

## MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Karin Brownlee at 8:30 A.M. on March 2, 2006 in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Kathie Sparks, Kansas Legislative Research Department  
Helen Pedigo, Revisor of Statutes  
Colin Brainard

Conferees appearing before the committee:

Ken Keller-Western Extralite  
Bill Miller-Building Erection Services  
Terri Tensley-VHC Mechanical  
Tonya Bair-Bair Excavating  
Don Haake-Haake Foundations  
Vince Migliazzo-Mark One Electric  
Beth Houser-Credit Professionals  
Tim McCarty-McCarty Mechanical  
Corey Peterson-Associated General Contractors of Kansas  
Eric Sartorius-City of Overland Park

Others attending:

Chairperson Brownlee opened the hearing on **SB 516-Fairness in public construction contract act** by introducing Helen Pedigo from the Revisors office to explain the bill. Ms. Pedigo stated **SB516** concerns public construction contracts and is somewhat similar to the bill Committee passed out last year on private construction. Differences between the two bills: this bill has public entities including the state of Kansas, cities, counties, school districts political subdivisions, and state universities or colleges.

Upon conclusion of Ms. Pedigo's review, there was discussion regarding the bill on public construction compared with the bill from last session on private construction.

Chairperson Brownlee introduced Ken Keller, Western Extralite, to give his testimony as a proponent of **SB 516**. Mr. Keller presented written testimony. (Attachment 1) Mr. Keller stated last session the Legislature passed **SB 33** which was very good and badly needed legislation for private construction contracts. Today, we have the opportunity to extend those same benefits to public contracts where the same problems exist. The egregious acts, the slow pay, only the owners have changed. In fact, the slow pay is even worse in public construction. Many of the public entities will take the monies they receive and put them in time deposits for a fixed period to enhance revenues. How can they be expected to pay if this money is tied up in a 90 day CD and is not available. The problem of course, is the general contractor and the subcontractors have payrolls to meet and suppliers to pay. Their only recourse is to borrow from the bank provided they have that ability. In closing he urged the Committee to support **SB 516**.

Chairperson Brownlee introduced Bill Miller representing the Greater Kansas City Chapter of the American Subcontractors Association. Mr. Miller presented written testimony. (Attachment 2). Mr. Miller stated **SB 516** is essentially the same as **SB 33**, which is the bill from last year, but with a different owner. Mr. Miller stated one of the problems with private construction is receiving retainage within a reasonable length of time after the work is completed. Mr. Miller feels that when the contract work is complete the retainage should be paid. He stated this bill would stop that problem. He referred the Committee to his testimony which contains facts on retainage and also a sheet with comparisons to Missouri law on Private and Public Prompt Payment Acts.

Chairperson Brownlee introduced Terri Tensly representing VHC Contracting, Inc. to testify as a proponent of **SB 516**. Ms. Tensly presented written testimony. (Attachment 3) She stated her company performs work for numerous public entities in Kansas as a subcontractor under a general contractor and on construction management projects where their contract is directly with the owner. Regardless of the form the contract takes

## CONTINUATION SHEET

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on public projects, VHC feels the arbitrary terms by which the majority of public entities make payments on construction projects is unfair and burdensome. She stated VHC usually has to wait six months after their portion of the job is complete to receive payment which causes them to have to borrow on their line of credit to start the next job. She feels that when the work is complete, 30 days is a reasonable length of time for payment. She asked the Committee to support **SB 516**.

Chairperson Brownlee introduced Tonya Bair representing Bair Excavating to give her testimony as a proponent on **SB 516**. Ms. Bair presented written testimony. (Attachment 4) Ms. Bair stated that excavators are first on the jobsite and first to complete their work. When an invoice is sent for the prior month's work to the General Contractor, it takes an additional 60 to 90 days before payment is received. Many times she is forced to borrow money and pay interest until payment is received ninety days later. She stated their experience with receiving retainage is worse. She stated that **SB 516** will help smaller contractors continue to roll their money. She also stated she sometimes has to wait as long as a year and a half to receive retainage monies. She urged the Committee to support **SB 516**.

Chairperson Brownlee introduced Dan Haake representing Haake Foundations to give his testimony as a proponent on **SB 516**. Mr. Haake presented written testimony. (Attachment 5) Mr. Haake stated he was a small concrete contractor in Kansas City and the best thing that could come out of this bill is the cash flow will be better. He stated he shies away from doing public work because the payments are so late he can't afford it. In closing, he stated **SB 516** would be good policy for owners, contractors and suppliers.

Chairperson Brownlee introduced Vince Migliazzo representing Mark One Electric to give his testimony as a proponent of **SB 516**. Mr. Migliazzo presented written testimony. (Attachment 6) Mr. Migliazzo stated Mark One Electric is trying to run their business in a fair and reputable way. That means paying employees and suppliers in a timely manner and hope we have some profit at the end of the day. But that is getting harder, especially when we have to wait 60 to 90 days or even longer to get paid for work that we have completed. He stated the bill will help them collect money in a reasonable and fair amount of time and enable them to conduct their business on a level field with the owners and contractors they work with.

Chairperson Brownlee introduced Beth Houser representing Credit Professionals to give her testimony as a proponent to **SB 516**. Ms. Houser presented written testimony. (Attachment 7) Ms. Houser stated **SB 516** is about fair business practices within the construction industry. She has witnessed many problems created for contractors and suppliers when construction project payments are not made in a timely manner. **SB 516** will change this.

Chairperson Brownlee introduced Tim McCarty representing McCarty Mechanical located in Merriam, Kansas to give his testimony as a proponent of **SB 516**. Mr. McCarty presented written testimony. (Attachment 8) Mr. McCarty stated he is a heating and air conditioning contractor and would typically be a sub-contractor on a public project. He also stated the bill would allow him to be paid for work he has completed in a reasonable time frame. Just as **SB 33** addressed these issues for the private sector, **SB 516** addresses the same issues for the public sector. He urged the Committee to support the bill.

Proponent written only testimony was received from: John Kelble representing Industrial Sales and Service; (Attachment 9) Michael Falbe, P.E. representing Bob D. Campbell & Company; (Attachment 10) Douglas Carlson representing C&O Electric Sales Company; (Attachment 11) and Robert Daly representing Kaw Roofing and Sheet Metal. (Attachment 12)

Chairperson Brownlee called for questions from the Committee to the proponents. Being none, she introduced Corey Peterson representing the Associated General Contractors of Kansas to give his testimony as an opponent to **SB 516**. Mr. Peterson presented written testimony. (Attachment 13) Mr. Peterson stated AGC opposes **SB 516** as written. He offered a balloon to the bill which was attached with his testimony. Mr. Peterson stated the retention language in the balloon is a compromise that was the result of several meetings between the subcontractors and general contractors within AGC. The balloon will improve the cash flow for subcontractors, while keeping important protections in place for general contractors and owners. The language in SB 516 will subject owners and general contractors to undue risk and would likely end up forcing smaller, less experienced subcontractors out of the marketplace, since they may be perceived as too risky for

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a general contractor to use without the protections of retention. Mr. Peterson went on to review the entire balloon.

Upon completion of Mr. Peterson's testimony there was discussion with the Committee. Chairperson Brownlee stated she thought that AGC's balloon would need more work for both sides.

Chairperson Brownlee introduced Sandy Jacquot representing the League of Kansas Municipalities to give her testimony as an opponent of **SB 516**. Ms. Jacquot presented written testimony. (Attachment 14) Ms. Jacquot stated she would like to focus on the 30 day payment. They understand and support the contractors getting paid in a timely fashion. The problem they have is the majority of cities in Kansas only meet once a month and that is when they pay bills. She suggests if for some reason they can't pay within the 30 days because a meeting got cancelled or something like that there could be language that would compel them to set a special meeting or make other arrangements to pay 15 days following that.

Chairperson Brownlee introduced Erik Sartorius representing the City of Overland Park to give his testimony as an opponent to **SB 516**. Mr. Sartorius presented written testimony. (Attachment 15) Mr. Sartorius stated the City of Overland Park maintains a strong relationship with a multitude of contractors who perform work vital to the growth of the City. To do so, the City must be able to take local conditions into account when formulating contracts for the performance of work to be done. Artificial measures for timely payment, work completion and retainage compromise the City's ability to ensure that work is performed at a standard expected by taxpayers. He stated public construction contracting is regulated by federal acquisition regulations, state statutes, Kansas Department of Transportation policies and procedures and in some cases, county requirements. The City of Overland Park has a standard construction contract which among other provisions, addresses prompt payment, retainage and dispute resolution. The provisions of **SB 516**, especially with respect to prompt payment and retainage, can create a conflict between federal contracting regulations and state statute. Finally, public construction contracting is done in the interest of the public good. Governmental agencies operate from a long-term perspective-serving citizens today and well into the future. Cities seek to develop long-term constructive relationships with the contractor community, on the basis that a mutually beneficial partnership serves the best interest of the citizens, cities and contractors. In closing, he stated the City of Overland Park believes adequate protections exist in current law for all parties engaged in public construction.

Chairperson Brownlee introduced Edward DeSoignie representing Heavy Constructors Association of the Greater Kansas City Area to give his testimony as an opponent to **SB 516**. Mr. DeSoignie presented written testimony. (Attachment 16) Mr. DeSoignie stated that Contractors acting as generals use retainage to have a hold on their subcontractors in the event work by the subcontractor is deficient or inadequate. This is because it is not common practice for general contractors to require performance bonds from their subcontractors. If something on the project goes wrong with work done by the subcontractor, the retainage is used to have the subcontractor correct the problem. Public entities such as cities and counties also employ the practice in addition to requiring a performance bond for much the same reason. He is opposed to **SB 516**.

Chairperson Brownlee introduced Trudy Aron representing the American Institute of Architects to give her testimony as a proponent with amendments to **SB 516**. Ms. Aron presented written testimony. (Attachment 17) Ms. Aron stated the AIA Kansas has worked with AGC, their Specialty Contractors, and the State's Build Owners Group on the amendments she is offering. The biggest concern AIA Kansas has is page 3, lines 9-10. She stated the construction of buildings is a complicated process. Many of the components of the building cannot be connected, completed, finished, or started until the building is ready for substantial completion. Many aesthetic and finish components lag significantly more than 30 days following substantial completion. Without retainage, there is no incentive for the subcontractor to finish the work. She stated AIA Kansas does not oppose returning retainage within 30 days after substantial completion to those subcontractors who have completely satisfied their contracts. In closing, she stated that AIA Kansas urges the Committee to accept the amendments they are proposing on **SB 516**.

Opponent written only testimony was received from: Joe Levens representing Martin K. Ebby, (Attachment 18) Tim Browder presenting Farrell Construction; (Attachment 19) Kevin Kelley representing Kelly Construction; (Attachment 20) Phil Sewell representing Central Mechanical of Wichita; (Attachment 21) Matt

CONTINUATION SHEET

MINUTES OF THE Senate Commerce Committee at 8:30 A.M. on March 2, 2006 in Room 123-S of the Capitol.

Shatow representing the City of Lenexa; (Attachment 22) Eric Arner representing Water District No. 1 of Johnson County. (Attachment 23)

Chairperson Brownlee closed the hearing on **SB 516** and made the statement if anyone else wanted to address the Committee to please deliver their written testimony to her office.

Meeting adjourned at 9:30 a.m. with the next meeting scheduled for March 3, 2006 at 8:30 a.m. in room 123S.



# WESTERN EXTRALITE COMPANY

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Madam Chairman,

First, I want to thank you and your committee for giving me the opportunity to address you on the merits of SB 516, The Kansas Fairness in Public Construction Contract Act. I am Ken Keller, Controller of Western Extralite Company with service centers in multiple locations in Kansas and Missouri. We supply electrical supplies to the construction industry.

Approximately one year ago Kansas, through the efforts of this committee, passed one of the most progressive prompt pay acts ever in the form of SB 33. That bill helped to level the playing field while creating fairness in private construction contracts for the general contractor, sub contractors and suppliers. It provided a specific timeline for payment for work properly performed and invoiced timely. It provided remedies if this timeline was not met such as stopping work, and pulling off the job. If this didn't work, you can go to court and not only recover the monies due you plus 18% interest but also your court costs and reasonable attorney fees. Certain egregious acts were addressed by the committee and made against public policy. These included having to waive your right to file suit to resolve any differences; you could not give up your right to file a mechanics' lien or a bond claim. You could not waive the right of your insurance carrier to subrogate against the negligent parties insurance company in the event of a claim.

As a colleague of yours in the Senate said, SB 33 was very good and badly needed legislation for private construction contracts. Today, we have the opportunity to extend those same benefits to public contracts. The same problems exist. The egregious acts, the slow pay, only the owners have changed. In fact the slow pay is even a little worse. Many of the public entities will take the monies they receive and put them in

Senate Commerce Committee  
March 2, 2006

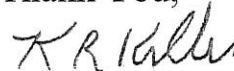
time deposits for a fixed period to enhance revenues. How can they be expected to pay if this money is tied up in a 90 day CD and is not available?

The problem of course, is the general contractor and the sub-contractors have payrolls to meet and suppliers to pay. Their only recourse, unless they are flush with working capital, is to borrow from the bank provided they have that ability.

The current contracts that often times exist in the public arena are grossly unfair and need to be corrected just as private contracts were by SB 33. You are going to hear that SB 516 just doesn't provide enough time. Administratively it can't be done.

Please consider this. In the 1990s the Federal government realized that their paying habits were bankrupting some of their smaller suppliers so they enacted a prompt pay act on themselves that they would pay the provider in 30 days or pay interest. It is working. If the Federal government can do it, anyone can. I urge your support of SB 516.

Thank You,



Kenneth Keller, Controller  
Western Extralite Company  
816-421-8404

# BUILDING ERECTION SERVICES COMPANY

15585 S. KEELER • P.O. BOX 970 • OLATHE, KANSAS 66051-0970

March 2, 2006

(913) 764-5560 • FAX (913) 764-2317

The Honorable Co-chairs Senator Brownlee and Senator Jordan  
Senate Commerce and Labor Committee Members

My name is William R. Miller. I represent the Greater Kansas City Chapter of the American Subcontractors Assoc. and myself, as President of Building Erection Services Company, L.C.

The American Subcontractors Association is a national association with over 6000 subcontractor members including 86 members in this local chapter. I am here to speak in favor of SB-516, The Fairness in Public Construction Contracts Act. SB-516 is very similar to SB-33 that this Committee passed last year dealing with private work.

There are four basic differences in SB-516. The differences are as follows:

1. Public owner instead of private.
2. Retention limited to 5% which is line with Missouri law limiting retention on public work to 5%.
3. Release of retention for early finishing subs. In line with Missouri law on private work.
4. Bans no damage for delay clauses in a contract which does not allow a contractor to collect for damages for delays caused by others.

We have two clean up items included that we missed last year in SB-33. They are to require in the venue provision, that litigation be under Kansas law and to allow waiver of subrogation in the Builders Risk policies which is standard and necessary.

SB-33 took effect July 1<sup>st</sup> of last year and even though we only have 8 months to look at, we have found no adverse or unintended consequences resulting from this law. To the contrary, we have found that the adversity in contract negotiation has been greatly reduced by the guidelines established in SB-33 that require fairness and accountability in the contract. This is especially true for the out of town contractors that come into Kansas with extremely onerous contract forms only to find out that they can not do that in Kansas.

We know of no litigation so far that was necessary to enforce the protections provided in SB-33.

SB-516 will provide the same protections for all parties in the chain of contracts for public work in Kansas that SB-33 provided on private work in Kansas. We ask for your support of this Bill.

Thank you for giving me the opportunity to testify.



William R. Miller



Senate Commerce Committee  
March 2, 2006

Certified Steel Erector Attachment 2-1

## PROMPT PAYMENT ACTS

SUBJECT	MISSOURI – PUBLIC	MISSOURI – PRIVATE
	<b>RSMo. §§ 34.057 et. seq.</b>	<b>RSMo. §§ 431.180 &amp; 436.300 et seq.</b>
<b>SCOPE</b>	All public works construction contracts	All contracts for <b>private design</b> or <b>construction</b>
<b>REGULATES</b>	<p><b>Payments from Gov't to General Contractor:</b> Progress payments within 30 days of proper invoice Final payment within 30 days of project completion</p> <p><b>Payment from General Contractor to Subs:</b> Payment due to Subs within 15 days of receiving payment from Gov't <b>NOTE:</b> Payment is deemed "received" at the time the Gov't mails Payment to the General Contractor</p>	<p><b>Payments from Owner to General Contractor</b> Payments must be made in accordance with the contract</p> <p><b>Payments from General Contractor to Subs</b> Payments must be made in accordance with the contract</p> <p><b>Payments from Subs to Sub-subs/suppliers</b> Payments must be made in accordance with the contract</p>
<b>PENALTIES</b>	<p><b>INTEREST:</b> 1.5% per month from due date until payment</p> <p><b>ATTORNEY'S FEES:</b> Court may, in its discretion award attorney's fees</p>	<p><b>INTEREST:</b> Court may award interest up to 1.5% per month on unpaid amounts in accordance with the contract terms</p> <p><b>ATTORNEY'S FEES:</b> Court may, in its discretion award attorney's fees</p>
<b>DUTY TO REPORT DEFECTIVE WORK</b>	General Contractor must report defective work to the Gov't that has been the subject of prior progress payments and deduct any such amounts from its next payment application	No duty set forth in the statutes
<b>RETAINAGE LIMITS</b>	<p>Retainage shall not be more than 5% unless owner and architect/engineer determine that a higher rate is required to ensure performance</p> <p>In no case shall retainage exceed 10%</p> <p>Owner may withhold no more than 200% of the value of incomplete work after substantial completion</p>	<p>Retainage shall not exceed 10%</p> <p>General Contractor may not retain funds from Subs in an amount greater than the amount retained by the Owner</p> <p>Retainage must be released with <b>30 days</b> of substantial completion</p> <p>Provides for the release of retainage to early finishing Subs.</p> <p>Owner may withhold no more than 150% of the value of incomplete work after substantial completion</p> <p>General Contractor must pay retainage to Subs within <b>7 days</b> after receiving retainage from Owner</p>
<b>SUBSTITUTE SECURITY FOR RETAINAGE</b>	None permitted	<p>Requires that an Owner or General Contractor release retainage within 5 days of receipt of "acceptable substitute security" including a letter of credit, cash or retainage bond = to retained amount</p> <p>The Contractor is entitled to receive all interest earned on security substituted for the retainage</p>

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# 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	<u>105 DAYS</u>
Ferrell	\$560,511.00	05/10/04	04/30/05	08/11/05	<u>103 DAYS</u>
Turner	\$93,053.00	01/05/04	11/30/04	03/14/05	<u>104 DAYS</u>
Bohnert	\$202,125.00	08/22/02	07/21/03	02/19/04	<u>212 DAYS</u>
Mar Lan	\$93,432.00	01/02/03	05/31/03	10/27/03	<u>150 DAYS</u>
Turner	\$293,342.00	07/28/03	06/30/04	01/03/05	<u>183 DAYS</u>
Pearce	\$109,650.00	10/07/04	05/31/05	12/12/05	<u>192 DAYS</u>
Turner	\$116,829.00	02/14/05	07/22/05	12/23/05	<u>150 DAYS</u>
Naboltz	\$221,908.00	03/01/05	05/31/05	11/21/05	<u>172 DAYS</u>
SM Wilson	\$160,527.00	07/23/03	12/31/03	04/01/04	<u>91 DAYS</u>
Miller-Stauch	\$139,326.00	09/02/03	10/14/04	03/09/05	<u>150 DAYS</u>
Miller-Stauch	\$101,606.00	09/19/03	04/30/04	09/27/04	<u>150 DAYS</u>
Turner	\$421,718.00	03/08/04	10/25/04	06/27/05	<u>245 DAYS</u>
J.E. Dunn	\$55,110.00	06/17/03	02/03/04	11/03/05	<u>270 DAYS</u>
Peak	\$101,250.00	12/20/02	07/25/03	10/01/03	<u>67 DAYS</u>
Kraus-Anderson	\$130,231.00	12/07/01	08/31/02	03/14/03	<u>195 DAYS</u>
D.H. Pace	\$34,101.00	05/10/04	08/31/04	01/13/05	<u>135 DAYS</u>
Miller-Stauch	\$49,242.00	05/05/04	08/17/04	01/03/05	<u>138 DAYS</u>
J.E. Dunn	\$534,761.00	08/01/01	10/31/02	07/18/03	<u>260 DAYS</u>
Walton	\$586,211.00	08/14/98	01/11/00		<u>6 YEARS PLUS &amp; COUNTING</u>
Walton	\$639,604.00	08/14/98	09/20/99		<u>6 YEARS, 4 MO. &amp; COUNTING</u> <u>181.6 DAYS A6</u>



Certified Steel Erector



# 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	164,964.00	7-28-04	9-16-04	4-28-05	12-08-05	190
Haren & Laughlin	44,835.00	5-04-04	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	

Please Send completed information to:

Mr. Bill Miller  
Building Erection Services, L.C.  
P.O. Box 970  
Olathe, KS 66051-0970  
Phone: (913) 784-5580  
E-mail: bmilller@builderac.com



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## 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

# Kansas Receipt of Retainage

Submitted By:

Tonya Bair

Company Name:

Bair Excavating Co. Inc

<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>
SM Wilson	—	11/03	11/03	6/04	7/05
Harmon	—	7/04	7/04	10/04	∅
Musselman+Hall	—	3/05	3/05	7/05	∅
Universal Const.	—	11/03	11/03	<del>12/04</del>	5/05
Universal Const.	—	12/03	10/04	3/05	11/05
					262 DAYS AVERAGE

39

150

240

262 DAYS AVERAGE

Please Send completed information to:

Mr. Bill Miller

Page \_\_\_ of

Building Erection Services, L.C.  
P.O. Box 970

764-2317  
764-5360

# 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	60
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	90
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	180
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	90
Turner Construction	\$134,228.00	4/04	7/04	11/04	5/05	15
Harmon Construction	\$ 13,148.00	2/04	12/04	2/05	6/05	120
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	60
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	30
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: bmiller@buildersco.com

Page \_\_\_ of

*109 DAYS AVERAGE  
 EARLY FINISHING SUB.*

*2-7*

# 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>	
Excel Constructors	\$ 16,206.00	1/05	2/05	3/05	5/05	60
Harmon Construction	\$ 13,035.00	9/04	1/05	3/05	9/05	180
Miller-Stauch Const.	\$ 51,991.00	4/04	8/04	10/04	2/05	210

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: [bmiller@builderac.com](mailto:bmiller@builderac.com)

# **VHC** *Van Hoecke Contracting, Inc.*

---

February 28, 2006

The Senate Committee on Commerce and Labor  
The Honorable Chairpersons,  
Senator Brownlee and Senator Jordan

I am writing to ask your support for Senate Bill No. 516. My name is Terri Tinsley and I have been employed as the Controller for VHC Van Hoecke Contracting, Inc. for nine (9) years. VHC is a heating, ventilation and air conditioning contractor with 39 employees located in Lenexa, KS. We are a Kansas corporation and have been in business for seventeen (17) years.

Our company performs work for numerous public entities in Kansas as a subcontractor under a general contractor and on construction management projects where our contract is directly with the owner. Regardless of the form our contract takes on public projects, VHC feels the arbitrary terms by which the majority of public entities make payments on construction projects are unfair and burdensome.

If you will examine the attached worksheet I have prepared on projects VHC has completed for public entities in Kansas for the last 5 years, you will notice that the average time from the date we last performed work to the date we receive final payment is six (6) months. In two (2) cases this period has exceeded one (1) year. I firmly believe that this time period is excessive and causes an undue financial burden on general contractors and subcontractors, alike. On each application for a progress payment, 10% is withheld on all of the work completed to date. Then, after all work is complete on the project, we usually have to wait for six (6) months or more to receive full payment. I do not believe any other industry that provides materials or services to public entities is subject to payment terms of this kind. I would also like to note that we pay our employees and material suppliers in full as the work is completed. Just the HVAC equipment for a project may be 70% to 80% of our contract amount. This, in effect, has us financing a portion of the project for the owner and, depending on the size of the contract, this amount can be substantial. Our only options to remedy non-payment is to file a claim against a general contractor's bond or, in the case of construction management projects where we carry the bond ourselves, litigation. It is my understanding that the point of the competitive bidding process on public projects is to provide the best and most responsible value for the use of public funds. Over the long term the current payment practices will only increase the cost to the public. With the cost of borrowing funds or financing litigation, it can be necessary for contractors and subcontractors to factor the cost of delayed payment into their bids on public projects.

VHC currently has work in process on Kansas public projects in the amount of \$6.8 million to be completed in the next 18 months. Of this over \$2.8 million is already complete and we are already carrying \$280,000 in retention until the projects are done. By the time these projects are completed VHC will have over \$680,000 out in retention. If we have to borrow on these funds to finance our next projects, the additional 5 months beyond the terms required by Senate Bill No. 516 would cost VHC more than \$22,000 in interest.

Page 1 of 2

Senate Commerce Committee

*March 2, 2006*

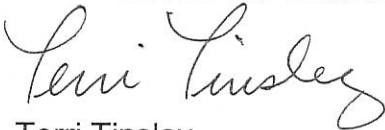
As I understand it, the arguments against Senate Bill No. 516 are concerns that projects will not be completed properly and/or problems with the installation will not be remedied without the financial incentive of holding 10% retention beyond the 30 days required by the bill. In my experience general contractors or owners have never hesitated to deduct amounts from progress payments for work they feel is not complete or operating properly. I believe the requirement of the owner receiving "a timely, properly completed, undisputed request for payment" in Section 3(d) of the Bill addresses this issue adequately. Also, Section 4(a) allowing 150% of the value of work not complete to be withheld addresses this issue as well. This last term is currently incorporated into most construction contracts, but withholding payment of the full amount of retention is being used instead.

I sincerely ask that you support Senate Bill No. 516. I believe this Bill will create a climate of fairness for all parties involved in the construction of public projects and allow us to work together to the benefit our communities.

Thank you for your time and consideration.

Sincerely,

VHC Van Hoecke Contracting, Inc.



Terri Tinsley  
Controller

Enclosure



### Kansas Receipt of Retainage on Public Projects

Company Name: VHC Van Hoecke Contracting, Inc.

Submitted By: Terri Tinsley

02/27/06

Contract With	Project	Contract Amount	Contract Date	Date 1st Worked	Date Last Worked	Received Retainage	Days Til Paid
Olathe USD #233, Universal Construction, Const Mgr	New Olathe Elementary No. 28	\$624,867	03/12/01	08/24/01	08/23/02	02/11/03	172
Heartland Construction	Kansas Army National Guard	\$43,390	10/17/01	03/08/02	05/15/02	09/10/02	118
DeSoto USD #232, JE Dunn, Const Mgr	Lexington Trails Middle School	\$705,994	12/06/01	01/23/02	12/20/02	05/01/03	132
Jenkins & Associates	Gardner City Hall	\$195,000	03/12/02	08/27/02	05/15/03	05/20/04	370
Olathe USD #233, Universal Construction, Const Mgr	Olathe North High School	\$293,490	05/23/02	06/07/02	07/29/03	05/10/04	285
Vanum Construction	Leawood Parks & Recreation	\$156,760	05/31/02	10/22/02	11/21/03	12/02/04	376
Olathe USD #233, Universal Construction, Const Mgr	New Olathe Elementary No. 29	\$598,050	07/22/02	11/18/02	12/16/03	03/08/04	82
McPherson Contracting	Merriam City Hall	\$639,761	09/19/02	01/20/03	08/13/04	02/07/05	178
Olathe USD #233, Universal Construction, Const Mgr	New Olathe Jr. High No. 8	\$1,681,340	10/22/02	07/28/03	08/25/04	12/06/04	103
Miller Building Service	Blue Valley Food Services	\$9,900	09/10/03	08/27/03	10/27/03	05/13/04	198
Shawnee Mission USD #512	McEachen Admin Bldg	\$78,900	09/22/03	12/12/03	02/27/04	04/14/04	46
Shawnee Mission USD #512	Indian Creek Computer Room	\$52,200	12/09/03	01/20/04	02/10/04	04/14/04	63
J.E. Dunn Construction Co.	JC Harmon High School	\$990,101	04/29/04	04/21/04	12/08/04	06/20/05	194
C & C Group	Kansas School for the Deaf	\$112,358	08/02/04	08/17/04	12/20/04	06/22/05	184
Spring Hill USD #230, J.E. Dunn Const Mgr.	Spring Hill Middle School	\$442,836	01/19/05	05/04/05	07/28/05	partial 2/21/06 \$10,000 still due	208



(913) 681-2407

2785 W. 247th STREET  
LOUISBURG, KS 66053

Fax (913) 947-7223

February 27, 2006

The Honorable Co-chairs Senator Brownlee and Senator Jordan  
Senate Commerce and Labor Committee Members

RE: Senate Bill No. 516

As a third generation small business owner, I encourage the approval of SB516 and would like to explain the extensive timeline we are forced to follow to receive payment.

Excavators are first on the jobsite and first to complete their work. When an invoice is sent for the prior month's work to the General Contractor, it takes an additional sixty to ninety days before payment is received. During those three months, enough operating capital is needed to support daily payroll, machine fuel, materials, unknown repairs/maintenance and the company's normal utilities, rent, etc. This presents a large financial strain on daily operations especially for small business owners.

Many times, I am forced to borrow money and pay interest until payment is received ninety days later. Materials such as gravel is needed for most jobsites and quarries require payment within thirty days of purchase or the account will be suspended until paid. Subcontractors pay upfront for materials but are forced to wait three months to be reimbursed.

Work performed extra to the contract, is delayed an additional two months for processing change order paperwork then wait sixty to ninety days for payment which will be six months total after the work was originally performed.

My experience with retainage is worse. Being the first subcontractor to complete its work on a project, we have to wait until the entire project is completed before receiving our retainage which is a year later. This timeframe is extended when other subcontractors have lengthy punch list items that have no direct effect to the site work. Retainage monies are then received a year and a half after the project has been completed.

The passing of Senate Bill No. 33 has benefited our efforts to receive fair contracts for private work in Kansas. Waiving the rights of subrogation puts responsibility to each subcontractor's own work and saves \$500-\$1,000. Payment for work is received in a timelier manner than before, which helps small businesses financially.

I appreciate the opportunity state my experiences regarding the above. Please consider small businesses in Kansas and how SB516 will benefit them and their future.

Respectfully,

Tonya Bair  
Vice President of Operations

Senate Commerce Committee

March 2, 2006

Attachment 4-1

**DAN HAAKE**

February 28, 2006

The Honorable Karin Brownlee  
Kansas State Capitol Building, Room 136 N  
300 SW 10<sup>th</sup>  
Topeka, Kansas 66612

Dear Senator Brownlee,

I have had the privilege to address your Committee in the past and I am privileged and honored to address you and your Committee concerning SB 516.

Haake Foundations is a small construction company with about 1.5 million in sales and our largest business challenge that we contend with is cash flow. We have a \$15,000.00 per week payroll expense fueling that challenge. Our revenue stream before the adoption of SB 445 was unpredictable at best, Owners, Contractors and Subcontractors would fund building projects and pay bills at their own leisure and now with the adoption of SB 445, we have little problems predicting receipt of project payments.

We find ourselves staying away from public building projects because of their payment process and lack of consequences for their failure to meet their obligations. We recently completed a project for Turner High School in Kansas City, Kansas where a payment application was misplaced by the District and when confronting the problem, they said they would catch up the payment the next month.

This method of business should not be permitted to take place and it is a shame that the actions of a few bring me here today.

SB 445 is a good policy and is working great on private work and my opinion is that SB 516 would also be a good policy for Owners, Contractors, and Suppliers.

Sincerely,

  
Dan M. Haake

**1 0 0 2 9 E. 6 3 R D T E R R A C E**

**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

March 2, 2006

Attachment 5-1



SB 516 Testimony:

We here at Mark One Electric are trying to run our business in a fair and reputable way. That means paying our employees and suppliers in a timely manner and hope we have some profit at the end of the day. But that is getting harder, especially when we have to wait 60 to 90 days or even longer to get paid for work that we have completed.

This Bill will help us collect our money in a reasonable and fair amount of time. We need those funds for working capital every week. We have to meet a payroll every Friday and in order to do that we now have a an employee whose only purpose is to collect money owed to us, usually from contractors who have already been paid by the owner. In some cases, we know the contractor has been paid and has cut a check to pay us, but will hold that check until we call and ask them about payment. That check just sits in their office unless we persistently call and then often times physically drive to their office and pick up the check.

We don't want to have to waste our resources chasing down money we are rightfully owed and we definitely don't want to have to resort to legal action to collect. This Bill will help us conduct our business on a level field with the owners and contractors we work with.

Vince Migliazzo  
Vice President of Business Development

Senate Commerce Committee

March 2, 2006

Attachment

6-1

909 Troost  
Kansas City, MO 64106  
(816) 842-7023 / Fax: (816) 842-8955  
markone@markone.com

NACM



Testimony Senate Bill 516

By Beth Houser

Good morning. My name is Beth Houser, I am the credit manager for a material supply company, I am also Chairman of the Board of Directors for Credit Professionals Alliance – formerly known as National Assoc. of Credit Management, Kansas City Division and a Johnson County taxpayer. I am here to support Senate Bill 516.

This bill is about fair business practices within the construction industry.

Prompt payment and fair retainage laws make sense. I have worked in the construction industry for approx. 24 years, as a bookkeeper and as a credit manager.

When a bid is put together for a public construction job, many times the bid is increased to cover the cost of cash flow problems created by slow, late payments during the course of the job. As a taxpayer, this concerns me. We are paying the price for the lack of good construction laws. Senate Bill 516 will change that.

As a credit manager, I have witnessed many problems created for contractors and suppliers when construction project payments are not made in a timely manner. A contractor's credit history can be damaged due to cash flow problems caused by these bad construction practices. Senate Bill 516 will change that.

Our construction industry deserves fair laws that work for all of us – please support and pass Senate Bill 516. Thank you.

**Board of Directors**

**President**  
Patrick Tolle

**Corporate Secretary**  
Rhonda Ross

**Treasurer**  
Kurt Borneman

**Chairman of the Board**  
Beth Houser  
Crown Millwork

**First Vice Chairman**  
Paul Calahan, CCE  
Cargill, Inc.

**Second Vice Chairman**  
Tim Wood  
Seaboard Foods

**Councilor**  
David Massey  
Spencer Reed Group

**One-Year Directors**  
Ron Schulze

Wanda Houghton

Janice Dodds

Dan Michalek

**Two-Year Directors**  
Ardyce Shipman

Jim Wardlow

Betty Carroll

Bob Rogers



Senate Commerce Committee

March 2, 2006

Attachment 7-1

Senate Commerce Committee

Re: Senate Bill 516 – Kansas Fairness in Public Construction Act

My name is Tim McCarty with McCarty Mechanical from Merriam, Kansas, and I support Senate Bill no. 516. As a heating and air conditioning contractor I would typically be a sub-contractor on a public project. I am in support of Bill 516 for the following reasons:

- It provides specific provisions as to when I would get paid for my work on the project and gives me financial remedy if not paid in a timely manner.
- It reduces the retainage amount from the current rate of 10% to 5%.
- It releases my retainage when my portion of the work is complete instead of holding my retainage until the entire project is completed. For example, if a project is a 12 month project, my work may be completed in 9 months. Currently, I have to wait until the entire project is complete before I can get my retainage released. It is not unusual to have to wait 90 to 120 days for my retainage to be released.

Simply stated, this bill allows me to be paid for work I have completed in a reasonable time frame. Just as Senate Bill 33 addressed these issues for the private sector Bill no. 516 addresses the same issues for the public sector. I support the bill and request that it be passed.

Senate Commerce Committee  
March 2, 2006  
Attachment 8-1

**Subject:** Senate Bill SB516

**From:** "John Kelble" <jkelble@aap-kc.com>

**Date:** Wed, 1 Mar 2006 09:06:14 -0600

**To:** "'Ken Keller (E-mail)'" <kkeller@westernextralite.com>

The importance of this Bill SB516 is immense to our company Associated Air Products and to the Electric Industry which is represented in a great part by the Electric League of Ks & MO. Public bid projects used to be a bulk of our company's projects and gave us great pride as we could see the projects completed and "opened" for the public to enjoy. However, we are a small business and we need to maintain good "cash flow" to stay in business. Most of the publicly funded projects we were involved, in as a supplier of equipment to a contractor, dragged out for very long periods of time. However our equipment (HVAC & Controls) had to be on site early and up and working to provide a proper environment for the other craftsmen to do their job. But we did not get paid in timely fashion as the overall owner acceptance of the project was months sometimes years away. Our equipment was being used but we were not being paid until much later- when the overall project was completed. We could not continue to bid competitively on these projects and our enthusiasm waned for doing these projects- we just could not maintain good "cash flow" when we had to pay our manufacturers for equipment that we were not being paid for by the contractor till much later.

Retainage was also a problem as I mentioned our equipment was being used on site early on in the project but the "acceptance" was not till much later and thus the training, spare parts and warranty for the owner was delayed to the last days of construction. We could not get our retainage till after those items were done and we were not able to do those items until the owner & construction manager allowed for them. Again our equipment is being used and we are unable to get full payment in a timely fashion.

We need a law that will allow us to be paid when the equipment is put into service not when it is "accepted". If you think about it our equipment is installed and being used and after time we lose are "lien rights" as we are waiting to get paid and we would have no legal rights but to continue to wait and hope we get paid.

Sincerely,

John Kelble  
Industrial Sales and Service Mgr.

Senate Commerce Committee

March 2, 2006

Attachment

9-1



Structural Engineers – Since 1957

4338 Belleview  
Kansas City, MO 64111  
(816) 531-4144 FAX (816) 531-8572

BOB D. CAMPBELL & CO., INC.

*President*  
Michael J. Falbe, P.E.

Lee S. Johnson, P.E.  
Steven R. Carroll, P.E.  
Richard C. Crabtree, P.E.  
Wayne E. Davis, P.E.  
Jeffrey L. Wright, P.E.

*Administrative Manager*  
Paul M. Spena

February 27, 2006

The Senate Committee on Commerce and Labor  
Co-Chairs: Senator Brownlee and Senator Jordan

Re: Senate Bill No. 516

Dear Senators:

Having read the proposed Senate Bill regarding public construction contracts in the State of Kansas and being involved in the arena of public construction by virtue of my profession of engineering, I would like to urge you to approve the legislation. This bill addresses several key issues that cause a great deal of hardship for small businesses that do not have the resources to extend their capital for public projects.

While this bill does not offer any special treatment to any particular interest, it does provide fair and equitable treatment of all business interests in the public projects which helps to place the small business interests on a more level playing field. The small businessman is essential to the health and well being of our statewide and national economy and passage of this legislation will enhance the opportunity for all to participate in public projects which will ultimately benefit all of us.

We appreciate your consideration of this bill and look forward to the improvements this will make for all involved with the construction process and the citizens in the State of Kansas.

Sincerely,

Michael J. Falbe, P.E.  
12813 Bond  
Overland Park, KS 66213

Senate Commerce Committee

March 2, 2006



**C&O ELECTRIC SALES COMPANY**

**February 28, 2006**

**Subject: Senate Bill 516 - Kansas Fairness in Public Construction Contract Act.**

**As a current Board Member and Treasurer of the Electric League of Missouri and Kansas I would like to voice our Organization's support of this legislation.**

**We represent hundreds of small and mid-sized Companies that do work or supply materials in the Public Project arena. This may include electrical contractors, electrical wholesalers, manufacturer's representatives and the many manufacturers that they represent. The financial health and welfare of this labor and supply line of Companies is drastically affected if and when these Companies are not promptly reimbursed for the material and labor to install that material. The Companies ability to make payroll and to remain current in their payment obligations to their suppliers and those suppliers to pay their manufacturers can also be impacted.**

**Many of these same issues were wisely remedied when Senate Bill 33 was passed by the Senate to approve Prompt Pay Legislation in the private sector.**

**We sincerely hope this same outcome will result with the work on Senate Bill 516.**

**Sincerely,**

**Douglas A. Carlson  
President**

Senate Commerce Committee

March 2, 2006

Attachment 11-1



# KAW ROOFING AND SHEET METAL, INC.

On Top of Kansas City Since 1923

February 28, 2006

The Honorable Members  
Senate Commerce Committee  
Kansas State Senate  
300 SW 10<sup>th</sup> St.  
Topeka, KS

Re: SB516 – Kansas Fairness in Public Contract Act  
Hearing Scheduled March 1, 2006

Dear Senators,

My name is Robert P. Daly, Jr., President and CEO of Kaw Roofing & Sheet Metal, Inc. I represent an 83 year old family owned construction business in Wyandotte County now it its fourth generation.

As a proponent of SB516 I am urging you to be objective as you conduct your hearings on March 1<sup>st</sup>, 2006. Never before has an attempt to level the playing field been so timely and long overdue. As a subcontractor, in most cases, I represent the majority of small business owners within the construction industry. By reducing risk and increasing return, as SB516 will do, you maintain the very tax base which supports this great state of ours. This will also keep businesses in Kansas knowing they will get a fair shake by the very people extending them contracts. The prospect of getting more businesses back into public bidding is very exciting.

In closing I would ask that you allow the process to take its full course before passing judgment. To hear each and every proponent of SB516 will encourage you to realize that the word "fairness" in the title of the SB516 will have its intended meaning.

Sincerely,

Robert P. Daly, Jr.  
President, CEO  
Kaw Roofing & Sheet Metal, Inc



13



*Building a Better Kansas Since 1934*  
200 SW 33<sup>rd</sup> St. Topeka, KS 66611 785-266-4015

**TESTIMONY OF  
ASSOCIATED GENERAL CONTRACTORS OF KANSAS  
BEFORE SENATE COMMITTEE ON COMMERCE  
SB 516**

March 2, 2006

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

Madam Chairman, Mister Chairman and members of the committee, my name is Corey D Peterson. I am the 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 Senate Bill 516 as written, but requests that you approve the attached balloon. AGC would fully support SB 516 if the attached amendments are included in the bill and would respectfully ask that you report it favorably for passage as amended.**

AGC fully supports the concept of a "fairness in construction bill for the public sector," as it supported the final version of SB 33 that was passed into law last session. However, SB 516 goes above and beyond the provisions of the private sector law negotiated in good faith last session.

AGC of Kansas has been working with the AIA, public owners, subcontractors and general contractors to come up with language that would make SB 516 a bill that is fair for all parties involved. Attached is a balloon that incorporates suggestions from all of the above mentioned groups, including compromise language from AGC on the subject of retention. While not all public owners will support the compromise, it is generally agreed it makes the bill more acceptable.

The retention language is a compromise that was the result of several meetings between subcontractors and general contractors within AGC. It is a position that admittedly is not perceived as perfect for all, but will improve the cash flow for subcontractors, while keeping important protections in place for general contractors and owners. The language in SB 516 will subject owners and general contractors to undue risk and would likely end up forcing smaller, less experienced subcontractors out of the marketplace, since they may be perceived as too risky for a general contractor to use with out the protections of retention.

Timely payment from public owners is a major concern for our industry. AGC feels that public entities should be asked to meet the same standards the legislature overwhelming set for the private sector with SB 33 last session.

The AGC of Kansas **respectfully requests that you recommend SB 516 for passage with the attached amendments.** Thank you for your consideration.

Senate Commerce Committee  
March 2, 2006

Attachment 13-1

**SENATE BILL No. 516**

By Committee on Commerce

2-7

AGC  
Proposed  
Compromise  
– Balloon  
3/2/06

9 AN ACT concerning public construction contracts; enacting the Kansas  
10 fairness in public construction contract act.

11

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

13 Section 1. (a) Sections 1 through 7, and amendments thereto, shall  
14 be known and may be cited as the Kansas fairness in public construction  
15 contract act.

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

19 Sec. 2. As used in this act:

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

25 (b) "Contract" means a contract or agreement concerning construc-  
26 tion made and entered into by and between an owner and a contractor,  
27 a contractor and a subcontractor or a subcontractor and another  
28 subcontractor.

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

32 (d) "Owner" means a public entity that holds an ownership interest  
33 in real property.

34 (e) "Public entity" means the state of Kansas, political subdivisions,  
35 cities, counties, state universities or colleges, school districts, all special  
36 districts, joint agreement entities, public authorities, public trusts, non-  
37 profit corporations and other organizations which are operated with pub-  
38 lic money for the public good.

39 (f) "Retainage" means money earned by a contractor or subcontractor  
40 but withheld to ensure timely performance by the contractor or  
41 subcontractor.

42 (g) "Subcontractor" means any person performing construction cov-  
43 ered by a contract between an owner and a contractor but not having a

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~~contract with the owner.~~

Sec. 3. (a) Subject to the provisions of subsections (b), (c), (d), (e), (f), (g) ~~and~~, (h) and sections 4 and 5, and amendments thereto, all persons who enter into a contract for public construction after the effective date of this act, shall make all payments pursuant to the terms of the contract.

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

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

(2) a provision that purports to waive, release or extinguish rights to file a claim against a payment or performance bond, except that a contract may require a contractor or subcontractor to provide a waiver or release of such rights as a condition for payment, but only to the extent of the amount of payment received; and

(3) a provision that purports to waive, release or extinguish rights of subrogation for losses or claims covered or paid by liability or workers compensation insurance except that a contract may require waiver of subrogation for losses or claims paid by a consolidated or wrap-up insurance program, owners and contractors protective liability insurance, or project management protective liability insurance or a builder's risk policy.

(c) Any provision in a contract for public construction providing that a payment from a contractor or subcontractor to a subcontractor is contingent or conditioned upon receipt of a payment from any other public party, including an owner, is no defense to a claim to enforce a bond to secure payment of claims pursuant to the provisions of article 11 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto.

(d) All contracts for public construction shall provide that payment of amounts due a contractor from an owner, except retainage, shall be made within 30 days after the owner receives a timely, properly completed, undisputed request for payment.

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

~~(f) (g)~~ A contractor shall pay its subcontractors any amounts due within seven business days of receipt of payment from the owner, including payment of retainage, if retainage is released by the owner, if the subcontractor has provided a timely, properly completed and undisputed request for payment to the contractor.

**Add new:** (h) *“Substantive completion” means the stage of a construction project where the project, or a designated portion thereof, is sufficiently complete in accordance with the contract, so that the owner can occupy or utilize the constructed project for its intended use.*

**Add:** *“and (i)”*

**Delete:** *... “binding arbitration as a substitute for litigation or require”*

**Add new:** *“(e) The architect/engineer of record shall review, approve and forward undisputed requests for payment to the owner within seven business days.”*

**Change:** *“(e)” to “(f)”*

**Change:** *“(f)” to “(g)”*

1 (g) h) If the contractor fails to pay a subcontractor within seven business  
 2 days, the contractor shall pay interest to the subcontractor beginning on  
 3 the eighth business day after receipt of payment by the contractor, com-  
 4 puted at the rate of 18% per annum on the undisputed amount.  
 5 (h) i) The provisions of subsections (f) g) and (g) h) shall also apply to all  
 6 payments from subcontractors to their subcontractors.  
 7 Sec. 4. (a) An owner, contractor or subcontractor may withhold no  
 8 more than 5% retainage from the amount of any undisputed payment  
 9 due. ~~Retainage shall be released by the owner upon completion of any~~  
 10 ~~portion of work that is described in a specification section.~~ No more than  
 11 150% of the value of work that is not completed due to no fault of the  
 12 subcontractor may be withheld pending completion.  
 13 (b) If an owner, contractor or subcontractor fails to pay retainage, if  
 14 any, pursuant to the terms of a contract for public construction or as  
 15 required by this act, the owner, contractor or subcontractor shall pay  
 16 interest to the contractor or subcontractor to whom payment was due,  
 17 beginning on the first business day after the payment was due, at a rate  
 18 of 18% per annum.  
 19 Sec. 5. If any undisputed payment is not made within seven business  
 20 days after the payment date established in a contract for public construc-  
 21 tion or in this act, the contractor and any subcontractors, regardless of  
 22 tier, upon seven additional business days' written notice to the owner and,  
 23 in the case of a subcontractor, written notice to the contractor, shall,  
 24 without prejudice to any other available remedy, be entitled to suspend  
 25 further performance until payment, including applicable interest, is  
 26 made. The contract time for each contract affected by the suspension  
 27 shall be extended appropriately and the contract sum for each affected  
 28 contract shall be increased by the suspending party's reasonable costs of  
 29 demobilization, delay and remobilization.  
 30 Sec. 6. In any action to enforce K.S.A. sections 3, 4 or 5, and amend-  
 31 ments thereto, including arbitration, the court or arbitrator shall award  
 32 costs and reasonable attorney fees to the prevailing party. Venue of such  
 33 an action shall be in the county where the real property is located and  
 34 under Kansas law. The hearing in such an arbitration shall be held in the  
 35 county where the real property is located.  
 36 Sec. 7. Any provision in a contract that purports to waive the rights  
 37 of a party to the contract to collect for damages for delays caused by  
 38 another party to the contract shall be void, unenforceable and against  
 39 public policy. This provision is not intended to create a contract between  
 40 parties where a contract did not otherwise exist.  
 41 Sec. 8. This act shall take effect and be in force from and after its  
 42 publication in the statute book.

Change: "(g)" to "(h)"

Change: "(h)" to "(i)"

Change: "(f)" to "(g)" and  
"(g)" to "(h)"

Add: "unless the owner and the architect or engineer determine that a higher rate of retainage is required to ensure performance of the contract. Retainage, however, shall not exceed 10% of the value of the contract."

Delete sentence:  
"Retainage shall... specification section."

Add: "An owner must release the retainage on any undisputed payment due on a construction project within 30 days after substantial completion of the project: provided, however, if any subcontractor is still performing work on the project under its subcontract, an owner may withhold that portion of the retainage attributable to such subcontract until 30 days after such work is completed."



League of Kansas Municipalities

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

TO: Senate Commerce Committee  
FROM: Sandy Jacquot, Director of Law/General Counsel  
DATE: March 2, 2006  
RE: Opposition to SB 516

I would like to thank the committee on behalf of the League of Kansas Municipalities for the opportunity to testify in opposition to SB 516. The League's opposition is primarily based upon the public policy of allowing municipalities the flexibility to contract for public improvement projects to the benefit of the public, although some of the terms of SB 516 are not workable in the public sector.

Most cities only have meetings once per month at which time they pay bills and may not be able to meet a strict 30 day payment requirement set forth in Section 3 of the bill. If this is an issue for a municipality, Section 1(b) of the bill would not allow the parties to contract for a more reasonable bill payment schedule. Thus, the cost of a public construction contract could be increased simply by a municipality not having a meeting timed to meet the invoicing of the contractor. It would be helpful to add language providing for some flexibility in the 30 day payment provision. In addition, for some public projects a greater than 5% retainage, which is prohibited in Section 4, would be appropriate, but again, the municipality would be prohibited from negotiating for such a term, perhaps to the detriment of the public. In fact, 10% is the more common percentage for retainage on public improvement projects. Municipalities should not have their hands tied in negotiating for public construction projects.

Some other issues include the work stoppage provision in Section 5, the attorneys fees provision in Section 6 and the no waiver provision in Section 7. These are terms that cities should be able to negotiate and putting them in statute merely ties the hands of public entities trying to negotiate a contract that is in the best of interest of the municipality and its citizens who pay the bills for the project. Thank you again for allowing the League to testify in opposition to SB 516.

Senate Commerce Committee

March 2, 2006



8500 Santa Fe Drive  
Overland Park, Kansas 66212  
• Fax: 913-895-5003  
www.opkansas.org

Testimony Before The  
Senate Commerce Committee  
Regarding  
Senate Bill 516  
By  
Erik Sartorius

March 2, 2006

The City of Overland Park appreciates the opportunity to appear before you in opposition to Senate Bill 516. The City instead supports retaining our current practices for paying contractors.

The City of Overland Park maintains a strong relationship with a multitude of contractors who perform work vital to the growth of the City. To do so, the City must be able to take local conditions into account when formulating contracts for the performance of work to be done. Artificial measures for timely payment, work completion, and retainage compromise the City's ability to ensure that work is performed at a standard expected by taxpayers.

Unlike contracts entered into between private entities, public construction contracts are funded by taxpayers, to which the governmental entities are ultimately accountable. City ordinances, policy resolutions and contracting procedures prescribe how the interests of all parties to the construction contracts are balanced – and protected.

Public construction contracting is also regulated by federal acquisition regulations, state statutes, Kansas Department of Transportation policies and procedures, and in some cases, county requirements. In order to assure compliance with all applicable contracting requirements, the City of Overland Park has a standard construction contract, which among other provisions, addresses prompt payment, retainage and dispute resolution. Many of the contract provisions required by federal and state legislation require accommodations not found in private construction contracts – such as the Buy American Act, Disadvantaged Business Enterprise, and Davis-Bacon Act, to name just three. These provisions are not applicable in private construction contracting.

The provisions of SB 516, especially with respect to prompt payment and retainage, can create a conflict between federal contracting regulations and state statute. Federal regulations require detailed documentation be provided from the contractor, and subcontractors, monthly in order for the City to approve pay requests. For example, federal regulations require the submittal of affidavits confirming payment to Disadvantaged Business Enterprises (DBE) and certified payroll reports. Failure of the Contractor to submit these is

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March 2, 2006  
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cause to withhold further payments until such time as the Contractor complies with the contractual requirements and federal regulations. Doing so, however, would conflict with the proposed state statute.

In addition, competitive bidding is required on all public construction contracting where the lowest, responsive bid determines the contractor selected to perform. For this reason, all contractual requirements and protections are included in the contract documents, including provisions related to retainage and prompt pay.

Finally, public construction contracting is done in the interest of the public good. Governmental agencies operate from a long-term perspective – serving citizens today and well into the future. Cities seek to develop long-term constructive relationships with the contractor community, on the basis that a mutually beneficial partnership serves the best interests of the citizens, cities and contractors.

Should the committee see fit to move forward with this legislation, the City believes changes must be made to the bill. For instance, Senate Bill 33 from 2005 allowed for 10% retainage. Senate Bill 516, as drafted in Section 4(a), limits retainage to five percent. We can see no valid public policy for treating retainage requirements for public and private construction differently, and feel strongly that SB 516 should be amended to include the ten percent retainage language.

Also within Section 4(a) (page 3, lines 9-12), we are uncertain what proponents are seeking to accomplish. We need clarification about that language, and would ask why it was not present in the bill addressing private construction last year, Senate Bill 33.

Section 5 of the bill suggests a payment schedule that is difficult to imagine in a public construction project. Seven business days is an impossibly tight timeline. With taxpayer funds, a City or other public entity cannot rush payments and jeopardize accountability or proper expenditure of public tax dollars. We would suggest that thirty days is a more reasonable figure, as most of our payments are now made within that timeframe. Thirty days is also the figure used in Section 3(e) for payment to contractors. Although we speculate that the seven days referenced in Section 5 relates to retainage only, it is not specified as such, and that ambiguity will cause confusion. Using thirty days for payment in Section 5 is both clear and feasible for city processing.

The City of Overland Park believes that adequate protections exist in current law for all parties in engaged in public construction. We request that you not recommend Senate Bill 516 favorably for passage.



# The Heavy Constructors Association

of The Greater Kansas City Area

TESTIMONY OF EDWARD DeSOIGNIE  
BEFORE THE SENATE COMMERCE COMMITTEE  
ON SENATE BILL 516  
March 2, 2006

My name is Edward DeSoignie, I am the Executive Director of the Heavy Constructors Association of the Greater Kansas City Area. The Heavy Constructors represent over 150 companies in the heavy, highway and utility public works construction industry in the Greater Kansas City Area which includes both Kansas and Missouri.

We thank you for the opportunity to come before you today to speak on our concerns with Senate Bill 516; the Kansas Fairness in Public Construction Contract Act.

Let me mention at the onset that the Heavy Constructors Association membership is made up of construction companies of various sizes. Any one of our companies may be the prime (or general) contractor on a public works project, while on another public works projects the may perform as a subcontractor. It is a common practice in our industry for the role of general and subcontractor to change in this manner. I mention this because it is important for the Committee to understand construction industry practices that have evolved over many years.

One of those practices has been the use of retainage, the holding back of a certain percentage of funds from final payment. Contractors acting as generals use retainage to have a hold on their subcontractors in the event work by the subcontractor is deficient or inadequate. This is because it is not common practice for general contractors to require performance bonds from their subcontractors. If something on the project goes wrong with work done by the subcontractor, the retainage is used to have the subcontractor correct the problem. Public entities such as cities and counties also employ the practice in addition to requiring a performance bond for much the same reason.

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March 2, 2006

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TESTIMONY-HEAVY CONSTRUCTORS ASSN.

Senate Bill 516

Senate Commerce Committee

March 2, 2006

Page 2

One of the problems created by the bill can be found in Section 3, paragraph (f) requiring a contractor to pay its subcontractors any amounts due within 7 days of receipt of payment from the owner, including release of any retainage. The question is which payment? Does paragraph (f) trigger upon receipt of a progress payment or does it trigger upon final payment? We also question why 7 days are required for payment when in business 30 to 45 days is not uncommon. Additionally, and more importantly on a public works project should you release retainage on all of your subcontractors?

Construction is phased work. Subcontractors brought in at the front of a project are by their very nature in a different position than subcontractors brought in toward the end. If work by a subcontractor at the front end of a project is later in the project found to be incorrect how do you bring the subcontractor back to correct the problem if you've released retainage?

We also note our concerns with the following portions of the bill:

+ Paragraph (g) of Section 3 requiring 18 percent interest to be imposed on non-payment. It seems high when the current prime rate is 7.5 percent.

+ Section 4, paragraph (a) limiting retainage to no more than 5 percent, where the common practice has been 10 percent.

For these reasons, we can not support Senate Bill 516 as introduced.

Thank you for the opportunity to appear before you today to share our thoughts and concerns on this very important issue. I would be glad to answer any questions.



March 2, 2006

TO: Senator Brownlee and Members of the Senate Commerce  
Committee

FROM: Trudy Aron

RE: Support of 516 with Amendments

Representative Brownlee and Members of the Committee, I am Trudy Aron, Executive Director, of the American Institute of Architects in Kansas (AIA Kansas.) I am here to testify in support of SB 516 with amendments.

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.

Last year, this Committee passed SB 33 that provided many remedies sought by subcontractors and material suppliers regarding prompt payment for **private contracts**. It provided penalties if payments are not made within stipulated time frames. While we lobbied against the bill, we did agree to the compromise worked out in conference committee.

We agree with most of the language in SB 516, however, we have worked with AGC, their Specialty Contractors, and the State's Build Owners Group on amendments to the bill that we can support.

The crux of our concern is on page 3, lines 9-10. Let me give you two examples of why it is not reasonable to release retention as each portion of the work as it is completed:

*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*  
Jenifer 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

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

700 SW Jackson, Suite 503  
Topeka, Kansas 66603-3758  
Telephone: 785-357-5308  
800-444-9853  
Facsimile: 785-357-6450

Senate Commerce Committee  
March 2, 2006  
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- 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.

The construction of buildings is a complicated process. Many of the components of the building cannot be connected, completed, finished, or started until the building is ready for substantial completion.

Substantial completion is where beneficial occupancy can take place - when life safety concerns are met. However, many aesthetic and finish components lag significantly more than 30 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 systems. 90 days later during balancing it is discovered that ducts have collapsed and chases must be opened to make significant repairs.

AIA Kansas does not oppose returning retainage within 30 days after substantial completion to those subcontractors who have completely satisfied their contracts. If a subcontractor has not satisfied their contract, then the owner needs to be able to withhold the entire retainage on the contract until their contract obligations are fulfilled.

AIA Kansas urges you to pass the amendments proposed by AGC. I will be happy to answer any questions you may have.



# Martin K. Eby Construction Co., Inc.

610 N. Main - P.O. Box 1679 - Wichita, Kansas 67201

(316) 268-3500 - (316) 268-3649 Fax

www.ebycorp.com

*"Building a Better Tomorrow"*

## WRITTEN TESTIMONY OF JOSEPH D LEVENS JR., CPC BEFORE SENATE COMMITTEE ON COMMERCE

SENATE BILL No. 516

March 2, 2006

Madam Chair, Mister Chair 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 SB 516 as written, but would support the AGC Proposed Compromise – balloon dated 3/02/06 presented by Corey Peterson, Executive Vice President of the AGC of Kansas, Inc.**

The AGC of Kansas is a trade association representing the commercial construction industry, including 64 general contractors, 97 subcontractors and 101 associate members throughout Kansas (with the exception of Johnson and Wyandotte counties)

The amendment of most importance relates to retention and how it is released by owners to contractors. This is a significant addition to the act agreed to last year for the private sector (SB33).

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 all AGC members in attendance to voice their opinions regarding the use of retainage in construction contracts. The following items are a brief summary of comments and concerns addressed in the roundtable discussions:

- Currently, most consider retainage as an additional guarantee that the constructor, both generals and subcontractors, will complete their work including any remedial work discovered during the fit and finish phase of a project.
- 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, SB 516 is a one size fits all and may not provide the flexibility required in construction contracting.
- Paying retainage earlier than the excepted standard, as proposed, could expose the entity withholding the retainage to increased risk. An example of such risk may include having to pay twice for material expenses, once to the sub and then to the supplier the subcontractor failed to pay.
- 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.
- A desire of the parties to establish an end date to the retention period without increasing the risk on the other parties.

In an effort to reach a compromise that could be supported by the entire industry the AGC of Kansas has been working internally with our subcontractor's council and externally with our industry partners consisting of the AIA of Kansas (architects), the owner agencies of the State of Kansas and The Builders Association (Kansas City). The AGC Proposed Compromise – Balloon dated 3/2/06 represents the suggestions and concerns of those affected by this proposed legislation.

**Therefore, I respectfully request that you consider the AGC's amended version of SB 516 for passage.** Thank you for your consideration.

Senate Commerce Committee

*March 2, 2006*

Attachment 18-1

19

# **FERRELL**

**CONSTRUCTION  
OF TOPEKA, INC.**

**WRITTEN TESTIMONY TO  
SENATE COMMERCE COMMITTEE**

**RE: SB 516**

**MARCH 2, 2006**

**BY**

**TIMOTHY BROWDER**

Madame Chairperson, Mr. Chairperson & Members of the Committee:

My name is Tim Browder, Senior Vice President of Ferrell Construction of Topeka, Inc. and Treasurer of the Associated General Contractors of Kansas.

I am writing to voice my opinion and opposition to SB 516 in its current form. My opposition is specifically due to language regarding the release of retention.

As currently written the bill provides for "line item" retention. In other words, retention will be paid when any section or portion of a contract is complete before the entire project is complete. This is the same concept we opposed and negotiated out of SB 33 last year. We are opposing the concept in this bill for the same reasons.

Construction is an extremely complicated process. As a general contractor we work with many subcontractors on a project. Each of these subcontractors work is broken down into smaller portions to be paid for by the Owner as the project progresses. We submit monthly pay requests for progress payments each month. These pay requests can have as many as 300-400 line items depending on the size of the project. Because of the complicated nature of installing work and finding a time to stop and start for the monthly pay application, getting an exact amount for installed work can be extremely difficult.

This is where retainage comes in. Retainage is used for two purposes. Retainage works as an incentive to finish the work in a timely manner and as a cushion in the event of over payment for a line item of the work on the pay application. Construction is very complicated in the fact that sometimes the value of each line item of the work completed is hard to establish because of the infinite number of elements that make up each line of work on a pay application. Getting an exact number for each line item can be very difficult if not impossible. Therefore, we make estimates of each line item and usually each line is paid by a percentage of the work complete. Retention gives us a cushion in determining the percentage complete, which at times can be very difficult to establish. This may sound like a hard system to control but this system has been used by owner, architects, and contractors for years.

Senate Commerce Committee  
March 2, 2006

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Requiring a general contractor or architect to certify a portion of work as complete when the entire scope of work is not complete will put undo liability on us. This concept will make the process even more complicated and unmanageable, opening doors for more abuse of the system.

I am sure the proponents of this bill will tell you there are many general contractors who abuse this system and treat them unfairly. I am confident that those that do are the exception. At the same time there are also some subcontractors who are unscrupulous in their dealings with general contractors. Without retention on the entire project general contractors and owners would not have the influence over these subcontractors to complete projects on time.

Timely payment is important to our industry. I strongly urge you to support the AGC balloon which modifies the language regarding retention. Otherwise, I urge you to oppose SB 516 as currently written.



20



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[www.kelley-construction.com](http://www.kelley-construction.com)

WRITTEN TESTIMONY OF KEVIN KELLEY  
BEFORE SENATE COMMITTEE ON COMMERCE  
SB 516  
March 2, 2006

Madam Co-Chair Brownlee, Mister Co-Chair Jordan 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 SB 516 as written and ask that you support the amendment of this bill as proposed by the AGC of Kansas.**

Even though Kelley Construction is primarily a small general contractor, we have performed as a subcontractor 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.

Although I would like to say the current system of contract provisions for the most part works fine, I must agree some things need changed. Since the legislature saw fit to enact laws last year to control the private sector's contracting methods, it only makes sense our state's public sectors abide by at least the same rules. The proposed bill before you for the most part mirrors what we are required to do in the private sector but not totally.

The AGC of Kansas has had extensive negotiations with the AIA of Kansas, agency representatives, and subcontractor groups and is proposing "balloon" amendments to the bill as written. In the spirit of compromise I support those balloons. I will say I have a hard time agreeing with the proposed amendment in Section 4 (e) which allows 7 days for the architect to process a billing and then allowing the public agency 30 days to pay. On most agency contracts we have had, the agency is able to pay within 23 days after receiving a process billing from an architect. The main time we have a slow payment is with the very first billing of a project. Just last month our first billing of a state project was over 30 days late to us. This problem happens on most of our public projects. It is the first billings that need speeded up not the subsequent monthly payments.

This bill as introduced wants to create release of retainage provisions that are more stringent than the current private sector law. There is no need to make the administration of retainage more difficult in the public sector than what is already required in the private sector. I would support the AGC compromise that was developed over the course of several meetings with subcontractors and general contractors.

**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.

Senate Commerce Committee

March 2, 2006

Attachment 20-1



**Central Mechanical Wichita, Inc.**

Plumbing #2395 • Mechanical #1787

P.O. Box 47343 • Wichita, KS 67201-7343 • 316-267-7676 • FAX 316-267-7684

**TESTIMONY  
BY PHIL SEWELL  
BEFORE SENATE COMMITTEE ON COMMERCE  
SB 516**

March 2, 2006

Phil Sewell, Central Mechanical Wichita, Inc., Wichita, KS

Madam Chairman, Mister Chairman and members of the committee, my name is Phil Sewell and I am president of Central Mechanical Wichita, Inc. I also serve as chairman of the Specialty Contractors Council of the Associated General Contractors of Kansas. My company is a mechanical contractor, where I do work as both a subcontractor and prime contractor. The Specialty Contractors Council represents the 98 subcontractor members of the AGC of Kansas.

I am speaking to oppose Senate Bill 516 as introduced, but ask that you amend it per the AGC proposed balloon.

As you know last year I testified on a similar bill, SB 33, which had similar prescriptive contract terms for the private sector. The current bill before you, SB 516, has language that is in addition to the bill (which many impacted parties negotiated in good faith ) that passed last session. The most significant change pertains to the early release of retention.

The subcontractor members of the AGC of Kansas met twice in December and again in February and successfully developed a compromise position on the release of retention. This was later approved by the AGC Board of Directors and the Specialty Contractors Council at our recent convention. This compromise is reflected in the AGC balloon introduced by Corey Peterson of AGC. The language was somewhat modified to consider concerns expressed by agencies of the state of Kansas and the AIA of Kansas.

I do not oppose the intent of SB 516 which I believe is to insure all public sector construction contracts are promptly paid in accordance with their respective contracts. The AGC balloon to SB 516 satisfies this intent, which is the prompt payment of monies rightfully due, in a manner that is fair for all parties.

Again, I respectfully request that you amend SB 516 per the AGC balloon. Thank you for your time

Phil A Sewell  
President CMW Inc.

Senate Commerce Committee  
*March 2, 2006*



**TESTIMONY IN OPPOSITION TO SENATE BILL NO. 516**

To: Members of the Senate Commerce Committee

From: Ronald L. Norris, Public Works Director

Date: March 2, 2006

RE: Senate Bill 516 – Public Construction Contracts

Thank you for the opportunity to submit testimony in opposition to Senate Bill 516. The bill, as proposed, would be detrimental to public entities that administer construction contracts in numerous ways. Of particular concern is the provision relating to retainage. It is standard practice in public contracting to retain 10% of progress payments until a job is substantially complete. This is a fair and equitable amount and ensures that any work that is not completed in accordance with a bill can be completed by the public entity with the retained funds and that the general public does not suffer – in terms of inconvenience or higher tax levies – for the contractors failure. This bill, in Section 4(a), would limit retainage in public contracts to only 5% and then require that the retainage be released completely upon completion of each portion of the work – a requirement which renders any retainage provision virtually useless. Further, we are unable to determine the purpose or meaning behind lines 9 -12 of this subsection and are concerned about what the consequences of that provision might be.

If the purpose of this bill is to provide additional protections to subcontractors, I would point out that a statutory bond which ensures the payment of subcontractors is required by state law on every public contract in excess of \$100,000.00. This mechanism ensures that every subcontractor will be made whole on public construction contracts and does so without putting additional public funds at risk.

In Section 3(e), the bill requires payment to contractors within 30 days following receipt of a pay request. This presents a logistical problem for the City of Lenexa, and presumably other public entities, in that once a pay request is received it must be verified and approved by the Department administering the project, forwarded to the City's Finance Department for payment and then must proceed through the standard Finance Department payment process, which only occurs two times per month. While it is the City's goal to issue payment as quickly as possible, it is simply not always possible for that to occur within 30 days of receipt of pay request and imposing 18% interest on the 31<sup>st</sup> day is an extremely harsh punishment for a public entity that must ensure that expenditures of public funds are carefully accounted for. The City of Lenexa's standard construction contract requires payment within 30 days following "approval" of the pay request, which can always be accomplished under the City's standard payment procedure.

In summary, the City of Lenexa believes that this bill is a solution in search of a problem and that current public contracting procedures and the associated statutory protections are sufficient. However, if this bill does move forward, we would strongly urge the committee to consider the ramifications of the issues raised in this testimony and to amend the bill to address those concerns. The City of Lenexa urges your opposition to SB 516. Please do not hesitate to contact me (913/477-7680 or rnorris@ci.lenexa.ks.us) if I can answer any questions or provide you with any additional information. Thank you for your consideration.

Water District No. 1 of Johnson County

**TESTIMONY IN OPPOSITION TO SENATE BILL NO. 516**

To: Members of the Senate Commerce Committee

From: Eric R. Arner, General Counsel

Date: March 2, 2006

RE: Senate Bill 516 – Public Construction Contracts

On behalf of Water District No. 1 of Johnson County, Kansas, (“WaterOne”), I would like to thank you for consideration of our opposition to Senate Bill 516. Although we are sympathetic to the concerns of subcontractors and prompt payment for their work, it is not clear to WaterOne that SB 516 will make that situation any better. We are though very concerned with the impact of SB 516 on the ability of WaterOne to properly manage our public construction contracts.

Water District No. 1 of Johnson County has an excellent reputation for paying bills related to public construction contracts. We have a proven and efficient process to make sure the contractor is paid in a timely manner for any and all satisfactorily completed work. Equally important to the process though is the protection provided the ratepayers of WaterOne by the diligent review and inspection of the pay request. SB 516 requires payment to contractors within 30 days of a completed and undisputed pay request or face an interest penalty of 18% per annum. Thirty days is an extremely short period of time to receive, analyze, confirm and process a pay request from a contractor. It is not uncommon for the pay request to include errors that must be corrected before payment can be initiated. We believe it is not good public policy to place public entities into a position of expediting pay requests in order to avoid interest penalties.

Next, SB 516 reduces retainage to no more than 5% in section 4(a). Currently, WaterOne uses model construction documents created by the Engineering Joint Contract Documents Committee (EJCDC). The EJCDC construction documents are generally accepted and used nationally. With respect to retainage, WaterOne follows the recommendation of EJCDC and calculates retainage at 10%. By limiting retainage to 5%, we believe SB 516 falls below well reasoned national standards and local practice. The EJCDC construction documents carefully balance the legitimate business needs of contractors with the equally legitimate needs of the owner to result in a fair payment process. SB 516 unnecessarily interferes with that process and alters the balance created by the use of reasonable retainage by a public entity.

Senate Commerce Committee

March 2, 2006

Attachment 23-1

In summary, Water District No. 1 of Johnson County, Kansas strongly opposes SB 516. It is our opinion that SB 516 sets out to solve a problem that here-to-for does not exist. Reducing retainage and limiting the time to verify payment requests would only serve to place the public at more risk by reducing the ability of public entities to efficiently manage public construction contracts.

#### Contact Information

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