

Approved: SRB 3/19  
Date

## MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE

The meeting was called to order by Chairman Steve Brunk at 9:09 A.M. on March 16, 2007 in Room 231-N of the Capitol.

All members were present except:

Brenda Landwehr- excused  
Charles Roth- excused  
Delia Garcia- excused  
Mario Goico- excused  
Mike Kiegerl- excused  
Terrie Huntington- excused

Committee staff present:

Jerry Ann Donaldson, Kansas Legislative Research Department  
Stephen Bainum, Committee Assistant

Conferees appearing before the committee:

Dan Morgan, The Builders' Association and The Kansas City Chapter, AGC  
Ken Keller, Controller, Western Extralite Company  
Bill Miller, American Subcontractors Association  
Corey Peterson, Associated General Contractors  
Dan M. Haake, Haake Foundations, Inc.  
Trudy Aron, Executive Director, AIA of Kansas  
Tonya Bair, Larry Bair Excavating  
Darci Meese, Governmental Affairs Contracts, Water One of Johnson County  
Bob Vancrum, Kansas Government Affairs Specialist, Blue Valley Unified School District 229  
Mark Tomb, League of Kansas Municipalities  
Erik Sartorius, City of Overland Park  
Bob Totten, Public Affairs Director, The Kansas Contractors Association, Inc.  
Joe Waters, Johnson County

Others attending:

See attached list.

The Chairman opened the hearing on **SB 333 - Fairness in public building construction contract act.** He requested that questions be held until all proponents had testified.

Dan Morgan testified as a proponent of **SB 333 (Attachment 1).**

Ken Keller testified as a proponent of **SB 333 (Attachment 2).**

Bill Miller testified as a proponent of **SB 333 (Attachment 3).**

Corey Peterson testified as a proponent of **SB 333 (Attachment 4).**

Dan Haake testified as a proponent of **SB 333 (Attachment 5).**

Trudy Aron testified as a proponent of **SB 333 (Attachment 6).**

Tonya Bair testified as a proponent of **SB 333 (Attachment 7).**

Representative Pauls asked about page 4, line 33. Isn't this an illegal delegation of power by the legislature? Bob Totten replied that it was Revisor's language. Representative Pauls said she would check with the Revisors.

The Chairman asked what was the difference between the public and private contract. This bill allows for the early release of the retainer for the early finishing Subcontractors as long as it does not cause the Contractor any damage. It protects everybody involved in the construction.

CONTINUATION SHEET

MINUTES OF THE House Commerce and Labor Committee at 9:09 A.M. on March 16, 2007 in Room 231-N of the Capitol.

Darci Meese testified as an opponent of **SB 333** (Attachment 8).

Robert Vancrum testified as an opponent of **SB 333** (Attachment 9).

Mark Tomb testified as an opponent of **SB 333** (Attachment 10).

Eric Sartorius presented written testimony as an opponent of **SB 333** (Attachment 11).

Bob Totten testified as an opponent of **SB 333** (Attachment 12).

Joe Waters testified as an opponent of **SB 333** (Attachment 13).

Representative Pauls asked a question about "Services" as shown on page 5, lines 5-10. This language was added to prevent conflicting statutes. The existing statute applies to everyone. This wording is focused on public construction.

The Chairman advised that we were short on time today because the House Session starts at 10:00 A.M. and said that we would continue the hearing on Monday at 9:00 A.M.

The meeting was adjourned at 9:56 A.M.

COMMERCE & LABOR COMMITTEE

DATE: 3-16-07

NAME	REPRESENTING
Curtis Miller	AMERICAN SUBCONTRACTORS ASSOC
Ken Keller	Western Extralite Co. & ASA
DAN M HODKE	HODKE FOUNDATIONS INC
Steve Davis	Blue Valley School District
Joe Waters	Johnson County
Bob Vanorum	Blue Valley USD 229
Scott Heider	ACEC Kansas
Edward DeSaigne	Heavy Constructors Assn.
Bob Tolan	Ks Contractors Assoc.
David Shuman	Ks Assoc of Sch Bldg
Tom Burgess	NACM - ASA
Mark Tomb	LKM
DAN MORGAN	Builders Assn. & KC Chapter, AGC
Corey Peterson	AGC of Kansas
Dan Meese	Waters
Judy Brown	Am Inst of Architect
Dan Murray	Federico Consulting

**TESTIMONY BEFORE THE  
HOUSE COMMERCE AND LABOR COMMITTEE  
REGARDING SENATE BILL 333**

BY DAN MORGAN, REPRESENTING  
THE BUILDERS' ASSOCIATION AND THE KANSAS CITY CHAPTER, AGC  
MARCH 16, 2007

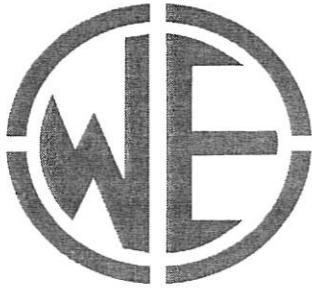
Thank you, Mister Chairman and members of the committee. My name is Dan Morgan. I am director of governmental affairs for the Builders' Association and also the Kansas City Chapter of Associated General Contractors of America. I appreciate the opportunity to appear before you this morning in support of Senate Bill 333. The Builders' Association and Kansas City Chapter, AGC represent more than 1,050 general contractors, subcontractors and suppliers engaged in the commercial and industrial building construction industry throughout central and western Missouri and portions of northeast Kansas. More than half of our members are located in the Kansas City area and are either domiciled in Kansas or perform work in the state.

Senate Bill 333 is appropriately titled the "Kansas fairness in public building construction contract act". It reflects the good and fair business practices by which the great majority of all parties to public building construction contracts conduct themselves on a daily basis and its provisions are considered fair by public owners, general contractors, subcontractors and suppliers alike. We have been pleased to meet and work with representatives of interested parties, including public owners, the AIA, the American Subcontractors Association, and the Associated General Contractors of Kansas, over the past couple of years to find this common ground.

You will find that this bill is very similar to Senate Bill 33 the "Kansas fairness in private construction act" that was passed into law in 2005. We strongly support the timely payment provisions set forth in this bill for all parties to public building contracts. We urge your support for the bill as well and respectfully ask that Senate Bill 333 be recommended favorably from your committee. Thank you very much. I would be happy to try to answer any questions that you might have.

-end-

*H Commerce + Labor  
3-16-07  
(Attach 1)*



**WESTERN EXTRALITE COMPANY**  
DISTRIBUTORS OF QUALITY ELECTRICAL AND VOICE/DATA PRODUCTS

March 16, 2007

Mr. Chairman,

First, I want to thank you and your committee for giving me the opportunity to address you on the merits of SB 333, 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. I also represent the American Subcontractors Association, the Electric League of Missouri and Kansas, NACM Credit Professional Alliance and other interested parties.

For the past several years, Bill Miller, myself, and other interested parties have met with this committee and the Commerce Committee in the Senate with the intent of creating fairness in construction contracts. Two years ago, thru the efforts of this committee, Kansas passed the most progressive Prompt Pay Act 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, subcontractors, and suppliers. It provided a specific timeline for payment for work properly performed and invoiced timely. It provide remedies if this timeline was not met, such as the ability to stop work and pull 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 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 mechanic's lien or a bond claim. You could not waive the right of your insurance carrier to subrogate against the negligent party's insurance company in the event of a claim. In the last two years, I have yet to hear any negative feedback or problems created by this legislation.

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 in the public sector is even worse. Many 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, unless they are flush with working capital, is to borrow from the bank, provided they have that ability.

Some of the current contracts that exist in the public arena are grossly unfair and need to be corrected just as private contracts were by SB 33.

H Commerce + Labor  
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(Attach 2)

We have been told 30 days wasn't always workable in smaller rural areas. We have increased the timeframe to 45 days in those instances. In the 1990's the Federal Government realized that their paying habits were bankrupting some of their smaller suppliers. They enacted a Prompt Pay Act on themselves, whereby; they would pay the provider in 30 days or pay interest. It is working. I say to you, if the Federal Government can do it, anyone can. I urge your support of SB 333.

Thank you,

Kenneth R. Keller  
Controller  
Western Extralite Company  
(816) 421-8404

# BUILDING ERECTION SERVICES COMPANY

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

March 16<sup>th</sup>, 2007

The Honorable Co-Chairs, Rep. Brunk and Rep. Kiegerl and Committee Members:

My name is Bill Miller. I represent the American Subcontractors Association and myself as President of Building Erection Services Co.

I am here to speak in favor of SB-333, The Fairness in Public Construction Contracts Act.

This Bill is very similar to SB-33 that was passed in 2005 out of this committee and was ultimately signed by the Governor. SB-33 has close to two years of history without any unforeseen consequences and only positive feedback.

The differences between the two Bills are that SB-333 covers the public sector and SB-33 covers the private sector. SB-333 also bans "No damage for delay" clauses in a contract that prevent a damaged party from collecting for damages for delays caused by another party. This Bill allows for the release of retainage to early finishing subcontractors and suppliers who have completed their work provided that release of this retainage would not result in additional costs to the owner or to the contractor.

SB-333 is designed to provide payment protections for all parties to the construction contract from the owner on down to the material and equipment supplier and for professionals that provided services for a public construction project. As it is titled, SB-333 requires fairness in the terms of the contract as well as fairness in the terms of payment.

I urge your support for the passage of this much needed Bill.

William R Miller



President

Building Erection Services Co.

Government Affairs Chairman  
Greater Kansas City Area  
American Subcontractors Association



Certified Steel Erector



H Commerce & Labor  
3-16-07  
(Attach 3)



*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 HOUSE COMMITTEE ON COMMERCE & LABOR**

**SB 333**

March 16, 2007

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

Mister Chairman and members of the committee, my name is Corey 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 supports Senate Bill 333 as written and respectfully asks that you report it favorably for passage.**

AGC fully supports the concept of a "fairness in construction bill for the public sector," just as it supported the final version of SB 33 which was a similar bill pertaining to the private sector that passed into law two years ago.

AGC of Kansas has worked with the American Subcontractors Association, AIA, public owners, The Builders Association and its own general contractor and subcontractor members to come up with language that makes SB 333 a bill that is fair for all parties involved. The bill includes many compromises made by all parties, both during the drafting of the bill introduced as well as amendments made in the Senate Commerce Committee.

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

The AGC of Kansas **respectfully requests that you recommend SB 333 for passage.** Thank you for your consideration.

*H Commerce & Labor*  
*3-16-07*  
*(Attach 4)*



**DAN HAAKE**

March 16, 2007

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

Dear Senator Brownlee,

Thank you for allowing me to vent to you about the payment practices that we are quite common with on Public Construction Projects.

A few years ago I shared with some of you a story about slow payments on a project I was involved with for the Turner School District. At that time, I testified that between the General Contractor, Architect and Owner, a progress payment request was either lost, misplaced or the Comptroller was on vacation. Either way, we were not paid for work completed and no one cared to correct the situation. After that job I told myself I did not need to work for these folks again. Shame on me because July 2006, I accepted a small job at the Shawnee Mission School District Softball Complex for some foundation work worth \$18,452.00. On August 20, 2006, we invoiced the job 100% and received ½ of the amount due on September 25 and had to beg to get the other half on October 30 and I am still waiting for the retention in the amount of \$1,846.00.

Some people think this is prompt pay, I don't. I have no leverage against anyone for their failure to live up to their responsibilities. Adoption of this Bill would ensure payment policies and procedures to be adopted and carried out on public projects.

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**

H Commerce + Labor  
3-16-07  
(Attach 5)

March 16, 2007



TO: House Commerce and Labor Committee  
FROM: Trudy Aron, Executive Director  
RE: Support for SB 333

President  
Douglas R. Cook, AIA  
Olathe  
President Elect  
C. Stan Peterson, FAIA  
Topeka  
Secretary  
David S. Heit, AIA  
Topeka  
Treasurer  
J. Michael Vieux, AIA  
Leavenworth

Good Morning Mr. Chairman 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 333.

Directors  
Jan Burgess, AIA  
Lawrence  
Corey L. Dehn, AIA  
Topeka  
Dale R. Duncan, AIA  
Olathe  
John Gaunt, FAIA  
Lawrence  
Gary Grimes, AIA  
Topeka  
Josh Herrman, AIA  
Wichita  
Chris C. Kliever, AIA  
Wichita  
Craig W. Lofton, AIA  
Lindsborg  
Bruce E. McMillan, AIA  
Manhattan  
Hans Nettelblad, AIA  
Overland Park  
Don I. Norton, P.E.  
Wichita  
Wendy Ornelas, FAIA  
Manhattan  
Zachary Snethen,  
Associate AIA  
Topeka  
Daniel (Terry) Tevis, AIA  
Lenexa  
Jerry E. Volesky, AIA  
Topeka  
Eric Wittman,  
Associate AIA  
Wichita  
Nadia Zhiri, AIA  
Lawrence

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.

SB 333 has been a long time in the making and I would like to thank those who have worked so hard to come to a consensus on a prompt pay bill for public construction. I'd especially like to thank the Associated General Contractors and the American Subcontractors Association. Not everyone got what they wanted, but we believe this bill serves everyone on the construction team – owners, architects, engineers, general contractors, subcontractors and material suppliers.

We urge you to pass SB 333 favorably.

Executive Director  
Trudy Aron, Hon. AIA

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

H Commerce + Labor  
3-16-07  
(attach 6)



(913) 681-2407

March 16, 2007

2785 W. 247th STREET  
LOUISBURG, KS 66053

Fax (913) 947-7223

The Honorable Co-Chairs, Rep. Brunk and Rep. Kiegerl and Committee Members:

My name is Tonya Bair and I work for my family's third generation excavation company. Please read my testimony why it is important to *pass* SB-333 - The Fairness in Public Construction Contracts Act. I am one of the small businesses it greatly effects.

As documented below during 2006, we were the excavator for three (3) schools in Kansas. Each school had similar issues which we were not paid for our work in a timely manner. Take those monies owed times three schools and it greatly hinders my company's operating finances.

The excavator is the first on the job and first to finish, *but*, we are not paid until ALL Contractors have finished their work including repairs such as paint touch-ups that does not pertain to excavation work. Below are a few issues we are forced to deal with and out of our control for Public Construction Contracts:

- \*School not in session therefore no school board meetings to approve paperwork.
- \*City or School Board meetings were cancelled or rescheduled another 30-60 days later.
- \*Approving change orders for work that is extra to the contract took 60-120 days *after* the work was completed. Subcontractors cannot invoice for that work until a signed change order is received.
- \*Retainage money is not be paid until all work (ie:punchlist) items are completed, even if that work has no impact on other subcontractor's work.
- \*We have to pay our material costs in thirty (30) days, as you can see below, we are unable to receive the monies owed to us for many months at a time. We are forced to borrow from our Line of Credit and pay interest for operating money when we are not paid in a timely manner by a Public entity.

**Paola School** - 60 days to receive payment for monthly invoices

Paola, Ks. 120 days to receive retainage monies held: Last day worked 7/25/06 Paid 11/25/06 \$7,020.00

**Nike School** - 90 days to receive payment for monthly invoices

Gardner, Ks. 90-120 days to receive change orders to invoice for work done, then wait 60-120 days to receive payment for that change order.

120 days to receive retainage monies held: Last day worked 9/13/06 Paid 1/25/07 \$40,367.77

**Ray Marsh School** - 30-60 days to receive payment for monthly invoices

Shawnee, Ks. 60-120 days to receive change orders to invoice for work done then wait 30-60 days to receive payment for change order.

72 days to receive retainage monies held: Last day 9/15/06 Paid 11/27/06 \$90,220.00

I urge your support for the passage of this much needed Bill.

*H Commerce & Labor*  
*3-16-07*  
*(Attach # 7)*

**TESTIMONY IN  
OPPOSITION TO SENATE BILL NO. 333**

To: Members of the House Commerce and Labor Committee

From: Darci Meese, Governmental Affairs Coordinator

Date: March 16, 2007

RE: Senate Bill 333 – Public Construction Contracts

On behalf of Water District No. 1 of Johnson County, Kansas, (“WaterOne”), thank you for consideration of our comments regarding Senate Bill 333. Although WaterOne understands the concerns of subcontractors being addressed by the bill, we believe there are adequate mechanisms in place to protect the interests of all contracting parties in the construction of water lines and related structures.

WaterOne uses standard, industry accepted contract documents prepared by the Engineering Joint Committee on Contract Documents. The EJCDC documents are the product of deliberation of engineers, owners and contractors, alike. The result is a set of documents addressing all interests, while the parties maintain the ability to negotiate certain terms. Additionally, WaterOne is required to obtain statutory public works bonds on projects to protect subcontractors and vendors from non-payment. We have no reason to believe that our current contract terms or our pay practices are anything other than efficient and fair.

As with public highways, roads, streets, bridges, dams and turnpikes, we do not believe that contractors or subcontractors experience problems with payment on water line projects, and therefore in the interest of best value to the public, we support the amendment to SB 333 as presented by the Kansas Association of Contractors.

Contact Information:

Darci Meese, Governmental Affairs Coordinator  
Water District No. 1 of Johnson County, Kansas  
913-895-5516 direct  
913-579-9817 cell  
[dmeese@waterone.org](mailto:dmeese@waterone.org)

H Commerce Labor  
3-16-07

(Attach 8)

Testimony to House Commerce and Labor Committee  
Robert Vancrum, Kansas Government Affairs Specialists  
Blue Valley Unified School District No. 229

March 16, 2007

Senate Bill 333

Honorable Members of the Committee:

I am here on behalf of the Blue Valley School District located in rapidly growing southeast Johnson County, and I also have the authority to speak on behalf of Wichita Public Schools. I appear as an opponent of Senate Bill 333, but will readily admit the legislation is much better than originally introduced, in large part due to our input.

The language inserted throughout the bill, especially in Section 3, which acknowledges that the public entity and the general contractor may have agreed to a payment schedule different from that which the bill is attempting to mandate is essential to making this bill at all acceptable. If that were to be removed, very few public entities could live with this bill, since most construction contracts specify a date by which invoices may be received that relate to the monthly meeting date of its governing board.

We still oppose Section 4, which sets an absolute limit of 10% on retainage, and can be read to mean that ALL of the retainage must be released on "substantial completion" of the project. You should recognize that "substantial completion" in construction law does not mean either completed or fully acceptable to the owner. There may be extensive punch list items yet to be completed, and if all retainage is released, some general contractors will not complete their work, and if the subs are paid, some of them will not come back. This section for retainage should also contain an amendment saying unless the contract otherwise provides

We believe the bill really largely overlooks the best way to get subcontractors paid. This sometimes happens when a general contractor makes an untrue representation in its application for payment that the subcontractor's work is completed and "undisputed," obtains payment and then does not pay the subs. We believe it is the contractor who should be penalized for making representation to the owner that work done by a subcontractor is undisputed and then does not pay the subcontractor promptly – this is somewhat weakly done in subsections (f) and (g) of Section 3, but certainly could be improved.

H Commerce & Labor  
3-16-07

(Attach 9)

In summary, we believe this bill is largely unnecessary. You will be told that his bill just does for public owners what SB 33 did in private construction projects several years ago. If this were true, why does Section 9 specifically exclude "construction services" under projects governed by SB 333 from the provisions of SB 33. Also, why are highway contractors excluded from the Act under Section 8? The answer is that SB 333 is attempting to impose tougher standards on public entities. Is that good public policy when every dollar we are talking about will come from the taxpayer's pockets?

I will be happy to answer any questions.



League of Kansas Municipalities

To: House Commerce and Labor Committee  
From: Mark Tomb, LKM  
Date: March 16, 2007  
Re: Opposition to SB 333

On behalf of the 576 member cities of the League of Kansas Municipalities, thank you for the opportunity to offer our comments regarding SB 333. Because this bill would interfere with contracts made between cities and contractors, we oppose this legislation.

While we recognize that a few of our initial concerns were addressed in the Senate, we believe that it is contrary to good public policy to tie the hands of public entities by precluding the negotiation of these key terms.

The provisions of SB 333 establishes a "one-size fits all" statutory framework for certain contractual terms which are typically negotiated between the parties when an agreement is made. In addition to our general opposition to the concept of this bill, we have several specific concerns:

**Timing of Payments.** SB 333 would require that all payments be made within 30 days. This is simply an unworkable schedule in the public sector. Many cities only have meetings once per month at which time they pay bills. In those cities, it may not be possible to meet the strict 30 day payment requirement set forth in New Section 3 of the bill. An interest rate of 18% for missing this deadline by even one day seems unreasonable.

**Retainage.** New Section 4 of this bill limits retainage to a 10% cap. Retainage is a contractual term which is typically negotiated based upon the type of project that is the subject of the contract. Because it fails to take into consideration the specific needs of individual situations, we oppose establishing this figure in statute for all projects.

**Attorneys Fees.** New Section 6 of this bill establishes attorneys fees to be paid in the event of litigation. Attorneys fees are not the norm in Kansas and to require them in this instance would be a major shift away from long standing public policy.

In conclusion, we believe that contractors and cities should be free to negotiate the terms of contracts for public building construction. For this reason, we oppose SB 333 and respectfully request that you do not recommend it favorably for passage. I would be happy to stand for questions at the appropriate time.

H Commerce & Labor  
3-16-07  
(attach 10)



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

Testimony Before The  
House Commerce & Labor Committee  
Regarding  
Senate Bill 333  
By  
Erik Sartorius

March 16, 2007

The City of Overland Park appreciates the opportunity to appear before you in opposition to Senate Bill 333. The City instead supports retaining our current practices for paying contractors.

We recognize that the Senate spent significant time on this legislation and have greatly improved it from where it began. For instance, an important amendment clarified that public agencies may require retainage of 10%. Depending on the track record of the party contracted to do work, public agencies would have the option of reducing the amount of required retainage. The City encourages this committee to keep this change.

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.

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(Attach # 11)



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 that the amendment offered by the Kansas Contractors Association should be adopted. This amendment would clarify that this act would not apply to highways, roads, streets, and bridges, among other items. The Senate Commerce committee considered an amendment that would have included these items in the legislation, and they chose not to adopt it. However, the language on page 1, lines 25-26, “or other improvement to real property,” leaves questions as to whether simply not including these items affirmatively excludes them from SB 333. Therefore, we encourage adoption of the amendment.

The City of Overland Park believes that adequate protections exist in current law for all parties engaged in public construction. Absent the addition of the Kansas Contractors’ amendment, we request that you not recommend Senate Bill 333 favorably for passage.

# THE KANSAS CONTRACTORS ASSOCIATION, INC.



## OFFICERS

CORKY BEACHNER, President  
St. Paul, Kansas

MIKE MORRAND, Vice President  
Paola, Kansas

DON CLARKSON, Treasurer  
Kansas City, Missouri

## STAFF

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BOB TOTTEN, Public Affairs Director

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MARY SULLIVAN  
Kansas City, Kansas

## Testimony

By the Kansas Contractors Association

before the House Commerce Committee regarding SB 333

March 16, 2007

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

Today, I want to thank you for allowing me to testify in connection with Senate Bill 333. Our organization initially supported this measure as we believed it would take the highway industry out of the bill. However after reviewing the bill once it got out of the senate, we realized the bill only pertains to KDOT work. Although we are pleased KDOT work is addressed, we would like to make sure the whole highway industry is excluded.

H Commerce and Labor  
3-16-07  
(Attach 12)

I have an amendment to this section which is more inclusive than just KDOT work and would exclude the highway industry from the bill. You may ask why do you want the highway industry excluded from the measure. Our members know that paying promptly is not a problem for highway contractors. They pay on time and they do that because the highway construction industry is pretty much a closed situation. One day a contractor is a prime contractor and then the next he/she is a subcontractor. What that means is that the roles interchange and get reversed so unless a prime wants to be paid late when he is a sub, he better pay on time when he is a prime.

Here is the language I would like to insert the place of Section 8:

The provisions of the Kansas fairness in building construction act shall not apply to the design, construction, alteration, modification, improvement or repair of a public highway, road, street, bridge, dam, turnpike, water or sewer lines or related structures or stand-alone parking lots.

This language would sufficiently remove highway industry from the measure.

I thank you for your consideration and I stand for questions.



**Testimony Before the  
House Commerce & Labor Committee**

**In Opposition to Senate Bill 333**

**Presented on Behalf of  
The Board of County Commissioners  
of Johnson County, Kansas**

**By Joe Waters  
Director of Facilities**

**March 16, 2007**

*H Commerce & Labor*

*3-16-07*

*(Attach 13)*



Good Morning, my name is Joe Waters. I am the Director of Facilities for Johnson County Government, and I appear here today on behalf of the Board of County Commissioners of Johnson County. I am an Architect with 25 years experience in public and private sector, primarily in the State of Kansas. I appreciate the opportunity to appear before the Committee and to present testimony regarding Senate Bill 333.

Johnson County undertakes a wide range of construction projects using a wide range of project delivery methods. All of our projects are competitively procured and provide for consistent and extensive contractual protections for all parties, all under the oversight of our elected County officials and in the public eye. Johnson County has productive and valued relationships with contractors in the community that are beneficial for the construction industry while ensuring the expectations of the taxpayers are met and their investments protected.

Fundamentally, Johnson County believes adequate protections exist for the public and the contractor in both statutory and case law. We believe that contract terms and conditions between a contractor and the local elected officials responsible for a specific project should be negotiated between those parties. Our standard contracts include timely payment provisions, review of payment applications, thorough and detailed provisions for retainage, and prompt payment of sub-contractors. It is crucial to the success of a given project that the contract language be tailored to the specific needs of that project, not artificially imposed.

Johnson County participated in negotiations on this bill in the Senate but do not agree with all outcomes. If it is the will of the Legislature to pass SB 333, there are several key amendments that are important for you to consider.

1. New section 2 (i) – Defines the term “undisputed payment”, however the term “undisputed request for payment” is most commonly used in the bill. The definition should be amended as follows:
  - Pg. 2 line 9 - “Undisputed payment” *and* “**undisputed request for payment**” means payments which all parties to the contract agree are owed to the contractor.
2. New section 3 (e) – It is unclear if partial payment of an inaccurate payment request is mandated under threat of late payment charges. We believe that minor corrections to a contractor's inaccurate payment requests should be done by the Architect or Engineer and the owner in order to continue to process a payment request, but only where the modifications are minor and can reasonably be done. We believe strongly that the burden of accurate invoicing is the responsibility of the contractor and that a payment request with multiple errors or an error that affects a significant portion of the payment request should be rejected and sent back to the contractor for correction. Requiring partial payments, as might be implied in this section, relieves the contractor of the burden of providing accurate invoices, inappropriately shifting the responsibility to the Architect or Engineer and the owner. The following will clarify the intent and correct any misinterpretation:
  - Pg. 3 line 3 - ...on the **undisputed** amount to the contractor ...
3. New sections 3 (e, g) & 4 (c) – Establishes a rate of 18% per annum, we believe this is exorbitant and inappropriate with taxpayer dollars. We recommend it be established at “the statutory judgment rate” which is consistent with other such clauses in State statute and offer the following amendments:
  - Pg. 3 line 2 and 3 – ...computed at the *statutory judgement* rate ~~of 18%~~ per annum...
  - Pg. 3 line 14 - ...computed at the *statutory judgement* rate ~~of 18%~~ per annum...
  - Pg. 3 line 35 and 36 - ...at a *statutory judgement* rate ~~of 18%~~ per annum.



4. New section 4 (a) – 10% retainage is consistent with our standard practice, however, there are extenuating circumstances and some project types for which a higher retainage amount is very important to the timely, successful completion of a project. For those instances, the owner needs to have the ability to contract for higher retainage amounts. It is important to note that this is for unusual circumstances and it is made very clear in Requests for Proposals, Bid Documents and subsequent contracts between the owner and contractor so that all parties are aware and everyone is treated fairly. The following phrase was stricken and should be added back to address this problem:
  - Pg. 3 line 19 – ...10% retainage from the amount of any undisputed payment due-, ***unless the owner and the architect or engineer determine that a higher rate of retainage is required to ensure performance of the contract.***
  
5. New section 5 – This section addresses alternately the contractual relationships between the owner/contractor and the contractor/subcontractor, which leaves some confusion as to whether a relationship is being created between the owner and the subcontractor. Without clarification, it could be interpreted that a dispute between the contractor and subcontractor could add time and cost to the contract between the owner and the contractor, delaying a project and increasing the cost to the taxpayers through no fault of the owner. The following sentence should be added to clarify: We believe a sentence should be added to the end of the section to clarify as follows: “
  - Pg. 5 line 16 – ***Nothing in this section shall affect the contract time or cost between the owner and the contractor unless the contractor is the suspending party.***
  
6. New Section 6 - The possibility of receiving attorney fees will have the unintended consequence of encouraging litigation and will prolong dispute resolution, resulting in further overcrowding in the court system and delayed project completion. In many contract disputes resulting in mediation, arbitration or litigation, there is not one clear “prevailing party”. Often there is shared responsibility for the dispute, therefore, determining who should be awarded attorney fees will further complicate and delay resolving the dispute.
  - Pg. 4 lines 17 through 23 – **This section should be deleted in its entirety.**

In closing, it is in the best interest of the taxpayers and local Governments to establish and maintain strong and mutually beneficial relationships with the construction industry in our community. We do so with fair and balanced contracts that are thoughtfully prepared to assure the greatest chance of success on a given project, and by administering those contracts equitably. Our contracts and our projects are entered into and managed in the public eye for the public good.

Johnson County believes that current statutory and contract law provide an adequate structure for fair and equitable construction contracts and successful construction projects for the public. If it is the desire of the Legislature to pass SB 333, we ask that you incorporate the amendments listed above which provide clarity and balance that are important for public funds.

Thank you for your time and I will be happy to answer any questions you may have.

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