

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Karin Brownlee at 8:30 A.M. on February 28, 2007 in Room 123-S of the Capitol.

All members were present except:
Jean Schodorf- excused

Committee staff present:
Kathie Sparks, Kansas Legislative Research Department
Mike Heim, Revisor of Statutes
Jackie Lunn, Committee Assistant

Conferees appearing before the committee:

Others attending:
See attached list.

SB 333--Fairness in public building construction contract act

Chairperson Brownlee announced to the Committee they would be working **SB 333** today. She introduced Corey Peterson representing AGC of Kansas, to explain the Proposed Compromise Balloon he was offering. (Attachment 1) He stated a group of owner representatives and construction related interest met to go over this bill and try to come up with common ground to make this a fair bill for everyone involved. They took the notes of the meeting and developed the balloon they offered. Mr. Peterson reviewed the balloon for the Committee.

Questions and discussion followed. During the discussion the Committee heard from Bob Totten representing Kansas Contractors. He stated they did not support the amendment because it added on page 1, under the definition of construction, line 23, "road, highway, bridges" and they were not in the original bill that they did support. After much discussion, it was decided by the Committee to remove the addition of "road, highway, bridges" from the Proposed Compromise Balloon.

Upon the conclusion of discussion, Senator Kelley made a motion to add water and waste water facilities on Page 1 (a) under the definition of construction, on the Proposed Compromise Balloon. Senator Emler seconded. Motion carried.

Questions followed on page 1 of the Proposed Compromise Balloon..

Senator Emler made a motion to remove the word "building" out of the title and any where it is used in the bill. Senator Jordan seconded.

Discussion followed.

Chairperson Brownlee called for a vote on the motion on the floor. Motion carried.

Chairperson Brownlee announced they had completed Page 1 of the Proposed Compromise Balloon and would move on to Page 2. Questions and discussion followed.

Senator Reitz made a motion to adopt new language on Page 2, line 32 .of the Proposed Compromise Balloon after the word payment, "according to terms of the contract". Senator Barone seconded. Motion carried.

Senator Jordan made a motion to adopt the new language on Page 2, line 36 (d), after the word record "or agent of the owner" and line 38 after the word days "of receipt from contractor." of the Proposed Compromise Balloon . Senator Teichman seconded. Motion carried.

CONTINUATION SHEET

MINUTES OF THE Senate Commerce Committee at 8:30 A.M. on February 28, 2007 in Room 123-S of the Capitol.

Senator Kelly made a motion to accept the changes on Page 3, line 13, changing the retainage, "Change "5%" to "10%" of the Proposed Compromise Balloon. Senator Teichman seconded.

Discussion followed.

Chairperson Brownlee called for a vote. Motion carried.

Senator Emler made a motion to delete the language on Page 3, line 22, 23 and 24 "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". Senator Kelly seconded. Motion carried.

Senator Kelly made a motion to accept the language being added on Page 3, line 35 after the word risk, striking "to the owner. The" and adding "or additional cost to the owner or contractor. Once so determined, the" of the Proposed Compromise Balloon. Senator Emler seconded. Motion carried.

Chairperson Brownlee moved the Committee's attention to Page 4 of the Proposed Compromise Balloon.

Discussion followed.

Senator Barone made a motion to accept the new language Page 4, Line 26 after (90P-205-R6) "or any subsequent editions" of the Proposed Compromise Balloon. Senator Jordan seconded. Motion carried.

Discussion followed.

Senator Jordan made a motion for the Revisor to cleanup the language in the bill. Senator Reitz seconded. Motion carried.

Chairperson Brownlee called the Committee's attention to the correspondence from J. Joseph Waters, Director Facilities Department, Johnson County, with proposed language that addresses their concerns with the bill. (Attachment 2)

Senator Emler made a motion to move SB 333 out favorably as amended. Senator Jordan seconded. Motion carried.

Meeting adjourned at 9:30 a.m. with the next scheduled meeting for March 1st at 8:30 a.m. in room 123 S.

SENATE BILL No. 333

By Committee on Commerce

2-7

**Proposed
Compromise
– Balloon
2/27/07**

9 AN ACT concerning public building construction contracts; enacting the
10 Kansas fairness in public building construction contract act; amending
11 K.S.A. 75-6402 and repealing the existing section.
12

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

14 New Section 1. (a) Sections 1 through 8, and amendments thereto,
15 shall be known and may be cited as the Kansas fairness in public building
16 construction contract act.

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

20 New Sec. 2. As used in this act:

21 (a) "Construction" means furnishing labor, equipment, material or
22 supplies used or consumed for the design, construction, alteration, ren-
23 novation, repair or maintenance of a building, oil line, gas line, appurte-
24 nance or other improvement to real property, including any moving, dem-
25 olition or excavation of a building.

road, highway, bridge,

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

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

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

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

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

43 (g) "Subcontractor" means any person performing construction cov-

1 ered by a contract between an owner and a contractor but not having a
2 contract with the owner.

3 (h) "Substantial completion" means the stage of a construction pro-
4 ject where the project, or a designated portion thereof, is sufficiently
5 complete in accordance with the contract, so that the owner can occupy
6 or utilize the constructed project for its intended use.

7 New Sec. 3. (a) Subject to the provisions of subsections (b), (c), (d),
8 (e), (f), (g), (h) and sections 4 and 5, and amendments thereto, all owners,
9 contractors and subcontractors, who enter into a contract for public con-
10 struction after the effective date of this act, shall make all payments pur-
11 suant to the terms of the contract.

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

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

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

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

29 (c) All contracts for public construction shall provide that payment of
30 amounts due a contractor from an owner, except retainage, shall be made
31 within 30 days after the owner receives a timely, properly completed,
32 undisputed request for payment, unless extenuating circumstances exist
33 which would preclude approval of payment within 30 days. If such exten-
34 uating circumstances exist, then payment shall be made within 45 days
35 after the owner receives such payment request.

36 (d) The architect or engineer of record shall review, approve and
37 forward undisputed requests for payment to the owner within seven busi-
38 ness days.

39 (e) If the owner fails to pay a contractor within the time period set
40 forth in subsection (c), the owner shall pay interest computed at the rate
41 of 18% per annum on the undisputed amount to the contractor beginning
42 on the day following the end of the time period set forth in subsection
43 (d).

according to terms of the contract

or agent of the owner

of receipt from the contractor.

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

Except as provided in Sec. 4 below, a

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

Change "5%" to "10%"

(h) The provisions of subsection (g) shall also apply to all payments from subcontractors to their subcontractors.

New Sec. 4. (a) An owner, contractor or subcontractor may withhold no more than ~~[5]~~ 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. Retainage, however, shall not exceed 10% of the value of the contract.]~~

Delete

Insert new: "(b) If at such time as the Contractor's Contract is fifty percent (50%) complete (based on Contract amount), the work has been timely performed in accordance with the Contract as determined by the Owner, the Owner shall hold no further Retainage. If, subsequent to such election, the Owner should determine that the work is not being performed timely or in accordance with the Contract, the Owner may withhold such additional Retainage as is deemed necessary to reasonably protect the Owner's interest, but not in excess of ten percent (10%) of the amount of any undisputed payment due.

(d) An owner must release the retainage on any undisputed payment due on a construction project within 30 days after substantial completion of the project; however, if any subcontractor is still performing work on the project under its subcontract, an owner may withhold that portion of the retainage attributable to such subcontract until 30 days after such work is completed. ~~[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.]~~

Insert "(d)"

Delete

(b- e) If an owner, contractor or subcontractor fails to pay retainage, if any, pursuant to the terms of a contract for public construction or as required by this act, the owner, contractor or subcontractor shall pay interest to the contractor or subcontractor to whom payment was due, beginning on the first business day after the payment was due, at a rate of 18% per annum.

(e f) Nothing in this section shall prevent early release of retainage if it is determined by the owner, the contractor and the project architect or engineer, that a subcontractor has completed performance satisfactorily and that the subcontractor can be released prior to substantial completion of the entire project without risk ~~to the owner. The~~ contractor shall request such adjustment in retainage, if any, from the owner as necessary to enable the contractor to pay the subcontractor in full, and the owner shall, as part of the next contractual payment cycle, release the subcontractor's retainage to the contractor, who shall, as part of the next contractual payment cycle, release such retainage as is due to the subcontractor.

Delete

(c) If at such time as a Subcontractor's contract is fifty percent (50%) complete (based on contract amount), the Subcontract work has been timely performed in accordance with the contract as determined by the Contractor, and the Owner has agreed to withhold no additional retainage on the Contractor as described in subsection (b), the Contractor shall hold no further Retainage on said Subcontract. If, subsequent to such election, the Contractor should determine that the Subcontract work is not being performed timely or in accordance with the Subcontract or the Owner elects to withhold additional Retainage under the Contract, the Contractor may withhold such additional Retainage as is deemed necessary to reasonably protect the Contractor's and/or Owner's interest, but not in excess of ten percent (10%) of the amount of any undisputed payment due the Subcontractor.

(d)"

or additional cost to the owner or contractor. Once so determined, the

1 construction or in this act, the contractor and any subcontractors, regard-
 2 less of tier, upon seven additional business days' written notice to the
 3 owner and, in the case of a subcontractor, written notice to the contractor,
 4 shall, without prejudice to any other available remedy, be entitled to sus-
 5 pend further performance until payment, including applicable interest, is
 6 made. The contract time for each contract affected by the suspension
 7 shall be extended appropriately and the contract sum for each affected
 8 contract shall be increased by the suspending party's reasonable costs of
 9 demobilization, delay and remobilization.

10 New Sec. 6. In any action to enforce sections 3, 4 or 5, and amend-
 11 ments thereto, including arbitration^[7] between a contractor and subcon- Delete “,”
 12 tractors or subcontractors and subcontractors, the court or arbitrator shall
 13 award costs and reasonable attorney fees to the prevailing party. Venue
 14 of such an action shall be in the county where the real property is located
 15 and under Kansas law. The hearing in such an arbitration shall be held
 16 in the county where the real property is located.

17 New Sec. 7. Any provision in a contract that purports to waive the
 18 rights of a party to the contract to collect damages for delays caused by
 19 another party to the contract shall be void, unenforceable and against
 20 public policy. This provision is not intended to create a contract between
 21 parties where a contract did not otherwise exist.

22 New Sec. 8. The provisions of the Kansas fairness in public building
 23 construction act shall not apply to construction projects which are re-
 24 quired to comply with section 109 of the Kansas department of trans-
 25 portation special provisions to the standard specifications, 1990 edition
 26 (90P-205-R6) . or any subsequent editions

27 Sec. 9. K.S.A. 75-6402 is hereby amended to read as follows: 75-
 28 6402. As used in the Kansas prompt payment act, unless the context
 29 clearly requires otherwise, the following words and phrases shall have the
 30 meanings respectively ascribed thereto.

31 (a) "State agency" means the state and any state agency, department,
 32 division or authority thereof.

33 (b) "Government agency" means any state agency, library, commu-
 34 nity college or unified school district.

35 (c) "Vendor" means any person, corporation, association or other
 36 business concern engaged in a trade or business, either on a profit or not-
 37 for-profit basis, and providing any goods or services to a government
 38 agency.

39 (d) "Goods" means any goods, supplies, materials, equipment or
 40 other personal property, but does not mean any real property.

41 (e) "Services" means any contractual services including architectural,
 42 engineering, medical, financial, consulting or other professional services,
 43 any construction services and any other personal services, but does not

1 mean any services performed as an officer or employee of any government
2 agency. *Services shall not include construction contracts subject to sections*
3 *1 through 8, and amendments thereto.*

4 (f) "Bill" means a proper billing which requests payment and which
5 contains or is accompanied by such substantiating documentation as may
6 be required for payment for the goods or services.

7 (g) "Community college" means any community college organized
8 and operating under the laws of this state.

9 (h) "Library" means a library which serves the general public and is
10 supported in whole or in part with tax money.

11 Sec. 10. K.S.A. 75-6402 is hereby repealed.

12 Sec. 11. This act shall take effect and be in force from and after its
13 publication in the statute book.



February 27, 2007

Senator Karin Brownlee, Co-Chair Senate Commerce Committee

Senator Nick Jordan, Co-Chair Senate Commerce Committee

(sent via e-mail)

Re: SB 333

Dear Senators,

After the hearing on February 19th, Senator Brownlee asked that those in opposition to SB 333 meet with the parties in support of the bill. Mac Andrew, Director of Infrastructure for Johnson County, and I attended a lengthy meeting on February 20th hosted by Eric Stafford. As a result of that meeting Eric Stafford has shared revisions made to the bill that address several concerns, but a number of issues still remain.

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. While we continue to request that the Committee not recommend SB 333 for passage, there are a few key issues that we believe should be addressed if it does move forward.

- New sections 3 (d) and 3 (e) – Allows for the “architect or engineer of record” to “review, approve and forward” undisputed payment requests, however, there are two key provisions missing. First, not all projects have an Architect or Engineer of record, and second, no provision is allowed for the owner to review and approve payments. The public owner has a high standard of care in reviewing payment requests before making payments of taxpayer’s dollars. We have an obligation to closely review payment requests and the public has a right to expect that we are not simply rubber-stamping the review of others. In addition, many public projects are Design/Build in which the Architect or Engineer of record actually works for the contractor, not the owner. Clearly the owner must also have authority to dispute or approve a payment request.
- 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 inaccurate payment requests should be done by the Architect or Engineer and the owner, where reasonable, in order to continue to process a payment request. However, 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 relieves the contractor of the burden of providing accurate invoices, inappropriately shifting the responsibility to the Architect or Engineer and the owner. We believe deleting the word “undisputed” on line 41 would clarify the intent and correct any misinterpretation.
- New section 3 (e) – Establishes a rate of 18% per annum, we believe this is exorbitant and inappropriate with taxpayer dollars. We recommend it be established here, and throughout SB 333, as “the statutory judgment rate” which is consistent with other such clauses in State statute.

February 28, 2007

Attachment 2-1



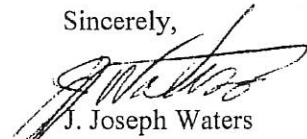
- New section 4 (a) – The revised language is an improvement and consistent with our standard practice, however, there are extenuating circumstances and some project types for which a higher retainage amount is very important to the timely, successful completion of a project. For those instances, the 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.
- 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. We believe a sentence should be added to the end of the section to clarify as follows: “Nothing in this section shall affect the contract time or cost between the owner and the contractor unless the contractor is the suspending party”.

Johnson County has a strong and positive relationship with the construction industry in our community and it is in the best interest of the taxpayers that this industry be successful. We utilize fair and balanced contracts that are thoughtfully prepared and assure the greatest chance of success on a given project. While the construction industry has inherent risks, we strive to balance those risks equitably and describe them in our contracts on a project by project basis.

Again, 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 SB 333 for favorable passage, however, if that is not the case and the bill moves forward, we ask that the above corrections/clarifications be incorporated into the bill.

If you have any questions or if I may be of any assistance in this matter please advise.

Sincerely,



J. Joseph Waters
Director

CC (via e-mail): Eric Stafford
 Stuart Little
 Hannes Zacharias
 Mac Andrew
 John Metzler