of continued solvency of the owner until collection.** SECG noted that "construction was financed bottom-up - therefore the weakest and smallest firms (with the poorest access to credit) bear the financing burden" (2002:6). They found that many of the subcontractors bearing the financial burden felt the reason retainage practice persisted is that it remains a source of interest-free financing for an owner. What was particularly offensive to some was that if a contractor reported income based upon the percentage of completion method, they were actually paying income tax on funds not yet received, thereby further aggravating the cash flow burden (Barr, 2002).

Ahmad and Barnes's (1994) Florida study yields similar findings. **It concludes that retainage reduces profitability, increases borrowing costs, precludes investment in additional work or equipment, and increases contractor bankruptcies. OPPAGA's (2000) investigation into retainage practices at the request of the Florida legislature supports this earlier study, but finds that the reduction, or elimination, of retainage may have some adverse effects.** Restricting subcontractor retainage would encourage sureties to become more defensive and underwrite fewer subcontractors needing payment and performance bonds. This in turn would increase contractor risk, resulting in micro management of the subcontractor (or contractor) and/or the reluctance to contract with firms unfamiliar to the parties thereby restricting competition.

Retainage Alternatives

Downs (2002), in a recent article titled "*Big owners liken retainage reform to terrorism,*" points out that resistance to changing retainage practice in the private sector is high and OPPAGA (2002) found that this reluctance to change extends to public agencies. However, in spite of industry resistance, retained percentages are trending down and retainage alternatives are often

2-1-05

7-6

appearing in legislation and industry practice. Over the past couple of decades legislators have enacted prompt payment statutes, the Federal government has adopted a zero retainage policy, and many states have reduced their retained percentage on public work with some even extending statutes to the private sector. In addition to these trends, alternatives to the *standard* retainage practices have started to take hold. The payment of interest on retained funds, retainage escrow accounts, substitution of securities or bonds, line item release, and limiting the amount of retainage that a contractor can withhold from a subcontractor are some of the more commonly emerging alternatives.

Payment of Interest

Proponents of change in retainage practice claim there is a national movement to require interest on retained funds (TCA, 2001). AGC/ASC/ASA's 2002 Joint Position on Retainage states "Where retainage is used, retained amounts should be deposited in an escrow account, which bears interest, accruing to the contractor and the subcontractor in their respective shares." The general consensus emerging within the industry is "once earned, amounts held in retainage should benefit the subcontractor (or contractor)" (OPPAGA, 2000:7). Currently two-thirds of the states require interest on retainage or permit securities with interest accruing to the contractor on public work and five states have extended interest requirements to private work.

Escrow Accounts

With this approach, retainage is placed in escrow accounts that prevent unwarranted expenditure or diversion of the retained funds. This practice can also place the retained funds out of the reach of creditors should the owner experience financial difficulties. An escrow account generally involves two types of expense that must be borne by one or more of the parties – the cost of administering the account and the cost of financing the escrowed funds. Currently 14 states have legislation regarding escrow accounts for retainage with three states extending this protection to private work (Stockenberg & Limbaugh, 2002).

Substitute Securities

Substitution of securities is essentially a process whereby the contractor (and/or subcontractor) substitutes securities in a form acceptable to the parties in lieu of the owner withholding retainage. Currently more than 40% of the states have regulations permitting the substitution of securities for retention on public work and three have extended this practice to the private sector (Stockenberg & Limbaugh, 2002; Mendes, 2003).

Line Item Release

Construction retainage is generally withheld starting with the contractor's first progress payment on the project and held until final completion of the project some months or even years later. This practice places a severe financial burden on those subcontractors, such as excavation or foundation contractors, whose work is completed early in the project (OPPAGA, 2000; SLRC, 2002). Line item release of retainage is a practice whereby retained funds are released when a separately identifiable portion of the work is satisfactorily completed. Seven states currently have statutes permitting this practice on public work and one state, New Mexico, passed legislation in 2001 requiring line item release of retainage on private work (Stockenberg & Limbaugh, 2002).

Retainage Abuse

Even though retained percentage rates are trending down and retainage alternatives are gaining popularity, retaining funds for work performed is still a significant operating challenge for the construction contracting community. The practice presents a financial burden, especially to small and medium sized contracting entities, and can be a source of financial abuse (SCEG, 2002; Stockenberg, 2001a).

As referenced earlier, ASA's 1999 study found that 92% of the respondents noted that retainage was a serious problem facing their firm. In this study, the average amount of retainage receivables 'on their books' was \$620,025 with an average age of 160 days but ranging up to 481 days. Three years later the problems and concerns persist. ASA's 2002 national survey of its membership found that 93% viewed retainage practices a serious or somewhat serious issue with slow final payment of retainage as a serious or somewhat serious issue for 95% of its membership. Additionally, slow payment was the most serious issue for 17% of the respondents which was up from 5% in 2000 (ASA, 2002).

Similar surveys were performed in several states in 2003 with comparable results. Ninety-three percent (93%) of ASA's membership in Ohio viewed retainage a serious or somewhat serious issue and 91% responded similarly for slow final payment. In Mississippi it was 92% and 83% while Ohio respondents indicated 94% and 94% respectfully. Colorado and Phoenix had similar results (ASA, 2003b).

An early UK study found that twenty-five percent (25%) of retained funds were never paid and a majority of the remaining retention was often paid late (Reading Construction Forum, 1998). Similarly, a study by Hughes *et al* (1998) found that payment of contractor and subcontractor retainage was often delayed and posed a serious problem for the industry.

Delays in the recovery of retention are often not justified as evidenced from a study commissioned by The Building Services, Research and Information Association (BSRIA) in 2002. The BSRIA study by Samuelson and Gooding (2002) investigated 27 cases and found only one with justifiable cause to hold the retained sums.

SCEG's (2002) investigation identified a number of instances of retention abuse including long delays in recovery of retained funds, the use of retained funds to unjustly offset alleged poor quality work, delaying retention payment to encourage a reduction in the amount of final payment, and the use of retention to offset charges or delays unrelated to the subcontractors work on the project. BSRIA's study identified common categories of retention abuse, including:

- Long delays in the recovery of retainage. In its study final payment of retained funds was often in excess of two years after completion of the project.
- Continuing to hold retained funds due to poor performance of others.
- Using retained funds to induce subcontractors into final settlement with unfavorable terms for the subcontractor (Samuelson and Gooding, 2002).

Opinions Vary

However, opinions on retainage and its impact and/or abuse often depend on one's vantage point. Most all agree that retainage practice has an impact upon the parties and the construction process, but whether its influence is favorable or unfavorable in large part depends upon perspective and contractual position. The polarization of opinion is evidenced in a 1994 study involving public

11
Senate Commerce Committee

2-1-05
Attachment 7-8

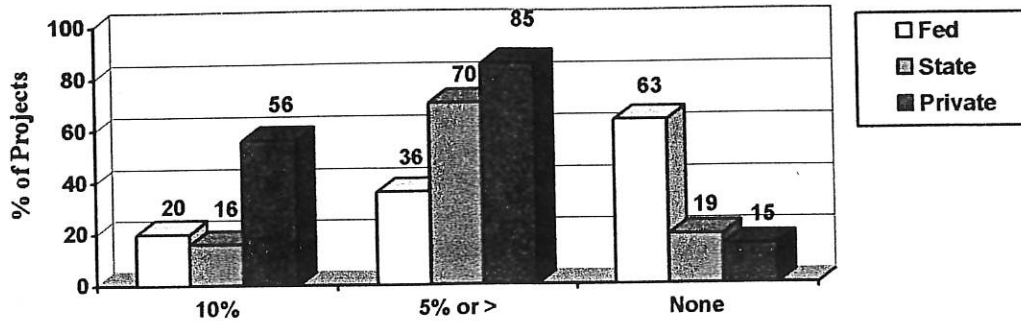


Figure 1: Retained Percentages

Architects, construction managers (CM), contractors, and subcontractors were also asked to provide input concerning the retained percentage on their projects. Table 3: Retained Percentages – Owner’s Agents & At-Risk Builders tabulates their response. As evidenced in Table 3, architects, CM’s, contractors and subcontractors were involved in a limited number of projects where no retainage was held (only 16%, 9%, 12%, and 12% respectively). Conversely, three-quarters or more of the projects for these participants had retainage of 5% or greater.

Table 3: Retained Percentages – Owner’s Agents & At-Risk Builders

Retained Percentage	% @ Comp.	Arch	CM	GC	Sub
10% for the contract duration	10.0%	30%	38%	37%	67%
10% till 50%, then 5% on the remainder	7.5%	17%	17%	8%	6%
10% till 50%, then 0% on the remainder	5.0%	20%	22%	20%	7%
5% for the contract duration	5.0%	9%	11%	19%	7%
5% till 50%, then 0% on the remainder	2.5%	3%	3%	3%	1%
2.5% for the contract duration	2.5%	1%			
1.0% for the contract duration	1.0%	4%		1%	
None	0%	16%	9%	12%	12%
Average retained % during the project		6.99%	8.00%	7.29%	8.27%

The average retained percentage during the life of the project ranged from 6.99% to 8.27% - a retainage rate similar to the average noted by private owners. This correlation is somewhat predictable because approximately 75% of all new work in the US is for the private sector. The most significant variation in the data collected from this group is the concentration of projects with 10% retainage. Two-thirds (67%) of the subcontractors’ projects have 10% retainage versus only approximately one third of the projects for the other categories in this grouping. A statistical comparison between general contractors and subcontractors supports the assertion that the retained percentage is greater for subcontractors.

Use of Alternative Retainage Practices

In the next section of the questionnaire, respondents were asked to indicate how often they encountered alternative retainage practices on their projects. These alternative practices are grouped into four general areas: 1) the substitution of financial instruments of guarantees, 2)

and 5) the perceived fairness of retainage practice. The mean response for each question was calculated and statistical comparisons were evaluated. A summary of the findings is presented in the following sections.

Owner Benefits / Detriments

In the first category, Owner Benefits/Detriments, owners, architects and construction managers (hereafter referred to as Owners/Agents) had general agreement on the benefits and detriments of retainage. The trio felt retainage provided financial protection for the owner and was not employed primarily to provide a source of interest free financing for the owner (a position most strongly voiced by the owners). However, Owner/Agents were neutral on whether retainage provided a buffer for overvaluation of the work installed, maybe in part because they believe that retainage encourages front-end loading.

Similar to the position held by Owners/Agents, contractors and subcontractors believe that retainage encourages front-end loading. In addition, they believe that retainage does not provide a 'buffer' against overvaluation. However, subcontractors feel strongly that retainage does not provide financial protection for the owner and that the primary reason owners withhold retainage is to provide interest free financing whereas, general contractors as a group are neutral on this issue. However, when the contractors that self-perform a majority of their work are analyzed separately, the data reveals sentiments for this group approaching those of the subcontracting community.

The effect of retainage on competition and pricing is also split. Owners/Agents do not believe that contractors and subcontractors are less likely to pursue a project if retainage is being withheld. However, that is not an opinion shared by Construction Managers at-Risk (CM at-Risk), General Contractors (GC), or Subcontractors as noted in Table 5.

Table 5: The Effect of Retainage on Competition and Pricing

Question	CM at-Risk	GC	Sub
Are you more likely to pursue contracts where no retainage is held? (% selecting Yes)	65%	58%	85%
Would your price be lower if no retainage was held? (% selecting Yes)	60%	50%	71%
How much lower would your price be?	2.4%	2.2%	3.6%

Over 65% of CM at-Risk, 58% of the GC's, and 85% of the subcontractors indicated that they would be more likely to pursue projects where no retainage was withheld. In addition, 60% of the CM's at-Risk, 50% of the GC's, and 71% of the subcontractors noted that their price would be lower if no retainage were held. When asked to quantify how much lower, CM's at-Risk advised 2.4%, GC's 2.2%, and subcontractors indicated 3.6%. "Owners would be amazed how much smoother and cost effective a project gets built when you eliminate retainage," stated one respondent. In deference to the opinion of owners and their agents, the financial protection that owners believe retainage provides has a price – reduced competition and increased project cost.

Timely & Full Payment of Retainage

Owners and their agents strongly believe that retainage is paid in full on each project. However, construction managers at-risk, general contractors, and subcontractors (at-risk builders) state that they receive 100% of their retainage on only 89.6%, 93.8%, and 89.6% of their projects respectively. There apparently is a disagreement on the definition of *paid in full*. In addition, there is a wide divide on the timeliness of payment. Owners, architects, and construction managers submit that retainage is paid promptly upon completion, whereas at-risk contractors and subcontractors claim it is not. Here it appears there is a disagreement on the definition of *prompt payment*.

To aid in the assessment of the timeliness of payment, at-risk contractors and subcontractors were asked to provide specific information on the collection of retainage. Their responses are tabulated in Table 6: Retainage Collection Period. Construction managers at-risk claimed the collection of final retainage ranged from 15-180 days with an average collection period of 98 days after completion of the work. General contractors indicated their collection period ranged from 30-400 days with an average of 99 days, and for subcontractors it ranged from 30-400 days with an average of 167 days to collect final retainage after completion of the work. The longer period for subcontractors may be attributed, at least in part, to 1) general contractors typically releasing subcontractor retainage only after receipt from the owner and 2) as noted earlier by the respondents, the release of retainage on work completed early in the project is seldom incorporated into contracts.

The at-risk builders were also asked the longest period they have waited for final retainage on a project. Construction manager's at-risk ranged from 45-1000 days with an average of 620 days, contractors ranged from 45-1825 days with an average of 365 days, and subcontractors ranged from 60-2500 days with an average of 529 days to collect final retainage.

Table 6: Retainage Collection Period

Retainage Collection Item	CM @ Risk		GC's		Subcontractors	
	Range	Ave	Range	Ave	Range	Ave
Days after completion to collect final retainage	15-180	98	30-400	99	30-900	167
Longest wait for final retainage (in days)	45-1500	620	45-1825	365	60-2500	529

When the parties were asked if slow payment of retainage was a serious problem, at-risk contractors, subcontractors, and even construction managers indicated it was a concern. The degree of concern for slow payment progressively ranged from construction managers' at risk 'slightly' agreeing that slow payment is a serious problem, to general contractors' with moderate agreement, to subcontractors' voicing strong support of the statement with an average response of 6.80 on a 7-point scale. Surprisingly, owners and architects were neutral on this issue. Even they did not believe that slow final payment of retainage *was not* a serious problem.

for the substitution of a letter of credit. In general, at-risk builders are not enthusiastic about swapping credit instruments, but favor the substitution of bonds.

Compensation or Protection of Retained Funds

At risk builders strongly support payment of interest on retained funds and the use of escrow accounts. Contractors and subcontractors would also like to see the Certificate of Occupancy withheld until retainage is paid.

Owners and their agents do not support the payment of retainage prior to receipt of the Certificate of Occupancy. Owners also do not support the payment of interest on retained funds while their agents are neutral on this issue. However, owners do not oppose the use of escrow accounts and both of their agents support its use.

Early Release of Retainage

Only subcontractors support the release of their retainage even if the owner has not released the retainage to the contractor. CM's and at-risk builders support line item release of retainage while owners and architects are neutral on this approach. However, all parties support the release of retainage for subcontractors completing work early in the project. A procedure suggested by one respondent was to "release the subcontractor's retainage when the following trade is able to initiate work for that portion of the project."

Prompt Payment and Retainage Legislation

At-risk builders support statutes limiting the maximum percentage of retainage that can be withheld while owners and their agents are neutral on this matter. However, Owners, architects, CM's, CM's at-risk, general contractors, and subcontractors support statutes requiring the prompt payment of retainage.

Additional Alternatives offered by the Respondents

Additional alternatives to traditional retainage practices offered by the respondents fall into six general categories. These include the selection of quality team members, variations on its application to work packages, providing the opportunity to price retainage policy, application of retainage for non-performance, the use of retainage as an incentive, and the withholding or allocation of funds for project closeout activities.

Involve Quality Team Members: A number of the respondents, including some owners, shared the opinion of one subcontractor that "*the best alternative to retainage is for owners and contractors to do their due diligence and only select quality contractors.*" An often-repeated suggestion was that owners should "prequalify contractors based on their size and experience and then award projects based on a combination of price and contractor rating". Many felt that if quality contractors and subcontractors were involved in the construction process, retainage would be unnecessary. "There is really no need for retainage if contractors are pre-qualified before being invited to bid" noted one respondent.

Retainage Incentives: Closely aligned with the involvement of quality builders was the suggestion to establish a retainage policy that provided performance incentives, rather than universal punishment. "First of all hire contractors that you can trust from previous experience. Pay them fair and insist on quality and schedule and only give them future work if they perform" was a

early in the project. None of the parties oppose statutes limiting the maximum retainage percentage. Additionally, owners and their agents along with contractors and subcontractors, support statutes requiring the prompt payment of retainage.

CONCLUSIONS AND RECOMMENDATIONS

There are essentially two camps, with often contrasting positions on the impact, or influence, of retainage practice. Owners and their agents essentially believe that retainage provides needed financial protection with no adverse consequences for the owner while at-risk builders submit that retainage is an unnecessary practice that affords the owner little, or no, protection while placing a severe financial burden on contractors and subcontractors. However, based on the findings of this study, both of these positions may be difficult to defend.

Financial protection for the owner is certainly a legitimate concern when you consider the high risk nature of construction and the fact that owners are extending payment during construction for a partially completed 'product'. However, owners primarily view the protection that retainage affords as materializing only when the project nears completion. Owners and their agents do not believe that retainage provides a financial buffer for overvaluation of the work during construction, in part because they believe that retainage encourages front-end loading. In addition, they view retainage as having marginal impact on contractor performance and believe it provides minimal incentive to ensure quality work. This limited impact on performance may be in part because at-risk builders, as well as architects, believe that retainage treats good and poor performers the same, thereby providing minimal incentive to perform. However, as the project nears completion, owners and their agents firmly believe that retainage encourages the correction of defects, expedites closeout documentation, and ensures completion of the punchlist. In essence, they view retainage as providing effective leverage for the correction of deficiencies and closeout of the project as opposed to providing financial protection or having a substantial impact on performance during the construction period.

However, the perceived protection that retainage provides has a price. Retainage by its definition is the withholding of the funds for portions of the work already completed. Retained funds represent revenue that has been earned by contractors and subcontractors in performance of the work. In essence, retainage requires builders to provide partial funding for the project during construction. For owners and their agents to maintain that the owner has use of this financing at zero cost is neither logical, nor supported by this and earlier studies. The findings of this study support the assertion that retainage policy influences a contractor's and subcontractor's willingness to bid, as well as the price for their portion of the work. Retainage reduces competition and increases the cost of a project – a position in harmony with economic theory. General contractors submit the increase in contract price is 2.2% while subcontractors claim it is 3.6%. However, the actual impact would be relatively easy to assess if owners did as suggested by respondents in this study who recommended that owners adopt a policy requiring contractors and subcontractors to price the project's retainage policy upon submission of their bid. If Owners implemented this approach, the actual impact of retainage policy – the price owners are paying for any perceived or actual financial protection – could be ascertained for each project.

An additional impact of retainage is its negative influence on project relationships. At-risk builders feel that eliminating, or reducing, retainage facilitates project relationships and encourages the alignment of project goals. In contrast, owners and their agents do not believe the implementation of retainage has an adverse influence on the contracting team. However, the only subset of the owners group that has extensive experience with 'zero' retainage projects are

representatives of federal agencies and they support the at-risk builders' position. The majority of these federal agents believe the elimination of retainage has a favorable impact on project relationships. As the construction industry continues to evolve toward an operating environment where effective Owner-Architect-Contractor relationships are essential to reach project objectives, retainage policy may take on added significance.

Contributing to the adverse impact that retainage may have on project relationships is perceived retainage abuse. At-risk contractors and subcontractors assert slow payment of retainage is a serious problem. They submit that they do not receive full payment of retainage on approximately 10% of their projects and sometimes have to wait one to two years after completion of the work for receipt. Even construction managers, as owners' agents, view slow payment of retainage as a concern and surprisingly, owners themselves didn't claim it was *not* a serious problem. Compounding this problem is that contractors and owners use retainage to induce settlement. Contractors use it as leverage against subcontractors to induce settlement on unfavorable terms. And even the owners' agents (architects and CM's) concur with at-risk builders that retainage is often used as leverage by the Owner to resolve contractor claims or changes for extra work.

To facilitate financial protection, enhance performance, and improve project relationships Owners may want to reevaluate retainage policy and align it with the suggestions of some of the respondents. To provide financial protection to ensure project completion owners could prequalify project participants and require contractors to establish line items on the schedule of values for closeout and demobilization activities. In addition, funds could be withheld for defective work – a contractual right that most owners already possess. To encourage performance owners could adopt a policy that gives at-risk builders an incentive to perform, rather than negative reinforcement. Retainage could be withheld only if the contractor falls behind schedule or is not meeting its contractual obligations. It may be in an owner's best interest to adopt the federal government's philosophy that *"retainage should not be used as a substitute for good contract management, and the contracting officer should not withhold funds without cause"*.

Despite the polarization on retainage policy the continuing efforts of the American Subcontractors Association (ASA), the American General Contractors of America (AGC), and the Associated Specialty Contractors (ASC) at the Federal and State level have yielded results. Federal agencies are more likely to embrace a zero retainage policy and the average retained percentage on public work, at both the Federal and State level, is significantly lower than the average of 7.6% on private work. However, this disparity may lessen in the future because, as evidenced by this study, even private owners do not oppose reducing retainage to 5%.

This study found additional evidence that the industry is moving toward a more balanced approach to retainage policy that addresses the legitimate needs and concerns of the parties. While alternatives to *traditional* retainage practice still have limited application, support is present on several fronts. This study confirmed that all of the parties support the release of retainage for work completed early in the life of the project and legislation to ensure prompt payment. Additionally, none of the parties oppose statutes limiting the maximum percentage of retainage. This study also found that the Owners' agents (along with at-risk builders) support the use of escrow accounts and do not oppose the payment of interest on retained funds. Changing attitudes coupled with legislative initiatives affecting both the public and private sector are reinforcing, and in some cases mandating, the acceptance of alternatives to *traditional* retainage practice.

DAN HAAKE

February 1, 2005

The Honorable Karin Brownlee
Kansas State Capitol Building, Room 136 N
300 SW 10th
Topeka, Kansas 66612

Dear Senator Brownlee,

March 3, 2004, I was honored to be able to testify in front of your committee concerning the "Kansas Fairness in Private Construction Contract Act" and for the second time we did not have enough support to enact this legislation. However, I do recall a comment made to me at a House Committee hearing, be persistent because if the legislation is worthy, you will prevail. So here I am again asking for your support as well as the support of this Committee to support and recommend the passage of this Act.

At present, most of the contracts we sign contain payment provisions that simply states that the General Contractor will pay the Subcontractor within 7 days after they have received payment from the Owner, however Subcontractors and Suppliers do not know when the flow down process starts thus making it very difficult to manage cash flow for the day to day operations.

Retention Reform is long past due, Owners and Contractors are using Subcontractors to finance this part of the project interest free and putting a real hardship on those that can at least afford to do so.

We again ask for your help by setting minimum standards for Owners, Contractors and their Subcontractors by passing this Fairness in Contracting Act.

Sincerely,



Dan M. Haake

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R A Y T O W N, M I S S O U R I 6 4 1 3 3

8 1 6 • 7 3 7 • 2 9 5 4

Senate Commerce Committee

2-05

Attachment 8-1

Cost of Money Analysis

1/31/05

Job	Contract Amt	App#	Invoice Amt	Invoice Date	Date Paid	Days Paid	Cost of \$	Retention Amt	Retention Date	Ret Amt Pd	Date Retention Pd	Days Pd	Cost of Retention	
CABOT <i>Hosp</i>	161,363.00	1	24,575.40	10/22/2003	01/08/04	50	336.65	2,730.60	11/20/03		open	437??	163.46	
											1,365.30	1/14/05	420	157.10
		2	36,863.10	12/19/2003	02/05/04	48	484.78	4,095.90	12/19/03			open	409??	229.48
											2,047.95	1/14/05	392	219.94
		3	34,132.50	01/20/2004	03/02/04	42	392.76	3,792.50	01/20/04			open	377??	195.86
											1,896.25	1/14/05	360	187.03
		4	1,365.30	03/23/2004	04/27/04	35	13.09	151.70	03/23/04			open	314??	6.53
											75.85	1/14/05	297	6.17
		5	25,749.04	09/20/2004	11/01/04	42	296.29	2,861.01	09/20/04			open	133??	52.13
											1,430.51	1/14/05	116	45.46
											open	102??	33.61	
										1,202.80	1/14/05	85	28.01	
											open	83??	.54	
										23.90	1/14/05	66	.43	
											open	35??	.25	
										25.59	1/14/05	18	.13	
						avg 44 days	1,784.06						1,326.13	
Turner <i>High School</i>	110,375.00	1	75,091.86	12/20/01	02/26/02	68	1,398.97	8,343.54	12/20/01	834.35	04/23/03	489	111.78	
										7,509.19	02/24/03	431	886.70	
		2	8,343.54	01/22/02	02/26/02	35	80.01	927.06	01/22/02		92.96	04/23/03	457	11.64
											834.10	02/24/03	399	91.18
		3	9,204.30	04/26/02	06/14/02	49	123.56	1,022.70	04/26/02		102.27	04/23/03	362	10.14
											920.43	02/24/03	304	76.66
		4	720.00	04/30/02	06/14/02	45	8.88	80.00	04/30/02		8.00	04/23/03	358	.78
											72.00	02/24/03	300	5.92
		5	1,652.40	05/03/02	06/14/02	42	19.01	183.60	05/03/02		18.36	04/23/03	355	1.79
											165.24	02/24/03	297	13.45
											04/23/03	344	-.44	
											02/24/03	286	-3.34	
											04/23/03	155	.54	
										115.29	02/24/03	97	3.06	
										415.80	04/23/03	36	4.10	
						avg 41 days	1,669.47						1,213.96	

Senate Commerce Committee
2-1-05
Attachment 9-1



Testimony of Kathy Tolle, Vice President, the Kansas City Div. Inc.
Proponent of Senate Bill 33, The Kansas fairness in private construction contract act.
February, 1, 2005

Good Morning, Chairman Karin Brownlee, Chairman Nick Jordan and member's of the Commerce Committee. My name is Kathy Tolle, Vice President of Operations for the National Association of Credit Management Kansas City Division, located in Overland Park, Kansas. Our association represents over 100 construction material manufacturers and distributors in the state of Kansas.

Our purpose today is to lend support to the Senate Bill 33. With provisions for Prompt payment, the Right to stop work, the Venue Requirement, the limits on retainage as they pertain to commercial construction.

Senate Bill 33 will bring order to an industry that is caught up in chaos. Current general contractor payment practices create undue financial hardships on their sub-contractors and suppliers, resulting from delays in payment for materials or labor creating loss of income and a deterioration of customer relationships. The bill is not asking for special treatment only fair treatment for the smaller or perhaps less sophisticated sub-contractor who relies greatly on good faith when signing one sided contracts to obtain business. Senate Bill 33 provides the contractor, subcontractor and suppliers fair treatment in undisputed request for payment.

Our goal is to protect the typically smaller and more volatile Kansas companies who may or may not be able to financially fight for due payment and whose livelihood depends on prompt payment for work performed.

Credit depends on the ability and willingness of a customer to pay. Without that credit is meaningless. Help us support our state's construction industry with fair payment consideration to contractors, subcontractors and suppliers and pass Senate Bill 33.

Thank you for your interest and attention.

Senate Commerce Committee

2-1-05

Attachment 10-1

**Kathy
Damron**

(785) 235-2525
(785) 354-8092 FAX
E-MAIL: MKDTopeka@aol.com

919 SOUTH KANSAS AVENUE

Topeka, Kansas 66612-1210

TO: Senate Commerce Committee
FROM: Kathy Damron, Kansas City Kansas Area
Chamber of Commerce
RE: Support for Senate Bill 33
DATE: February 1, 2005

The Kansas City Kansas Area Chamber of Commerce appreciates the opportunity to appear before you in support of Senate Bill 33, enacting a prompt pay in private construction act.

The proposal under consideration has the support of the businesses and individuals who participate in the KCK Chamber. Brought to the chamber's consideration by members of the American Subcontractor's Association, this bill brings forward good business practices for inclusion in state statute. If enacted, Kansas would join the list of some 18 states where prompt pay laws govern contractors and subcontractors. In the Kansas City area, the state of Missouri operates under prompt pay laws, although they are less stringent than those embodied in this proposal.

We urge the Senate Commerce Committee to give full, thoughtful consideration to this measure. Many small Kansas companies who may not be able to fight for due payment would benefit greatly by consideration of this measure.

Thank you for your interest and consideration.

Public Relations and Governmental Affairs

Senate Commerce Committee

2-1-05
Attachment 11-1



PRE-ENGINEERED METAL BUILDINGS
ARCHITECTURAL ROOFING/SIDING

P.O. BOX 6144
KANSAS CITY, KANSAS 66106
913/384-5577
FAX 913/677-9680

January 31, 2005

The Senate Commerce Committee
Hon. Karin Brownlee & Nick Jordan, Chairpersons
Kansas State Capitol Building
Topeka, Kansas 66612

Senate Committee Members:

Jim Barone, Jay Elmer, Laura Kelly, Roger Reitz, Jean Schodorf, Susan Wagel, david Wysong

Re: Senate Bill 33 – Kansas Fairness in Construction Contracts Act

My name is Thomas E. Farrar, president of Advanced Building Systems, Inc. I'm representing my company and the American Subcontractors Association. My company is a subcontracting firm. We provide material, as well as labor on construction projects.

I've been a member of the American Subcontractors Association for approximately 9 years. As a member of the Board of Directors of the Greater Kansas City Chapter of the American Subcontractors Association, I value my position greatly, and the knowledge the association has brought to the table for me and other members. The association is doing great things for the subcontractors in Kansas City, as well as across the nation, especially with regards to legislative issues. The association has been an invaluable tool for subcontractors and remains so today. I'm here today to show **my support for Senate Bill 33**, as well the support of the American Subcontractors Association.

Senate Bill 33 and what it stands for, is long overdue. I've been a subcontractor in Kansas City since 1987. In that time, I've reviewed my share of unfair construction contracts. I've experienced slow progress payments, been subjected to unfair back-charges to my contract for delays caused by others, and have experienced the long, drawn out wait for retainage on completed projects, as well as other unfair business practices or language in a contract. At the present time, I have no recourse or remedy contractually to avoid these items, with the exception of filing a mechanics lien, which typically creates dissension between us and the party we have contracted with.

The items I mentioned above do nothing but cost my company money in the way of finance charges, and thus reduce my cash flow. Meanwhile, my bills keep coming in, and my suppliers and subcontractors expect be paid on time, not to mention my employees. If I were slow paying with my bills, it would seriously damages my ability to hire reliable employees, subcontractors, and to procure the material I've contracted (agreed) to furnish.

(cont. pg 2)

Senate Commerce Committee

2-1-05

Attachment 12-1

Many times, the only way to stay current with my subs and suppliers is to borrow money, and as a small business, it's difficult at best, and not getting any easier with bank or lending institutions regulatory requirements and changes, and the banks expectation of being paid on time, or face the possibility of incurring serious delinquent interest charges. It's a fact that no bank will lend money without charging interest for it and for late payments. Senate Bill 33 will eliminate much of this burden, and sometimes nightmare.

We will assuredly have opposition to this bill, opposition from some parties or entities that SB33 will also benefit. I cannot understand how anybody could argue against fair and prudent business practices. We're all taught at a very young age not to lie, cheat, or steal, but in many ways, in my opinion, that is what some construction agreements allow. As a business man and subcontractor, I'm only asking to be paid on time the money that is due me for my and my employee's honest, hard work, and not be responsible for or affected by others mistakes or short comings on a construction project.

We enter into agreements with general contractors most of the time. Typically, our agreement is contractually tied into the general contractor's agreement with the owner, yet in many instances, the general contractor has his own language in our contract that is contrary to theirs with the owner, and unless you spend hours upon hours researching the owner/general contractor agreement, and all it's supplemental conditions, you may not ever be aware of how the agreements differ. I've even experienced some general contractors getting upset or delaying, and even refusing to furnish a copy of their agreement with the owner, even though they are obligated to furnish a copy of that agreement because our contract is directly tied in with theirs and the owners. Why? You can probably come to your own conclusion. I am not here to "bash" general contractors or any others for that matter, but simply want a fair, level playing field in the construction industry, which I would like to be a part of for many years to come.

Those who are opposing this bill will say that it will influence their decision on whether to do business in Kansas. These same companies, some of them global, multi-million dollar businesses do business in most, if not all of the states that have fair construction legislation on the books.

In all walks of life, change is inevitable. It doesn't matter whether it's personal or in business. It's time for a big change for subcontractors and subcontract agreements. It's time to do away with the status quo, "business as usual mentality". The change SB33 will bring about will do just that, make construction agreements fair for all parties involved. Subcontractors should not be in the banking or finance business. We're here for a specific reason, to perform a specific part of a total construction project, as a team player, not a "catch all" for others involved up stream, to improve their cash flow and reduce their costs of doing business. The change will be hard to swallow for some, because the benefits of the "status quo" have been so good for so long for those who are on the other end of the subcontract agreement.

(cont. pg 3)

Senate Commerce Committee

2-1-05

Attachment

12-2

Page 3
January 31, 2005
Senate Bill 33

I sincerely appreciate your time and prudent evaluation of SB33, and all the testimony and letters you have received and reviewed these past few months. What we want is not unheard of and it's certainly not wrong to expect fair business practices for all parties involved in the construction industry and in construction agreements. As a matter of fact, it's the law in many other states. You can make that change for Kansas by voting in favor Senate Bill 33. You will not only benefit those of us business owners contracting in the great State of Kansas, but also our employees, and will join many other states that have mandated fair construction agreements and practices. What a wonderful, exciting chapter of Kansas history the passing of Senate Bill 33 will be.

Thank you very much for your consideration !

Respectfully Submitted,



Thomas E. Farrar
Advanced Building Systems, Inc.
Sb33.test.1-31-05



Senate Commerce Committee

2-1-05

Attachment 12-3