

## MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE

The meeting was called to order by Chairman Don Dahl at 9:00 A.M. on February 7, 2006 in Room 241-N of the Capitol.

All members were present except:

Joe Humerickhouse- excused  
Mike Kiegerl- excused

Committee staff present:

Jerry Ann Donaldson, Kansas Legislative Research Department  
Norm Furse, Office of Revisor of Statutes  
Renaë Jefferies, Office of Revisor of Statutes  
June Evans, Committee Secretary

Conferees appearing before the committee:

Rep. John Grange  
Ken Keller, Western Extralite Company  
Bill Miller, Building Erection Services Company  
Dale Glenn, Co-Chair, Government Affairs, AIA, Kansas  
Corey Peterson, Associated General Contractors  
Joe Levens, Martin K. Eby Construction, Wichita  
Dean Ferrell, Ferrell Construction Company, Topeka  
Kevin Kelly, Kelly Construction Company,  
Topeka Mark Schreiber, Manager, Government Affairs, Westar Energy

Others attending:

See attached list.

The Chairman opened the hearing on **HB 2655 - Kansas fairness in private construction contract act.**

Representative John C. Grange testified as a proponent to **HB 2655**. Similar legislation was introduced last session under **SB 33** which contained elements of contractor rights for prompt pay for private construction projects. Retainage, normally 10%, is held until completion of the project. Once all conditions of the contract are met, the owner has use of the project, and has accepted the keys so to speak, and final payment is released along with the retainage. Current law requires this payment to be made within 60 days. An amendment to the bill is reducing the 60 days to 30 days. There is room for compromise; therefore, continued work with all concerned parties to bring about additional retainage reform in the future is needed (Attachment 1).

Ken Keller, controller, Western Extralite Company, testified as a proponent to **HB 2655**. Last year the Kansas Legislature took an enormous step forward in leveling the playing field between the owner, the general contractor and sub-contractors when **Sub SB 33** was passed out. A very important part of the payment process was omitted from **Sub SB 33**. The average final retainage payment is made 167 days after completion of the project and only 89.6% is paid in full. That means that a little over 10% aren't paid in full (Attachment 2).

Dale Glenn, Government Affairs Chair, American Institute of Architects in Kansas (AIA Kansas) testified as an opponent to **HB 2655**. The process of designing and constructing buildings involves a myriad of people: the owner, design professionals, general contractors, subcontractors representing a wide variety of trades, and material suppliers. Many remedies are sought by subcontractors and material suppliers regarding prompt payment between the owner, the contractor, subcontractor and the material suppliers for private contracts. It provides penalties if payments are not made without stipulated time frames. AIA agreed to the compromise worked out in the conference committee that deleted the requirements that are now in **HB 2655**. Retainage is often the only tool the owner has to make sure the work is finished in a satisfactory way. Many times returning retainage within 60 days on undisputed work is not reasonable (Attachment 3).

Corey D. Peterson, Associated General Contractors of Kansas, Inc., (AGC) testified in opposition to **HB 2655**. AGC opposes **HB 2655** as written, but would support the bill with the inclusion of two amendments. AGC respectfully requests that the text beginning on page 2, line 43 with “, *but in any...*” and concluding on

CONTINUATION SHEET

MINUTES OF THE House Commerce and Labor Committee at 9:00 A.M. on February 7, 2006 in Room 241-N of the Capitol.

page 3, line 4 “...under the contract,” be deleted. AGC also asks that on page 3, line 18, “60 days” be amended to read “30 days.” AGC of Kansas respectfully requests that **HB 2655** be passed out favorably as amended (Attachment 4).

Joseph D. Levens, Jr., Vice President of Eby Construction and President of the Associated General Contractors of Kansas, Inc., testified as an opponent to **HB 2655** as written, but would support the bill with one amendment as presented by AGC of Kansas (Attachment 5).

Dean Ferrell, Ferrell Construction of Topeka, Inc., testified in opposition to **HB 2655**. Concern with **HB 2655** is centered around early release of retainage to subcontractors when they have certified their work is 100% complete. Urge passage of **HB 2655** with AGC of Kansas amendments (Attachment 6).

Kevin Kelley, President of Kelley Construction Co., Inc. and Vice President of the Associated General Contractors of Kansas, testified opposing **HB 2655** as written. With the amendment by AGC, **HB 2655** would be supported (Attachment 7).

Mark Schreiber, Manager, Government Affairs, Westar Energy, testified in opposition of **HB 2655**. Westar’s opposition is based on the new language in section 2(f). If this new language was deleted there would be no opposition to the bill (Attachment 8).

William R. Miller, President, Building Erection Services Company, testified after the opponents as a proponent. Mr. Miller spoke in favor of a balloon to **HB 2655**, striking (h) on page 1, on page 2 deleting “*but in any*” through “*contract*,” on page 3 and adding “Retainage shall be released by the owner upon completion of any portion of work that is described in a specification section. No more than 150% of the value of work that is not completed due to no fault of the subcontractor may be withheld pending completion. In line 15, page 3, change 10% to 5% and delete (b) and reletter (c) to (b) (Attachments 9, 10 and 11).

The Chairman closed the hearing on **HB 2655**.

The meeting adjourned at 10:55. The next meeting will be February 8, 2006.

COMMERCE AND LABOR COMMITTEE

DATE February 7, 2006

NAME	REPRESENTING
Ken Keller	Western Extralite Company
Richard J. Smalley	Kuang & Assoc
Cody Peterson	AGC of Kansas
JOE LEVENS	EBY CONSTRUCTION / AGC OF KS
DEAN PERRELL	PERRELL CONSTRUCTION OF TOPEKA
KEVIN KELLEY	KELLEY CONSTRUCTION Co., INC
Diane Levens	Eby Construction
Eric Steffel	AGC of KS
DALE GLENN	AIA KANSAS
Denny Burgess	ASA
Jim McHaff	KS AFL-CIO
Jim Meag	Spirit Aerosystems
Brian McJannet	KTLA
Kiel Brunner	intern
Wendy Williams	KAPA-KRMCA
Martha Ann Smith	KMHA
David Hanson	KS Insur Assns
Dan Murray	Federico Consulting

Testimony Re: HB 2655 Contractor Retainage 05  
Representative John C. Grange  
Room 531-N, 296-7663  
February 7<sup>th</sup> 2006

Similar legislation was introduced last session under SB 33 which contained elements of contractor rights for prompt pay for private construction projects. This included provisions for work stoppage by subcontractors if payment is not received from the project owner/developer through the general contractor, under conditions of the contract.

In the normal course of work monthly progress payments are requested for acceptable and properly completed work. This work must be approved by the design architects or their designated representative (inspectors or general contractors for example). You should be aware some of these projects from ground breaking to completion can last for months, a year, or longer.

The pay requests are typically submitted by the sub contractor or speciality contractor by the 25<sup>th</sup> of each month to the General Contractor who will in turn presents a request for payment to the Architect by the 30<sup>th</sup>, who will give the same to the owner for payment by the 5<sup>th</sup> of the following month. This payment is then presented in reverse order for payment to reach the subcontractor within 7 days later.

Be advised that in the normal course of business the material suppliers, taxing entities, mortgage companies, insurance companies, utility companies, and employees of these speciality contractors expect to be paid regardless if the subcontractor receives his payment.

A portion of this payment called "*retainage*" (normally 10%), is held until completion of the project. Once all conditions of the contract are met, the owner has use of the project, and has accepted the keys so to speak (*substantial completion, Sec 1, h, lines 39-42*), final payment is released along with the retainage. Current law requires this payment to be made within 60 days. We are asking this to be reduced to *30 days (Sec 3, b, line 18)*.

Today in our industry the profit margin can be relatively slim. It is not unusual for a contractor to make less than 5% profit and in many cases 1% to 3% profit is more likely. If payment is not received in time to satisfy his or her other fiduciary responsibilities then an "operating loan" may be required by the contractor to continue operation. The contractor's lending institution could set this loan rate at 7 ½ % or more. Cash flow is very important!

As with many statutes there remain some "fine tuning" of the language of the law to more accurately reflect the intent. During our session debate last year on this bill some issues were found to be unacceptable to some; the Association of General Contractors (AGC), American Subcontractors Association (ASA), and Architects to name a few.

During the interim period I have met with representatives of the AGC and ASA to work out a compromise piece of legislation. This past Friday, 3 February, I was a invited to the AGC convention in Wichita where I participated in two round table discussions with the contractor and

Comm Labor  
2-7-06  
Atch #1



sub contractor members. I had the opportunity to hear from over 40 members that represented all crafts involved in the commercial construction industry. Some construction companies are very large multi-generation firms with internal engineering and legal departments while many more are as small as two men and a truck.

The construction industry throughout Kansas is made up of various groups and each has their own issues specific to the different services and geographical areas they serve.

This brings us to this point in our deliberations. I am in-between the proponents and opponents on these issues. I can see both views and am aware that we do not wish unintended consequences upon ourselves. How do you we protect the interest of owners and General Contractors while ensuring the cash-flow for the subcontractors is not delayed for an unusually extended period?

You will hear from both sides of this issue and their positions require your careful thought and consideration. I would hope you will ask questions so as to develop your own understanding and position on the issues.

While I am not in total agreement with either side, their positions are based on their many years of experience in the construction industry and are deserving of our consideration. I believe there is room for compromise, therefore I present this legislation with the intent to continue to work with all concerned parties to bring about additional retainage reform in the future.

Thank-you for you attention and I will stand for questions now and will address issues as they arise from the testimony of others.

February 7, 2005

Mr. Chairman:

I want to thank you and your committee for the opportunity to speak in support of House Bill 2655 relating to retainage on construction projects. I'm Ken Keller, controller of Western Extralite Company with locations in Topeka, Lawrence, Leavenworth, Manhattan, Lenexa and various locations in Missouri. I also represent the Electric League of Greater Kansas City, with a membership of 325, and the National Association of Credit Managers, Kansas City Division, with a membership of 560, plus other interested organizations. Western Extralite Company sells electrical supplies to the construction industry.

Last year the Kansas Legislature took an enormous step forward in leveling the playing field between the owner, the general contractor and subcontractors when they passed into law Substitute for SB 33. To promote passage of that bill, a very important part of the payment process was omitted. That being retainage. HB 2655 addresses that shortcoming.

In your handouts you will see the cover pages of a survey conducted by Clemson University in November 2004. This covered retainage practice in the construction industry. Behind that you will see page 22 of this report stating that the average final retainage payment is made 167 days after

Comme labor  
2-7-06  
Atch # 2

completion of the project and that 89.6% is paid in full. That means that a little over 10% aren't paid in full.

Both of these numbers are appalling and grossly unfair. All of this legislation was designed to be fair and level the playing field. HB 2655 sets a definite timetable for final payment of retainage and will correct a grossly unfair situation. I urge your support of HB 2655

Kenneth R. Keller,

Western Extralite Company,

(816)421-8404



**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.**  
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# Retainage Practice in the Construction Industry

Dennis C. Bausman, PhD

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### 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.



February 7, 2006



TO: Representative Dahl and Members of the House Commerce and Labor Committee

FROM: Dale Glenn, Government Affairs Chair

RE: Opposition of HB 2655

*President*  
Jan Burgess, AIA  
Derby

*President Elect*  
Douglas R. Cook, AIA  
Lenexa

*Secretary*  
C. Stan Peterson, AIA  
Topeka

*Treasurer*  
Michael G. Mayo, AIA  
Manhattan

*Directors*

Janifer Cain, Assoc. AIA  
Wichita

Mark Franzen, AIA  
Overland Park

John Gaunt, FAIA  
Lawrence

Chad P. Glenn, AIA  
Wichita

Gary Grimes  
Topeka

David S. Heit, AIA  
Topeka

Josh Hermann, AIA  
Wichita

Craig W. Lofton, AIA  
Salina

Don I. Norton, P.E.  
Wichita

Wendy Ornelas, FAIA  
Manhattan

J. Michael Rice  
Wichita

David Sachs, AIA  
Manhattan

Andrew D. Steffes, AIA  
McPherson

Daniel (Terry) Tevis, AIA  
Lenexa

J. Michael Vieux, AIA  
Leavenworth

Nadia Zhiri, AIA  
Lawrence

Representative Dahl and Members of the Committee, I am Dale Glenn, Government Affairs Chair, of the American Institute of Architects in Kansas (AIA Kansas.) I am here to testify on our opposition of HB 2655.

AIA Kansas is a statewide association of architects and intern architects. Most of our 700 members work in over 120 private practice architectural firms designing a variety of project types for both public and private clients. The rest of our members work in industry, government and education where many manage the facilities of their employers and hire private practice firms to design new buildings and to renovate or remodel existing buildings.

The process of designing and constructing buildings involves a myriad of people: the owner, design professionals, general contractors, subcontractors representing a wide variety of trades, and material suppliers.

Last year, this Committee passed SB 33 that provided many remedies sought by subcontractors and material suppliers regarding prompt payment between the owner, the contractor, subcontractor and the material suppliers for private contracts. It provides penalties if payments are not made without stipulated time frames. While we lobbied against the bill, we did agree to the compromise worked out in conference committee that deleted the requirements that are now in HB 2655 on page 2, line 43 and continuing on page 3, lines 1-4 and lines 17 and 18.

Why does the owner retain a percentage of the contractor's or subcontractor's payment? It is often the only tool the owner has to make sure the work is finished in a satisfactory way.

Many times returning retainage within 60 days on undisputed work is not reasonable:

- Underslab plumbing contractor completed work in January and actual connection to fixtures occurs in August. Only then can we be certain work was complete.
- Concrete structural deck subcontractor "completes" his work in November. In May of the following year it is discovered that proper block-outs have not been provided for openings.
- Iron work subcontractor completes work and submits all paperwork. 4 months later Union calls general contractor – Ironworkers have not been paid benefits. Subcontractor falsified benefits records. \$100,000 claim by Union that is covered by retainage.

*Executive Director*  
Trudy Aron, Hon. AIA, CAE

AIA Kansas has no issue with the definition of Substantial Completion. Beneficial occupancy can take place when life safety concerns are met – however, many time aesthetic and finish components

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Comm & Labor  
2-7-06  
Atch # 3

can lag significantly more than 60 days following substantial completion. Without retainage, there is no incentive for the subcontractor to finish the work. For instance, substantial completion is given prior to final balancing of mechanical system. 90 days later during balancing it is discovered that ducts have collapsed and chases must be opened to make significant repairs.

AIA Kansas urges you to oppose this bill. I will be happy to answer any questions you may have.

---





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**TESTIMONY OF  
ASSOCIATED GENERAL CONTRACTORS OF KANSAS  
BEFORE HOUSE COMMITTEE ON COMMERCE AND LABOR  
HB 2655**

February 7, 2006

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

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

**AGC of Kansas opposes HB 2655 as written, but would support the bill with the inclusion of two amendments. AGC respectfully requests that the text beginning on page 2, line 43 with “, but in any...” and concluding on page 3, line 4 “...under the contract,” be deleted. AGC also asks that on page 3, line 18, “60 days” be amended to read “30 days.”** A copy of the requested balloon is attached.

The deletion of the above mentioned text is of importance as it conflicts with Sec. 3 (b) on page 3, lines 17-18. The change from 60 to 30 days is to make the pay period consistent with the existing statute.

While AGC of Kansas philosophically opposes government continuing to expand its involvement in private contracts, it supports the amended bill per the attached balloon. HB 2655, as amended, would help insure that retention of subcontractors who’s work is successfully complete be released by the owner within 30 days of “substantial completion.” The bill approved last year specifies prompt payment terms by the general contractor to the subcontractor.

This amendment is the consensus position of AGC both general contractors and subcontractors following compromises by both groups. Anything less would not likely improve the subcontractor’s ability to collect monies owed after the completion of a project. Additions to this compromise may put the general contractor and owner at undue risk.

This amendment may not be deemed perfect by all subcontractors (or general contractors), but it at least provides an “end game” (substantial completion) when the retention will be released. The length of a project is generally known when the project is put out for bid. Thus the time period until substantial completion may be used by subcontractors when figuring their costs in preparing a bid.

The AGC of Kansas **respectfully requests that you consider the above amendments and approve HB 2655 for passage as amended.** Thank you for your consideration.

Comm & Labor  
2-7-06  
Atch # 4

**HOUSE BILL No. 2655**

By Committee on Commerce and Labor

1-19

9 AN ACT concerning private construction contracts; relating to retainage;  
10 amending K.S.A. 2005 Supp. 16-1802, 16-1803 and 16-1804 and repealing  
11 the existing sections.  
12

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

14 Section 1. K.S.A. 2005 Supp. 16-1802 is hereby amended to read as  
15 follows: 16-1802. As used in this act:

16 (a) "Construction" means furnishing labor, equipment, material or  
17 supplies used or consumed for the design, construction, alteration, renovation,  
18 repair or maintenance of a building, structure, road, bridge, water  
19 line, sewer line, oil line, gas line, appurtenance or other improvement to  
20 real property, including any moving, demolition or excavation.

21 (b) "Contract" means a contract or agreement concerning construction  
22 made and entered into by and between an owner and a contractor,  
23 a contractor and a subcontractor or a subcontractor and another  
24 subcontractor.

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

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

30 (e) "Person" means an individual, corporation, estate, trust, partnership,  
31 limited liability company, association, joint venture or any other legal  
32 entity.

33 (f) "Retainage" means money earned by a contractor or subcontractor  
34 but withheld to ensure proper performance by the contractor or  
35 subcontractor.

36 (g) "Subcontractor" means any person performing construction covered  
37 by a contract between an owner and a contractor but not having a  
38 contract with the owner.

39 (h) "Substantial completion" means the stage of a construction project  
40 where the project, or a designated portion thereof, is sufficiently complete  
41 in accordance with the contract, so that the owner can occupy or utilize  
42 the constructed project for its intended use.

43 Sec. 2. K.S.A. 2005 Supp. 16-1803 is hereby amended to read as

1 follows: 16-1803. (a) Subject to the provisions of subsections (b), (c), (d),  
 2 (e), (f), (g) and (h) and K.S.A. 2005 Supp. 16-1804 and 16-1805, and  
 3 amendments thereto, all persons who enter into a contract for private  
 4 construction after the effective date of this act, shall make all payments  
 5 pursuant to the terms of the contract.  
 6 (b) The following provisions in a contract for private construction  
 7 shall be against public policy and shall be void and unenforceable:  
 8 (1) A provision that purports to waive, release or extinguish the right  
 9 to resolve disputes through litigation in court or substantive or procedural  
 10 rights in connection with such litigation except that a contract may require  
 11 binding arbitration as a substitute for litigation or require non-binding  
 12 alternative dispute resolution as a prerequisite to litigation;  
 13 (2) a provision that purports to waive, release or extinguish rights  
 14 provided by article 11 of chapter 60 of the Kansas Statutes Annotated,  
 15 and amendments thereto, except that a contract may require a contractor  
 16 or subcontractor to provide a waiver or release of such rights as a condition  
 17 for payment, but only to the extent of the amount of payment  
 18 received; and  
 19 (3) a provision that purports to waive, release or extinguish rights of  
 20 subrogation for losses or claims covered or paid by liability or workers  
 21 compensation insurance except that a contract may require waiver of subrogation  
 22 for losses or claims paid by a consolidated or wrap-up insurance  
 23 program, owners and contractors protective liability insurance, or project  
 24 management protective liability insurance.  
 25 (c) Any provision in a contract for private construction providing that  
 26 a payment from a contractor or subcontractor to a subcontractor is contingent  
 27 or conditioned upon receipt of a payment from any other private  
 28 party, including a private owner, is no defense to a claim to enforce a  
 29 mechanic's lien or bond to secure payment of claims pursuant to the  
 30 provisions of article 11 of chapter 60 of the Kansas Statutes Annotated,  
 31 and amendments thereto.  
 32 (d) All contracts for private construction shall provide that payment  
 33 of amounts due a contractor from an owner, except retainage, shall be  
 34 made within 30 days after the owner receives a timely, properly completed,  
 35 undisputed request for payment.  
 36 (e) If the owner fails to pay a contractor within 30 days following  
 37 receipt of a timely, properly completed, undisputed request for payment,  
 38 the owner shall pay interest to the contractor beginning on the thirty-first  
 39 day after receipt of the request for payment, computed at the rate of 18%  
 40 per annum on the undisputed amount.  
 41 (f) A contractor shall pay its subcontractors any amounts due within  
 42 seven business days of receipt of payment from the owner, including  
 43 payment of retainage, if retainage is released by the owner, *but in any*

← Delete “,but in any” on line 43.

1 ~~case the owner shall release for payment the retainage due to a contractor~~  
 2 ~~and the contractor shall release for payment the retainage due to a subcontractor~~  
 3 ~~not more than 60 days after the subcontractor has satisfactorily~~  
 4 ~~completed all the work of the subcontractor under the contract,~~ if the  
 5 subcontractor has provided a timely, properly completed and undisputed  
 6 request for payment to the contractor.

← Delete lines  
 1-4 up to  
 ...under the  
 contract,"

7 (g) If the contractor fails to pay a subcontractor within seven business  
 8 days, the contractor shall pay interest to the subcontractor beginning on  
 9 the eighth business day after receipt of payment by the contractor, computed  
 10 at the rate of 18% per annum on the undisputed amount.

11 (h) The provisions of subsections (f) and (g) shall apply to all payments  
 12 from subcontractors to their subcontractors.

13 Sec. 3. K.S.A. 2005 Supp. 16-1804 is hereby amended to read as  
 14 follows: 16-1804. (a) An owner, contractor or subcontractor may withhold  
 15 no more than 10% retainage from the amount of any undisputed payment  
 16 due.

17 (b) ~~An owner may withhold retainage on any undisputed payment~~  
 18 ~~due for no more than 60 30 days after substantial completion of the project.~~

← Delete "60"  
 and replace  
 with "30". days

19 (c) If an owner, contractor or subcontractor fails to pay retainage, if  
 20 any, pursuant to the terms of a contract for private construction or as  
 21 required by this act, the owner, contractor or subcontractor shall pay  
 22 interest to the contractor or subcontractor to whom payment was due,  
 23 beginning on the first business day after the payment was due, at a rate  
 24 of 18% per annum.

25 Sec. 4. K.S.A. 2005 Supp. 16-1802, 16-1803 and 16-1804 are hereby  
 26 repealed.

27 Sec. 5. This act shall take effect and be in force from and after its  
 28 publication in the statute book.

4-4





# Martin K. Eby Construction Co., Inc.

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*"Building a Better Tomorrow"*

## WRITTEN TESTIMONY OF JOSEPH D LEVENS JR., CPC BEFORE HOUSE COMMITTEE ON COMMERCE AND LABOR

HB 2655

February 07, 2006

Mister Chairman and members of the committee, my name is Joe Levens, Vice President of Eby Construction and President of the Associated General Contractors of Kansas, Inc.

**The AGC of Kansas opposes House Bill 2655 as written, but would support the bill with one amendment as presented by Corey Peterson, Executive Vice President of the AGC of Kansas, Inc.**

On February 2-3 2006, the AGC of Kansas, Inc. conducted its 72nd Annual State Convention in Wichita, Kansas. During the convention roundtable discussions were conducted to allow subcontractor and general contractor AGC members to voice their opinions regarding this proposed legislation. The following is a brief summary of the roundtable discussion:

- Currently, most consider retainage as an additional guarantee that the constructor, both generals and subcontractors, will complete the work including any remedial work discovered during the fit and finish phase of a project. This is in addition to the typical warranty periods that begin when the project is accepted by the owner.
- In some cases it may be appropriate to release retainage upon satisfactory completion of the work, while other cases may not be appropriate. As presented, HB 2655 is a one size fits all and may not provide the flexibility required in construction contracting.
- Paying retainage earlier than the expected standard could expose the entity withholding the retainage to increased risk regarding mechanics liens for unpaid material expenses.
- To protect the entity withholding the retainage from increased risk associated with business failures, etc. may require an increase in the need for the lower tier entity to provide performance and payment bonds for their work. This may exclude small companies who do not qualify for performance and payment bonds from competing for trade contracts. The additional use of performance and payment bonds from lower tier contractors would increase the cost of the project to the owner.
- Currently, a variety of retainage clauses exist in construction contracts including early release of retainage and in some cases no retainage. These conditions exist because the contracting parties have developed trustworthy relations based on years of experience working with each other to satisfy the needs of the project.
- The AGC's amended version of the bill attempts to reach a compromise by establishing an end date to the retention period without increasing the risk on the other parties.

**Therefore, I respectfully request that you consider the AGC's amended version of HB 2655 for passage.**

Thank you for your consideration.

Commerce Labor  
2-7-06  
Atch # 5

# FERRELL

CONSTRUCTION  
OF TOPEKA, INC.

WRITTEN TESTIMONY TO THE HOUSE  
COMMERCE & LABOR COMMITTEE

Re: HB 2655

February 7, 2006

By  
DEAN F. FERRELL

Mr. Chairman and Members of the Committee:

My name is Dean Ferrell, President and Owner of Ferrell Construction of Topeka, Inc. I am a past president of the AGC of Kansas.

I am writing to voice my opinions of HB 2655, pertaining to construction contracts, as it relates to retainage.

The withholding of retainage can be a controversial issue. Retainage is not a bad thing. Since I've been around the construction industry, it's been a way of life. It provides Owners with a sense of security, sometimes leverage to ensure their "entire" project is completed correctly and on time. Successful contractors and subcontractors have learned to deal with retainage by allowing for financing costs in their estimates.

My concern with HB 2655 is centered around early release of retainage to subcontractors when they have certified their work is 100% complete:

1. A general contractor is placed at risk if required to pay a subcontractor the full amount of the subcontractor's contract prior to the substantial completion of the project. Most assuredly, should deficiencies in the subcontractor's work suddenly appear after the subcontractor has been paid off, but prior to the Owner's acceptance of the project, I can guarantee that the Owner will show no sympathy to the general contractor when the subcontractor won't return or, at least, won't return promptly. The "buck will stop" with the general contractor, and a non-cooperative, "paid off" subcontractor, will probably force the general contractor to spend his own money to correct the problem. That would be unfair.
2. There is no mention of warranty "start" dates in the present bill. If a subcontractor establishes his work is complete prior to the substantial completion date of the project, will that subcontractor expect his warranty to start on the date "he" finishes or the date the entire project is accepted by the Owner. There should only be one warranty date established for all parties: the substantial completion date. Please don't place the general contractor in the middle of this impossible situation. This bill, as worded, will leave the door open for disputes in enforcing warranty durations.

The AGC of Kansas is presenting today an amended version of HB 2655. I ask that you give strong consideration to endorsing the AGC's amendments. Otherwise, I strongly urge that you vote down HB 2655 as presently written.



Comm Labor  
2-7-06  
Atch # 6





PO Box 750256 Topeka, KS 66675  
Phone: 785-235-6040 Fax: 785-235-3305  
[www.kelley-construction.com](http://www.kelley-construction.com)

WRITTEN TESTIMONY OF KEVIN KELLEY  
BEFORE HOUSE COMMITTEE ON COMMERCE AND LABOR  
HB 2655  
February 7, 2006

Mister Chairman and members of the committee, my name is Kevin Kelley, President of Kelley Construction Co., Inc. and Vice President of the Associated General Contractors of Kansas.

**I oppose HB 2655 as written and ask that you support the amendment of this bill as described by the AGC of Kansas.**

Even though Kelley Construction is primarily a small general contractor, we have performed as a sub contractor many times. Some years, over 25% of our work has been as a subcontractor. I feel this gives me a unique view of the consequences of this bill as written.

The bill as written will unjustly shift the burden of risk from subcontractors to the general contractor. As business owners we accept risk everyday and can make assessments and compensations for that risk. It is my assertion that the risk should be on the party better able to control that risk.

- As a subcontractor we are reasonably able to determine when a project will be done and thus able to determine the cost of waiting on retainage to be released. That cost can be included in our estimate or our overall cost of doing business. If a general contractor or owner is known to be a slow payer, we can choose to not bid to them in the future or even bid them a higher price than other general contractors. A little research into the general contractor or owner can also minimize this risk. The State should not be in the business of protecting us from our own poor business decisions.
- As a small general contractor, it is important we hold retainage through out the project in the event a subcontractor has errors in their work. Even though we are diligent in watching subcontractors perform their work, they will inevitably make mistakes and quite often they are not found until the end of the project. If a subcontractor wants to ignore their responsibility to correct their work or if they are even out of business, a small general contractor may not have the resources to complete the work for them. This is an unfair shift of risk.

Risk is a burden we all face in business but one person should not be forced to take on the risk of another, especially when the latter person has the greatest control over the risk. Retainage to the end of a project is the only tool a general contractor has to make sure a subcontractor performs their work completely and assures all their bills are paid.

**Members of the committee, I respectfully request you accept the amendment to this bill as proposed by the AGC of Kansas.**

Thank you for your consideration.

Comm & Labor  
2-7-06  
Atch #7

Testimony on HB 2655 before the  
House Commerce and Labor Committee

By

Mark Schreiber, Manager, Government Affairs  
Westar Energy  
February 7, 2006

Chairman Dahl and members of the committee, I am Mark Schreiber, manager government affairs for Westar Energy.

Westar Energy is opposed to House Bill 2655. Our opposition is based on the new language in section 2(f). If this new language was deleted we would have no opposition to the bill.

We understand the desired outcome of the bill is to have retainage released at an earlier point in time than current contracts usually allow. Negotiations between private parties are part of private contracts and we have reservations about the role of government in these negotiations. We appreciate the work of Representative Grange to seek language that can address the issue and not harm the parties in a private contract. We stand ready to continue discussions with him and others to find mutually agreeable language.

We are certain there are some bad players in the construction field, whether it is owners, general contractors or subcontractors that do not perform according to the signed contract. Westar Energy is not one of these. When a contract is signed we do our very best to uphold the contract just as we expect everyone who signed the contract to uphold it according to its terms. When disagreements arise, we work with the parties to resolve them. We believe most contract signators behave in the same way. However, this bill addresses the actions of a few with consequences for everyone.

As an owner, our contract is with the general contractor not with the subcontractors. House Bill 2655 directs the owner to release retainage to the subcontractors with whom they have no contractual arrangement. Current contracts we use are modeled after the standard American Institute of Architects (AIA) contract language. Part of this language has the release of 50% of the retainage after at least 50% of the work is completed. When a contract is signed the parties understand when retainage is to be paid. It is not or should not be a surprise by any of the signators to the contract when and how retainage is to be paid. Retainage provides some leverage for the owner to ensure work is completed according to the specifications and without defects. If retainage is released piecemeal throughout the contract, the owner has little leverage at the end of the project.

In summary, Westar Energy opposes House Bill 2655 due to the new language in section 2(f). We urge the committee to not pass this bill out of committee. I will be glad to answer questions at the appropriate time.

Comm Labor  
2-7-06  
Atch # 8

# BUILDING ERECTION SERVICES COMPANY

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

Feb. 6<sup>th</sup>, 2006

To: The House Commerce Committee  
Re: HB-2655

Chairman Dahl, Vice-chair Schaub and Committee members:

My Name is William R. Miller. I am president and owner of Building Erection Services Co., L.C. Our office is in Olathe, Kansas with locations in Topeka and St. Joseph, Mo. We employ approximately 111 men and women in the construction industry.

I am here today to speak in favor of a balloon amendment to HB-2655.

Retainage is an archaic means of withholding a percentage of the amount of money that a subcontractor or a supplier has earned on a construction project in order to encourage timely performance. Retainage has evolved to the point that it no longer is used for its intended purpose but rather to finance the project with interest free money. Much of that interest free money is never paid for various reasons that appear when the sub or supplier is trying to get paid the final amount due.

On the Kansas jobs that my company received our retention money on in 2004 and 2005, the average time it took to get paid from the last day that we worked on that project, was 181.6 days. Two projects that we finished in 1998 have yet to be paid.

This is why we need, as a matter of public policy, to pass legislation to stop this practice of abusing the system for personal gain.

I am including information the we were given to show what is happening in our industry to those that do not have the power to change this unconscionable practice.

I thank you Mr. Chairman and members of the committee for allowing me to speak to you on this very important Bill.

William R. Miller

President  
Building Erection Services Company, L.C.



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2-7-06  
Atch # 9



# BUILDING ERECTION SERVICES COMPANY

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

## Kansas Receipt of Retainage

Contractor	Contract Amount	Contract Date	Date Last on Job	Date Retainage Received
Turner	\$2,774,974.00	10/06/03	01/31/05	05/16/05
Ferrell	\$560,511.00	05/10/04	04/30/05	08/11/05
Turner	\$93,053.00	01/05/04	11/30/04	03/14/05
Bohnert	\$202,125.00	08/22/02	07/21/03	02/19/04
Mar Lan	\$93,432.00	01/02/03	05/31/03	10/27/03
Turner	\$293,342.00	07/28/03	06/30/04	01/03/05
Pearce	\$109,650.00	10/07/04	05/31/05	12/12/05
Turner	\$116,829.00	02/14/05	07/22/05	12/23/05
Naboltz	\$221,908.00	03/01/05	05/31/05	11/21/05
SM Wilson	\$160,527.00	07/23/03	12/31/03	04/01/04
Miller-Stauch	\$139,326.00	09/02/03	10/14/04	03/09/05
Miller-Stauch	\$101,606.00	09/19/03	04/30/04	09/27/04
Turner	\$421,718.00	03/08/04	10/25/04	06/27/05
J.E. Dunn	\$55,110.00	06/17/03	02/03/04	11/03/05
Peak	\$101,250.00	12/20/02	07/25/03	10/01/03
Kraus-Anderson	\$130,231.00	12/07/01	08/31/02	03/14/03
D.H. Pace	\$34,101.00	05/10/04	08/31/04	01/13/05
Miller-Stauch	\$49,242.00	05/05/04	08/17/04	01/03/05
J.E. Dunn	\$534,761.00	08/01/01	10/31/02	07/18/03
Walton	\$586,211.00	08/14/98	01/11/00	
Walton	\$639,604.00	08/14/98	09/20/99	

*181.6 DAYS A/c*



Certified Steel Erector



*Comm & Labor  
2-7-06  
Atch # 10*



# Kansas Receipt of Retainage

Submitted By: JIM WISSMAN

Company Name: STRUCTURAL METALS OF KANSAS CITY, MO.

Contractor	Contract Amount	Contract Date	Date First on Job	Date Last On Job	Received Retainage	
Haren & Laughlin	164,961.00	7-28-04	9-16-04	4-28-05	12-08-05	190
Haren & Laughlin	44,835.00	9-04-04	6-1-05	8-12-04	3-31-05	230
Miller Stauch	288,411.00	1-23-04	2-19-04	<del>12-4-04</del>	<del>3-8-05</del>	95
Harmon Construction	203,984.	1-20-04	3-15-04	9-16-04	6-21-05	280
Huber Const	32,000.	12-31-03	1-19-04	9-30-04	12-14-04	75
Miller Stauch	352,632	8-21-03	10-20-03	9-16-04	3-10-05	175
					174 DAYS	175

Please Send completed information to:

Mr. Bill Miller  
 Building Erection Services, L.C.  
 P.O. Box 970  
 Olathe, KS 66051-0970  
 Phone: (913) 784-5560  
 E-mail: bmilller@builderac.com

10<sup>-2</sup>



# BUILDERS STEEL CO.

P.O. BOX 12538 • 601 E. 12TH AVE.  
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12/29/05

## Kansas Receipt of Retainage

<u>Contractor</u>	<u>Contract Amount</u>	<u>Contract Date</u>	<u>Date First On Job</u>	<u>Date Last On Job</u>	<u>Received Retainage</u>	
Dunn	\$1,118,688	12/5/2003	12/28/2003	4/25/2005	8/17/2005	115
Turner	\$187,735	9/4/2003	9/21/2003	7/11/2004	3/22/2005	250
MW Mech	\$50,000	1/12/2004	1/25/2004	3/15/2004	6/15/2004	90
Dunn	\$271,206	1/13/2004	12/22/2003	9/5/2005	11/18/2005	70
Dunn	\$74,397	2/4/2004	1/11/2004	9/20/2004	3/21/2005	180
Schweiger	\$30,037	2/25/2004	2/28/2004	6/15/2004	11/17/2004	150

142.5 DAYS AVERAGE

10-3





# Kansas Receipt of Retainage

Submitted By: Bryan Caton

Company Name: Midland Marble & Granite

<u>Contractor</u>	<u>Contract Amount</u>	<u>Contract Date</u>	<u>Date First on Job</u>	<u>Date Last On Job</u>	<u>Received Retainage</u>	
Allied Retail Concepts	\$ 29,109.00	9/04	9/04	1/05	3/05	50
Anderson-Combes.	\$ 5,091.00	9/04	3/05	4/05	5/05	30
Meyer Brothers	\$155,622.00	12/04	3/05	9/05	12/05	00
Ed Moore Construction	\$ 14,100.00	3/05	4/05	6/05	7/05	30
Clayco Construction	\$ 12,861.00	9/04	9/04	12/04	6/05	00
McCownGordon	\$113,992.00	1/04	9/04	9/05	12/05	90
Excel Constructors	\$ 23,311.00	1/05	3/05	6/05	9/05	00
Turner Construction	\$134,228.00	4/04	7/04	11/04	5/05	0
Harmon Construction	\$ 13,148.00	2/04	12/04	2/05	6/05	20
Miller-Stauch Construction	\$ 20,234.00	4/04	11/04	1/05	8/05	210
McCownGordon	\$ 6,361.00	12/04	3/05	5/05	12/05	210
Walton Construction	\$ 28,026.00	2/05	5/05	10/05	12/05	00
J.E. Dunn Construction	\$ 1,186.00	12/04	3/05	4/05	9/05	150
Ed Moore Construction	\$ 4,373.00	7/05	9/05	11/05	11/05	
Ed Moore Construction	\$ 33,438.00	11/04	12/04	2/05	3/05	30
Ed Moore Construction	\$ 33,636.00	11/04	3/05	5/05	6/05	00
R&O Construction	\$ 34,307.00	5/05	7/05	8/05	11/05	90
R&O Construction	\$ 34,307.00	5/05	7/05	9/05	12/05	90

Please Send Completed Information To:

Mr. Bill Miller  
 Building Erection Services, L.C.  
 P.O. Box 970  
 Olathe, KS 66051-0970  
 Phone: (913) 764-5560  
 E-mail: bmillr@buildersc.com

Page \_\_\_ of

*109 DAYS AVERAGE  
 EARLY FINISHING SUB.*

10<sup>-5</sup>



## HOUSE BILL No. 2655

By Committee on Commerce and Labor

1-19

9 AN ACT concerning private construction contracts; relating to retainage;  
10 amending K.S.A. 2005 Supp. 16-1802, 16-1803 and 16-1804 and re-  
11 pealing the existing sections.

12

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

14 Section 1. K.S.A. 2005 Supp. 16-1802 is hereby amended to read as  
15 follows: 16-1802. As used in this act:

16 (a) "Construction" means furnishing labor, equipment, material or  
17 supplies used or consumed for the design, construction, alteration, ren-  
18 ovation, repair or maintenance of a building, structure, road, bridge, water  
19 line, sewer line, oil line, gas line, appurtenance or other improvement to  
20 real property, including any moving, demolition or excavation.

21 (b) "Contract" means a contract or agreement concerning construc-  
22 tion made and entered into by and between an owner and a contractor,  
23 a contractor and a subcontractor or a subcontractor and another  
24 subcontractor.

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

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

30 (e) "Person" means an individual, corporation, estate, trust, partner-  
31 ship, limited liability company, association, joint venture or any other legal  
32 entity.

33 (f) "Retainage" means money earned by a contractor or subcontractor  
34 but withheld to ensure proper performance by the contractor or  
35 subcontractor.

36 (g) "Subcontractor" means any person performing construction cov-  
37 ered by a contract between an owner and a contractor but not having a  
38 contract with the owner.

39 ~~(h) "Substantial completion" means the stage of a construction project~~  
40 ~~where the project, or a designated portion thereof, is sufficiently complete~~  
41 ~~in accordance with the contract, so that the owner can occupy or utilize~~  
42 ~~the constructed project for its intended use.~~

43 Sec. 2. K.S.A. 2005 Supp. 16-1803 is hereby amended to read as

Comm Labor  
2-7-06  
Atch #11

1 follows: 16-1803. (a) Subject to the provisions of subsections (b), (c), (d),  
2 (e), (f), (g) and (h) and K.S.A. 2005 Supp. 16-1804 and 16-1805, and  
3 amendments thereto, all persons who enter into a contract for private  
4 construction after the effective date of this act, shall make all payments  
5 pursuant to the terms of the contract.

6 (b) The following provisions in a contract for private construction  
7 shall be against public policy and shall be void and unenforceable:

8 (1) A provision that purports to waive, release or extinguish the right  
9 to resolve disputes through litigation in court or substantive or procedural  
10 rights in connection with such litigation except that a contract may require  
11 binding arbitration as a substitute for litigation or require non-binding  
12 alternative dispute resolution as a prerequisite to litigation;

13 (2) a provision that purports to waive, release or extinguish rights  
14 provided by article 11 of chapter 60 of the Kansas Statutes Annotated,  
15 and amendments thereto, except that a contract may require a contractor  
16 or subcontractor to provide a waiver or release of such rights as a con-  
17 dition for payment, but only to the extent of the amount of payment  
18 received; and

19 (3) a provision that purports to waive, release or extinguish rights of  
20 subrogation for losses or claims covered or paid by liability or workers  
21 compensation insurance except that a contract may require waiver of sub-  
22 rogation for losses or claims paid by a consolidated or wrap-up insurance  
23 program, owners and contractors protective liability insurance, or project  
24 management protective liability insurance.

25 (c) Any provision in a contract for private construction providing that  
26 a payment from a contractor or subcontractor to a subcontractor is con-  
27 tingent or conditioned upon receipt of a payment from any other private  
28 party, including a private owner, is no defense to a claim to enforce a  
29 mechanic's lien or bond to secure payment of claims pursuant to the  
30 provisions of article 11 of chapter 60 of the Kansas Statutes Annotated,  
31 and amendments thereto.

32 (d) All contracts for private construction shall provide that payment  
33 of amounts due a contractor from an owner, except retainage, shall be  
34 made within 30 days after the owner receives a timely, properly com-  
35 pleted, undisputed request for payment.

36 (e) If the owner fails to pay a contractor within 30 days following  
37 receipt of a timely, properly completed, undisputed request for payment,  
38 the owner shall pay interest to the contractor beginning on the thirty-first  
39 day after receipt of the request for payment, computed at the rate of 18%  
40 per annum on the undisputed amount.

41 (f) A contractor shall pay its subcontractors any amounts due within  
42 seven business days of receipt of payment from the owner, including  
43 payment of retainage, if retainage is released by the owner, ~~but in any~~

1 ~~case the owner shall release for payment the retainage due to a contractor~~  
 2 ~~and the contractor shall release for payment the retainage due to a sub-~~  
 3 ~~contractor not more than 60 days after the subcontractor has satisfactorily~~  
 4 ~~completed all the work of the subcontractor under the contract,~~ if the  
 5 subcontractor has provided a timely, properly completed and undisputed  
 6 request for payment to the contractor.

7 (g) If the contractor fails to pay a subcontractor within seven business  
 8 days, the contractor shall pay interest to the subcontractor beginning on  
 9 the eighth business day after receipt of payment by the contractor, com-  
 10 puted at the rate of 18% per annum on the undisputed amount.

11 (h) The provisions of subsections (f) and (g) shall apply to all pay-  
 12 ments from subcontractors to their subcontractors.

13 Sec. 3. K.S.A. 2005 Supp. 16-1804 is hereby amended to read as  
 14 follows: 16-1804. (a) An owner, contractor or subcontractor may withhold  
 15 no more than ~~10%~~ retainage from the amount of any undisputed payment  
 16 due. <sup>5%</sup>

17 ~~(h) An owner may withhold retainage on any undisputed payment~~  
 18 ~~due for no more than 60 days after substantial completion of the project.~~

19 (c) If an owner, contractor or subcontractor fails to pay retainage, if  
 20 any, pursuant to the terms of a contract for private construction or as  
 21 required by this act, the owner, contractor or subcontractor shall pay  
 22 interest to the contractor or subcontractor to whom payment was due,  
 23 beginning on the first business day after the payment was due, at a rate  
 24 of 18% per annum.

25 Sec. 4. K.S.A. 2005 Supp. 16-1802, 16-1803 and 16-1804 are hereby  
 26 repealed.

27 Sec. 5. This act shall take effect and be in force from and after its  
 28 publication in the statute book.

Retainage shall be released by the owner upon completion of any portion of work that is described in a specification section. No more than 150% of the value of work that is not completed due to no fault of the subcontractor may be withheld pending completion.