

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Karin Brownlee at 8:30 A.M. on February 19, 2007 in Room 123-S of the Capitol.

All members were present except:

Jean Shodorf- excused
Susan Wagle- excused

Committee staff present:

Amy Deckard, Kansas Legislative Research Department
Kathie Sparks, Kansas Legislative Research Department
Norm Furse, Revisor of Statutes
Jackie Lunn, Committee Assistant

Conferees appearing before the committee:

Bill Miler, American Subcontractors Association
Ken Keller, Western Extralite Company
Beth Houser, Board of Directors, Credit Professionals Alliance, Johnson County
Bob Totten, Kansas Contractors Association
Eric Stafford, AGC of Kansas
Dan Morgan, Builders Association, KC Chapter
Trudy Aaron, AIA
Kim Winn, League of Kansas Municipalities
Scott Parker, City of Lenexa
Joe Waters, Board of Johnson County Commissioners
Erik Sartorius, City of Overland Park
Bob Vancrum, Blue Valley School District

Others attending:

See attached list.

SB 333-Fairness in public building construction contract act

Chairperson Brownlee introduced Kathie Sparks, Legislative Research, to explain **SB 333**. Ms. Sparks presented written copy. (Attachment 1) Ms. Sparks explained the bill.

Discussion followed with the Committee and Ms. Sparks.

Chairperson Brownlee introduced Bill Miller representing the American Subcontractors Association to give his testimony as a proponent of **SB 333**. Mr. Miller presented written copy. (Attachment 2) Mr. Miller stated **SB 333** will provide the same protections for contractors, subcontractors, and suppliers doing public work that legislation has provided for those doing private work. He is in support of the bill.

Chairperson Brownlee introduced Ken Keller, Western Extralite Company, to give his testimony as a proponent of **SB 333**. Mr. Keller presented written copy. (Attachment 3) He urged the Committee to support **SB 333** and give the same protection to public construction as private construction received with legislation passed out of the Committee.

Chairperson Brownlee introduced Beth Houser, Board of Directors for Credit Professionals Alliance, to give her testimony as a proponent of **SB 333**. Ms. Houser presented written copy. (Attachment 4) She stated she had worked in the construction industry for 25 years. When a bid is put together for a public construction job, many times the bid has to be increased to cover the cost of cash flow problems created by slow, late payments during the course of the job. With the passage of this bill that would not have to happen. In closing, she stated the construction industry deserves fair laws for all and urged the Committee to support **SB 333**.

Chairperson Brownlee introduced Bob Totten representing the Kansas Contractors Association to give his testimony as a proponent of **SB 333**. Mr. Totten presented written copy. (Attachment 5) Mr. Totten stated they are in support of the bill with one change. In section 8 on page 4, there is reference to KDOT and its spec

CONTINUATION SHEET

MINUTES OF THE Senate Commerce Committee at 8:30 A.M. on February 19, 2007 in Room 123-S of the Capitol.

book. They know KDOT is updating the spec book this year and they would like to change the language to read "or any subsequent editions".

Chairperson Brownlee introduced Eric Stafford representing the Associated General Contractors of Kansas, Inc. (AGC) to give his testimony as a proponent of **SB 333**. Mr. Stafford presented written copy. (Attachment 6) Mr. Stafford stated that AGC fully supports the concept of a "fairness in construction bill for the public sector". Timely payment from public owners is a major concern for all levels of their industry. AGC feels that public entities should be asked to meet the same standards the legislature set for the private sector. Mr. Stafford urged the Committee to support **SB 333**.

Chairperson Brownlee introduced Dan Morgan representing the Builders Association, KC Chapter, to give his testimony as a proponent of **SB 333**. Mr. Morgan presented written copy. (Attachment 7) Mr. Morgan stated that they strongly support the timely payment provisions set forth in this bill for all parties to public building contracts. He urged the Committee to support **SB 333**.

Chairperson Brownlee introduced Trudy Aaron representing AIA to give her testimony as a proponent of **SB 333**. Ms. Aaron presented written copy. (Attachment 8) Ms. Aaron offered an amendment stating that on page 3, New Section 4, they would like to strike the last sentence on lines 22-24 that reads, "No more than 150% of the value of work that is not completed due to no fault of the subcontractor may be withheld pending completion." She stated they would support the bill with this change.

Chairperson Brownlee introduced Joseph Privitera, Mark One Electric Company, to give his testimony as a proponent of **SB 333**. Mr. Privitera presented written copy. (Attachment 9) Mr. Privitera stated he feels that this is a fair bill that will help Mark One Electric Company collect their money in a reasonable but fair amount of time. They are in support of **SB 333**.

Chairperson Brownlee called the Committee's attention to the written only testimony of David Shriver, Kansas Association of School Boards, as a proponent of **SB 333**. (Attachment 10)

Chairperson Brownlee opened the floor for questions for the proponents of **SB 333**. Questions and answers followed.

Chairperson Brownlee introduced Kim Winn, League of Kansas Municipalities, to give her testimony as an opponent of **SB 333**. Ms. Winn presented written copy (Attachment 11) Ms. Winn stated this bill would interfere with the contracts made between cities and contractors and they are in opposition of the bill. She listed several other concerns they have with the bill.

Chairperson Brownlee introduced Scott Parker representing the City of Lenexa to give his testimony as an opponent of **SB 333**. Mr. Parker presented written copy. (Attachment 12) Mr. Parker stated the City of Lenexa is opposed to the bill because there are times when they must use the retainage to make sure to get the final completion of a job done.

Chairperson Brownlee introduced Joe Waters representing the Board of Johnson County Commissioners, to give his testimony as an opponent of **SB 333**. Mr. Waters presented written copy. (Attachment 13) He stated 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 their community. Johnson County feels that the current statutory and contract law provide an adequate structure for fair and equitable construction contracts and successful construction projects for the public. He stated they do not support the bill.

Chairperson Brownlee introduced Erik Sartorius representing the City of Overland Park to give his testimony as an opponent of **SB 333**. Mr. Sartorius presented written copy. (Attachment 14) Mr. Sartorius stated they support retaining their current practices for paying contractors. If the Committee decides to support this bill they would like to see some changes which he listed in his testimony.

Chairperson Brownlee introduced Bob Vancrum representing the Blue Valley School District to give his testimony as an opponent of **SB 333**. Mr. Vancrum presented written copy. (Attachment 15) He gave a quick

CONTINUATION SHEET

MINUTES OF THE Senate Commerce Committee at 8:30 A.M. on February 19, 2007 in Room 123-S of the Capitol.

review of his testimony stating Blue Valley School District did not support the bill. They operate upon an agreed payment schedule in their contracts.

Chairperson Brownlee called the Committee's attention to the written only testimony of Darci Meese, Water One, Johnson County and an opponent of **SB 333**, (Attachment 16) and opened the floor for questions for the opponents of **SB 333**.

Questions and discussion followed.

Chairperson Brownlee announced she would like to see both sides get together and work out the differences in **SB 333** before the Committee takes action on the bill.

Chairperson Brownlee adjourned the meeting at 9:30 a.m. with the next scheduled meeting Tuesday, February 22, at 8:30 a.m. in room 123 S.

Senate Commerce Committee

Guest List

Date: February 19, 2007

DAN MORGAN	Builders' Assn. & KC Chapter, AGC
Eric Stafford	AGC of KS
Kevin Kelley	AGC of Kansas
Tim Browden	AGC OF KANSAS
scott parker	City of Lenexa
Darci Meese	WaterOne
MARK BODANYAK	CAPITOL STRATEGIES
Erik SARTORIUS	CITY OF OVERLAND PARK
Shirley Dangler	Hein Law Firm
Stuart Little	Johnson County
Denny Burgess	ASA
BILL MILLEN	ASA - BUILDING DIRECTOR SUCC.
Ken Keller	Western Extralite Company
Judy Cron	Am Inst of Architects
Ordel Giles	KTLA
Ben Houser	Crown Millwork
Kurt Berneman	NACM Credit Professionals Alliance
Joe Puntke	Mark One Electric Co Inc
Joe Waters	Johnson County Government
Melinda Lewis	El Centro, Inc.
Yassin Niang	El Centro, Inc.
Bob Totten	Ks Constructors Assoc
DICK CARTER	TIAC

KANSAS LEGISLATIVE RESEARCH DEPARTMENT

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February 19, 2007

To: Senate Committee on Commerce

From: Kathie Sparks, Principal Analyst

Re: SB 333—Kansas Fairness in Public Building Construction Contract Act

SB 333 would create the Kansas Fairness in Public Building Construction Contract Act. The bill would require that all persons who enter into a contract for public construction after the Act is published would be required to make all payments pursuant to the terms of the contract; however, the following provisions would be void and unenforceable in a contract:

- A provision that waives, releases, or extinguishes the right to resolve disputes through litigation in court; however, the contract may require binding arbitration as a substitute for litigation or require non-binding alternative dispute resolution as a prerequisite to litigation.
- A provision that waives, releases, or extinguishes 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
- A provision that waives, releases, or extinguishes rights to subrogation for losses or claims covered or paid by liability or workers compensation insurance; provided however, 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.

Contract is defined to mean a contract or agreement concerning construction by and between an owner and a contractor, a contractor and a subcontractor, or a subcontractor and another subcontractor. The payment schedule would be as follows:

- The owner would be required to make payment to a contractor within 30 days after the owner receives an undisputed request for payment. If the owner fails to pay the contractor within the 30 days, of an undisputed request for payment, the owner would be required to pay interest at the rate of 18 percent per annum. However, when extenuating circumstances exist, then payment would be made within 45 days prior to the interest payment requirement.
- The contractor is required to pay the subcontractors within seven business days of receipt of payment from the owner, including retainage, if the retainage is released by the owner. If the contractor fails to pay a subcontractor within the

time requirement, the contractor will be required to pay interest at the rate of 18 percent per annum.

- The subcontractors would be required to pay their subcontractors within seven business days or the interest payment would be required.

The bill also sets the maximum retainage an owner, contractor, or subcontractor may withhold at 10 percent. Failure to pay the released retainage by any party within the appropriate time frame also would trigger the interest provision. If any payment is not made within seven business days after the payment date established in a contract, the contractor and any subcontractors, regardless of tier, upon seven additional business days' written notice would be entitled to suspend further work until payment, including applicable interest, is paid. The contract time for each contract affected by the suspension would be extended and the contract sum for each affected contract would be increased by the suspending party's reasonable costs of demobilization, delay, and remobilization. Any contract that purports to waive the rights of a party to the contract to collect damages for delays caused by another party to the contract would be void, unenforceable and against public policy.

The bill would require that the court or arbitrator award costs and reasonable attorney fees to the prevailing party and the venue of any action would be in the county where the real property is located. The provisions of the Act would not apply to construction projects which are required to comply with Section 109 of the Kansas Department of Transportation special provisions to the standard specifications, 1990 edition (90P-205-R6).

The bill would amend the Prompt Payment By Government Agencies Act by amending the definition of services. Services would not be subject to the provisions of the Act.

BUILDING ERECTION SERVICES COMPANY

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

Feb. 19th, 2007

The Honorable Co- Chairs Senators Brownlee and Jordan 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 Work Construction Contracts Bill.

SB-333 is very similar to SB-33 that was passed out of this committee two years ago and then passed out of both Senate and House and signed by the Governor.

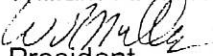
The differences are as follows.

1. Public Owner instead of private.
2. Retention limited to 5% instead of 10% as in Missouri public work.
3. Allows release of retention for early finishing subs., if the owner will not be damaged.
4. Bans no damage for delay clauses that prevent contractors from collecting for damages for delays caused by others.

SB-33 went into effect in July, 2005. We have 17 months of history without any unforeseen consequences. We have heard nothing but positive comments from all parties involved in the construction process.

SB-333 will provide the same protections for contractors, subcontractors, and suppliers doing public work that SB-33 provided to those that do private work. We ask for your support for SB-333.

William R. Miller



President

Building Erection Services Co. LC

Greater Kansas City Area American Subcontractors Assoc.

Senate Commerce Committee
February 19, 2007

Attachment 2



Certified Steel Erector





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

February 12, 2007

Madam 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 Building 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.

For the past several years, Bill Miller, myself, and other interested parties have met with this committee 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, thus, possibly shutting down 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 address 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 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.

As a colleague of yours in the Senate said, SB 33 was very good and badly needed legislation for private construction contacts. 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.

Last year we were told 30 days wasn't always workable in smaller rural areas. We have increased the timeframe to 45 days in these instances. Beyond that, I will repeat something that I commented on last

Senate Commerce Committee

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Attachment 3-1

year. That being, in the 1990's 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. I will repeat myself when I say, 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

4
Good morning. My name is Beth Houser, I am the credit manager for a material supply company. I am also on the Board of Directors for Credit Professionals Alliance, and a Johnson County taxpayer. I am here to support Senate Bill 333.

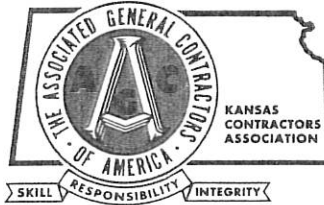
This bill is about fair business practices within the construction industry.

Prompt payment and fair retainage laws make sense. I have worked in the construction industry for approx. 25 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 and angers me. We are paying the price for the lack of good construction laws. Senate Bill 333 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. Many times, the unpaid retainage sitting on their acct. - which can sit there for years - takes up their credit limit & they can't purchase material for upcoming projects. This affects not only the many suppliers and contractors, but the contractor's subs, these companies' employee's income, and finally taxpayers in general that expect our laws to work in everyone's best interest. Our construction industry deserves fair laws that work for all of us - it's way overdue. Please support and pass Senate Bill 333. Thank you.

Senate Commerce Committee
February 19, 2007
Attachment 4

THE KANSAS CONTRACTORS ASSOCIATION, INC.



OFFICERS

CORKY BEACHNER, President
St. Paul, Kansas

MIKE MORRAND, Vice President
Paola, Kansas

DON CLARKSON, Treasurer
Kansas City, Missouri

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BOB TOTTEN, Public Affairs Director

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Great Bend, Kansas
MARY SULLIVAN
Kansas City, Kansas

Testimony

By the Kansas Contractors Association

before the Senate Commerce Committee regarding SB 333

February 19, 2007

Co-chairman Browlee and Co-chairman Jordan and members of the Senate 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. We have had some concerns on this measure in the most recent past however after reviewing this bill, we basically have no problem with the way it is written except in Section 8 on page 4 of the bill. This section refers to KDOT and its spec book. We know KDOT is updating the spec book this year and I am concerned the bill needs to reflect the proposed changes.

Senate Commerce Committee
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Attachment 5-1

I would suggest a minor change in that it should say “or any subsequent editions “

That way, this bill will not refer to a standard that may be out of date July 1st of this year.

Other than that minor amendment, we are supportive of SB 333 in its present form.

I will be glad to answer any questions at this time.



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

**TESTIMONY OF
ASSOCIATED GENERAL CONTRACTORS OF KANSAS
BEFORE SENATE COMMITTEE ON COMMERCE
SB 333**

February 19, 2007

By Eric Stafford, Associated General Contractors of Kansas, Inc.

Madam Chairman, Mister Chairman and members of the committee, my name is Eric Stafford. I am Associate Government Affairs Director for 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 very similar bill pertaining to the private sector that was 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. This bill is very similar to the bill that was passed out of this committee last session and includes several amendments that were made in committee to satisfy concerns expressed by public owners.

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 the same standards the legislature overwhelmingly set for the private sector with SB 33 two years ago.

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

Senate Commerce Committee
February 19, 2007
Attachment 6

**TESTIMONY BEFORE THE
SENATE COMMERCE COMMITTEE
REGARDING SENATE BILL 333
BY DAN MORGAN REPRESENTING
THE BUILDERS' ASSOCIATION AND KANSAS CITY CHAPTER, AGC
FEBRUARY 19, 2007**

Thank you, Madam Chairman, 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 516 which was approved by this committee in the 2006 legislative session and very similar to Senate Bill 33, the "Kansas fairness in private construction act", which 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.

Senate Commerce Committee
February 19, 2007
Attachment 7



AIA Kansas
A Chapter of the American
Institute of Architects

February 19, 2007

TO: Senate Conference Committee
FROM: Trudy Aron, Executive Director
RE: Support with Amendment for SB 333

Good Morning Madam Chair and Members of the Committee, I am Trudy Aron, Executive of the American Institute of Architects in Kansas (AIA Kansas.) I am here to testify in support of SB 333 with one change.

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

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Dale R. Duncan, AIA
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John Gaunt, FAIA
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Gary Grimes, AIA
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Josh Herrman, AIA
Wichita
Chris C. Kliwer, 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 is a compromise agreed to between the Associated General Contractors and the American Subcontractors Association. In most part, we agree with the compromise with one exception. On page 3, New Section 4. Strike the last sentence on lines 22-24 that reads, "No more than 150% of the value of work that is not completed due to no fault of the subcontractor may be withheld pending completion."

As we have discussed with this committee before, the most frustrating time for the owner and architect can come at the end of a project when the architect goes through the building to see what needs to be finished. While the remaining items do not affect the occupancy and hence substantial completion, they do remain to be finished in order to achieve final completion.

Let me give you some examples of problems that occur after substantial completion when the contractor has been paid for their work, except for retainage:

- Painting and base – there may be numerous places where painting needs to be touched up and cove base installed.
- Tile Work – at substantial completion, the tile work is completed except for damaged tiles that need to be replaced
- Carpet – there is a flaw in the carpet and it needs to be replaced
- Electric wall cover plates are not installed

In all of these cases, some work remains to be finished and the contractor has been paid for the work except retainage. If the owner cannot withhold the retainage due on the entire contract, the owner has no certainty that the contractor will finish the job. In that case, the owner has two choices – hire someone else to finish (often at a much higher cost) or try to get the bonding company to get the original subcontractor back on the job.

When SB 33 – Prompt Pay for Private Construction - was passed, it did not include this language. While we would like to be able to support SB 333, we cannot unless this amendment is made. Retainage on those who need to finish their work is the only way to get the contractor back on the job or to have enough money remaining to have others finish the work.

We urge you to strike the language on lines 22-24 on page 3. Thank you for allowing me to address you on this bill.

Executive Director
Trudy Aron, Hon. AIA

700 SW Jackson, Suite 209, Topeka, KS 66603 Voice: 800-444-9853 Email: info@aiaks.org Web: www.aiaks.org

Senate Commerce Committee
February 19, 2007
Attachment 8



Mark One
Electric Company, Inc.
The Mark of Electrical Excellence

February 16, 2007

SB 333 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. Timely payment is crucial to cash flow because we are actually months beyond the finished work when we receive payment.

This Bill will help us collect our money in a reasonable but fair amount of time. We need those funds for working capital every week. We have to meet payroll every Friday in order to do that we now have 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 us a check to pay us, but will hold the check until we call and ask them about the payment. That check just sits in their office unless we persistently call and then often time 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.

We would appreciate your support of SB333.

Thank you,

Joseph A. Privitera
Vice President

Senate Commerce Committee
February 19, 2007
Attachment 9

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

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Testimony on SB 333
before the
Committee on Commerce

by

David G. Shriver, Attorney
Kansas Association of School Boards

February 19, 2007

Ms. Chairwoman and Mr. Chairman, Members of the Committee:

Thank you for the opportunity to submit written testimony today on SB 333, which proposes to create the Kansas Fairness in Public Building Construction Contract Act. We support this proposal, but suggest modification in the time constraints contained in the language.

KASB represents 294 of the 296 public school districts in the state. Our objective is to be certain these school districts can meet the legislative requirement in a timely manner. Subsection c of New Section 3 in the bill directs that payment for undisputed amounts be made within 30 days after receipt of the bill. Most school districts pay bills on a monthly basis after the board has reviewed the supporting information at a regular meeting, which generally occurs once a month. The timing of receipt of the bill may preclude payment within that mandatory 30 day time frame which then causes assessment of interest at 18% per year. Consideration of a longer time period, such as 45 days, would be more appropriate from the position of most school boards.

KASB believes the intent of SB 333 is favorable, but the mechanics of school board operation need to be considered.

Thank you.

Senate Commerce Committee
February 19, 2007

Attachment 10



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: Kimberly Winn, Director of Policy Development & Communications
Date: February 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.

The provisions of SB 333 propose to establish in statute certain contractual terms which are typically negotiated between the parties when an agreement is made. We believe that it is contrary to public policy to tie the hands of public entities by precluding the negotiation of these key terms. 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.



TESTIMONY IN OPPOSITION TO SB 333

To: Members of Senate Commerce Committee
From: Scott Parker, Public Works Administrator
Date: February 15, 2007
Subject: SB 333

The City of Lenexa agrees that the prompt distribution of undisputed requests for payment on capital projects is of utmost importance. Our city strives to make timely payments and has crafted procedures to assure this takes place. Nevertheless, the City of Lenexa is opposed to Senate Bill 333 because we believe that the mandatory release of retainage at Substantial Completion poses an unnecessary risk to our citizens.

Our experience tells us that one of the most demanding aspects of a project is the completion of final punch list items. Releasing all retainage at substantial completion would hamstring the city in its attempts to assure that its citizens receive a quality product for the public investment in capital building projects. Due to the complexity and specialization required in most of these projects, it is almost inevitable that certain details will be overlooked and need to be addressed even after the terms of substantial completion are reached. The city has experienced several instances where the enforcement of this legislation would have negatively affected projects. For example, in one instance a contractor was hired to replace the heating, ventilation, and air conditioning system at one of its facilities, and while substantial completion, as defined in the contract, was reached, more than 70 items remained to be done before the project could be considered complete. Due to personnel changes that occurred with the general contractor and other extenuating circumstances, these items could not be addressed for several weeks. If the city had been forced to release retainage within the 30-day time frame, however, it would have no leverage to compel the contractor to complete their work and assure a quality product. This is an unacceptable risk that falls to the city.

In summation, we believe that without retainage, the Owner has no expedient means of requiring the contractor to complete final punch list items. For this reason, we feel retainage as it is currently administered is the best incentive for the contractor to complete and finalize a construction project, and oppose any effort to restrict the withholding of it.

Senate Commerce Committee
February 19, 2007
Attachment 12



**Testimony Before the
Senate Commerce 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**

February 19, 2007

Senate Commerce Committee
February 19, 2007

Attachment 13-1



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 in opposition to Senate Bill 333.

Johnson County undertakes a wide variety of construction projects; new buildings, renovations, sanitary and storm sewer systems, roads, bridges, airport runways, etc. We utilize several different project delivery methods, all of which are competitively procured and provide for consistent and extensive contractual protections for all parties, all under the oversight of our elected County officials.

We have productive 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. SB 333 endeavors to establish terms and conditions between parties in the execution of construction projects. Johnson County believes terms and conditions are best determined between a contractor and the local elected officials responsible for a specific project. SB 333 would also establish obligations between the public owner and the sub-contractors. Johnson County believes those obligations are unnecessary and detrimental to the timely and cost effective completion of public projects.

The standard contract terms and conditions Johnson County utilizes incorporate the myriad of requirements that may exist on a given project. Quite often those requirements are mandated from federal agencies that may be providing funding support, whose rules change from one agency to the next. Our contracts incorporate all of these requirements and the specific needs of a given project to strike the balance of protection and obligation for both 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 project that this language be tailored to the specific needs of that project, not artificially imposed. A few examples:

- Retainage amounts for a septic tank neighborhood replacement project are often 30%, significantly different than a standard office building construction project. Johnson County believes the limits on both percentage of retainage and on the value of the work in section 4 (a) will significantly impede project closure..
- Release of retainage to a sub-contractor for rough grading on an office building project is an entirely different matter than reducing retainage to a security electronics sub-contractor on a jail. Johnson County believes the provisions of early release of retainage in section 4 (c) will directly increase administrative costs through additional professional services and additional project close-out steps. It is not unusual for there to be more than 50 subcontractors involved



in execution of larger, more complex county construction projects. The costs to the tax payer to use the services of an outside consultant or County staff to track the large number of punch lists, close out documentation, etc. associated with this many subcontractors would be substantial indeed.

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. We request that you not recommend Senate Bill 333 for favorable passage.

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



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

February 19, 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.

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.

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.

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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, which dealt with private construction contracts, allowed for 10% retainage. Senate Bill 333, as drafted in Section 4(a), assumes retainage to be set at five percent, unless the owner and architect or engineer determine a higher amount is necessary. In that instance, 10% retainage may be required. We believe this section should be reversed, and that the presumption should be ten percent retainage. We can see no valid public policy for treating retainage requirements for public and private construction differently.

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(c) for payment to contractors.

The City of Overland Park believes that adequate protections exist in current law for all parties engaged in public construction. We request that you not recommend Senate Bill 333 favorably for passage.

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Testimony to Senate Commerce Committee
Robert Vancrum, Kansas Government Affairs Specialists
Blue Valley Unified School District No. 229
February 19, 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. I appear as an opponent of Senate Bill 516, but the district is certainly a proponent of making sure that any subcontractor working on school construction in its district is being paid and paid promptly. This bill is substantially identical to Senate Bill 516, which passed the Senate last year and was not considered in the House in part due to our opposition. We have therefore had an opportunity to study it for the last year and still find that there are provisions in the bill that we simply can't live with. More importantly, there are provisions that are virtually certain to increase the cost of public building projects at the expense of our taxpayers because they expose the public entity (described as "owner") in the bill to a very real possibility of (a) fines and exorbitant interest for late payments, (b) the district will have to pay both the general contractor which is under contract with the school district and subcontractors for the very same work. Without attempting to describe everything in this bill that we object to, some of the major provisions are:

1. "Construction" is described in such an expansive way that it includes materials, supplies and labor used in repairing and maintaining a building. Is this intended to include all contracts for maintenance supplies and ordinary mechanic's tools and supplies?

2. The bill as a practical matter would require the district to develop its own construction contracts since many of its provisions do not fit the typical contracts developed by AIA and other contractors associations for use in private and public construction. This will be a substantial expense in itself imposed upon the district. One of those provisions is the handling of retainage which is restricted by the bill to no more than 5% from the amount of any undisputed payment due and 10% of the value of the contract. The provisions actually require release of retainage attributable to a subcontractor's work even though the contractor or another subcontractor may still be performing material work on the project. One actually says you can't withhold more than 150% of any such construction work – what if that is less than 10% of total. This also puts the public entity involved in substantial risk that people will simply walk off the job with large items of uncompleted work.

3. A provision for payment of all amounts due within 30 days after a request for payment again runs contrary to typical construction contract forms which generally provide for an agreed upon payment schedule. So long as the entity is meeting the agreed upon payment schedule nothing else should be required. For your information, Blue Valley pays its bills upon a pre-scheduled date during each month. Every contractor, vendor or supplier knows that if the invoice is not in by a certain date they will have to wait an additional 30 days. One reason is that State law requires many of these payments to be specifically approved by our Board of Education that only meets once a month. Provisions in section 3 that contain a laundry list of

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provisions that will be deemed to be against public policy again rewrites or attempts to rewrite typical provisions that are used in private and public construction contracts.

4. In addition, it is interesting that highway contractors and subcontractors are specially carved out of this bill by the provisions of subsection 8. The purported reason is that this doesn't meet the standard specifications. Under the same logic, this bill does not meet standard construction contract language.

5. The fact that we are setting up a separate class of vendor to be given protection is also demonstrated by the fact that services under construction contracts described in the Act are being carved out of the Kansas Prompt Payment Act.

I said upfront that while we are opposed to the specific language contained in SB 333, we are not opposed to giving subcontractors on our projects additional tools to use when they are actually defrauded by a general contractor who makes a representation in its application for payment that the subcontractor is through with his work, that the work is undisputed and then does not promptly pay his subcontractors. We would have no problem with language in a bill that imposes upon the general contractor substantial penalties if they (a) misrepresent in their application for payments from a public entity owner that an item of work is completed and undisputed knowing that it is not or (b) obtains payments from the owner for work actually done by a subcontractor as an "undisputed" item and then does not pay a subcontractor promptly. This could be accomplished by simply enacting subsection (f) and subsection (g) of section 3, perhaps with some lead in language helping to determine when a request for payment without dispute has occurred.

I will be happy to answer any questions.

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

To: Members of the Senate Commerce Committee

From: Darci Meese, Governmental Affairs Coordinator

Date: February 19, 2007

RE: Senate Bill 333 – 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 comments regarding Senate Bill 333. The problem that Senate Bill 333 attempts to address may be a valid one, but one that exists between general contractors and subcontractors, not the public entity contracting for the work. It is not clear that SB 333 will make that situation any better. Furthermore, it seems that Senate Bill 333 would constitute an attempt to interfere with the constitutional right of contracting. We are very concerned with the impact of SB 333 on the ability of public entities to properly manage public construction contracts.

Article 1 Section 10 of the United States Constitution reads in relevant part “No state shall...pass any...law impairing the obligations of contracts...” First and foremost, Senate Bill 333 expressly states that its provisions cannot be waived by contract. Such language certainly must lend itself to the conclusion that the State is acting contrary to the Constitutional language that limits its ability to interfere with contracts. This is likely why the already existing Prompt Pay law of Kansas, found in K.S.A. 75-6401 et seq., requires certain payment obligations of state and government agencies but qualifies those requirements by stating that the agency and vendor or contractor are free to enter into contracts with different terms.

Aside from the questionable constitutionality of SB 333, the bill’s effect will seriously impede public entities from entering into solid contracts for public improvement that protect the interest of the tax-paying or rate-paying citizens. SB 333 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. In WaterOne’s experience 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.

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Next, SB 333 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 and are prepared by a joint committee of engineers, public agencies and contractors. With respect to retainage, WaterOne follows the recommendation of EJCDC and calculates retainage at 10%. By limiting retainage to 5%, we believe SB 333 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 333 unnecessarily interferes with that process and alters the balance created by the use of reasonable retainage by a public entity.

In summary, Water District No. 1 of Johnson County, Kansas opposes SB 333. It is our opinion that SB 333 is an unconstitutional interference with the right to contract and furthermore seeks to solve a problem that should be resolved outside of the legislative process. 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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