

Approved: SRB 2/11/09
Date

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE

The meeting was called to order by Chairman Steve Brunk at 9:00 a.m. on February 11, 2009, in Room 784 of the Docking State Office Building.

All members were present except:

Representative Louis Ruiz-excused
Representative Broderick Henderson- excused
Representative Bill Wolf- absent

Committee staff present:

Renaë Jefferies, Office of the Revisor of Statutes
Daniel Yoza, Office of the Revisor of Statutes
Jerry Donaldson, Kansas Legislative Research Department
Dennis Hodgins, Kansas Legislative Research Department
Stephen Bainum, Committee Assistant

Conferees appearing before the committee:

Bill Miller, American Subcontractors Association
Ken Keller, American Subcontractors Association
Kurt Brack, American Subcontractors Association
Eric Stafford, Associated General Contractors
Diane Gjerstad, Wichita Public Schools
Joe Waters, Johnson County
Robert Vancrum, Blue Valley Schools
Dan Morgan, Associated General Contractors

Others attending:

See attached list.

The meeting was called to order by Chairman Steve Brunk at 9:00 a.m. He opened the hearing on **HB 2238**.

HB 2238 - Amending the fairness in private construction contract act and the fairness in public construction contract act regarding retainage.

Renaë Jefferies, Assistant Revisor, explained the changes being made to the bill (Attachment 1).

Bill Miller, American Subcontractors Association, appeared as a proponent of **HB 2238** (Attachment 2). He said that retainage was money that a contractor or subcontractor had earned but was being withheld to ensure completion of the job. 74% of the states have decreased retainage to 5% or less with one at 0% and seven at 2.5%. This bill would bring Kansas more into line with other states retainage rates.

Representative Quigley asked who is retaining the funds. Bill answered that it was the owner of the project.

Representative Schwab gave the example of a contractor who wanted to retain 7%. This bill would say that he could not do that. He could only withhold 5%. So basically the state is telling me how much retainage I can withhold in my contract? Bill said that was correct. You can retain 5% or less but not more than 5%. Bill said that the state was protecting people who might tend to be abused.

Representative Schwab asked why not put it in the contract that the bill must be paid in 45 days. Bill replied that the subcontractor was not in a position to bargain that since he is paid by the general contractor, not the owner.

Representative Tietze asked about the 10.4% of the subcontractors that got none or only part of their retainage funds. Why don't they get their funds? Bill said the reason might be that the money no longer exists because it was used for cost overruns, change orders or under financing.

Representative Kerschen asked if the retainage costs were being added to the contract price. Bill said that might occur in good times but during downturns they would not because they would lose the business.

CONTINUATION SHEET

Minutes of the House Commerce And Labor Committee at 9:00 a.m. on February 11, 2009, in Room 784 of the Docking State Office Building.

Ken Keller, American Subcontractors Association, appeared as a proponent of **HB 2238** (Attachment 3). He said that the legislation would bring Kansas into the 21st century in regard to retainage laws. Kansas retainage law is antiquated and needs to be changed. This bill will accomplish that.

Kurt Brack, American Subcontractors Association, appeared as a proponent of **HB 2238** (Attachment 4). He said that getting paid their retainage was one of the top concerns for subcontractors. He urged support of **HB 2238**.

Representative Kerschen asked if anyone paid retainage before it was due. Kurt said that it was rare for that to happen and usually on a very small project.

Representative Schwab asked if the best way to solve the non-payment of retainage was to file a lien even if the owner and general contractor are upset. Kurt said that the bank would have a mortgage filed on the project which was a substantial amount and your lien filing would come after the mortgage. So many times the lien is not worth the paper it is written on. Most of the time the subcontractor is not in position to bargain on these things.

Representative Grant asked how bad retainage nonpayment was in Kansas. Kurt said that the problem is rampant right now. This bill would change that.

Representative Gatewood asked if retainage withholding was more of a problem in bad times. Kurt said yes and the Kansas retainage rate of 10% was larger than their profit margin on the job. So if it is not paid they are losing money on the job.

Eric Stafford, Associated General Contractors, appeared as an opponent of **HB 2238** (Attachment 5). He said that Associated General Contractors had a great concern with the Legislature intruding in private contracts.

Representative Bethell asked when do you know that a job is complete. Eric said that it can vary depending on circumstances. Is there a reasonable amount of time with which we could say that the job is complete? Most of the time there is a clause in the contract that calls for substantial completion.

Representative Schwab said that if you don't pay the retainage you would probably end up in court. If we pass this bill and you don't pay the retainage, won't you still end up in court? So that doesn't change anything.

Representative Grange asked who pays the general contractor the money that he is withholding from the subcontractor? Eric said the owner pays the general contractor and the general contractor pays the subs. John said that this law will put the owner on notice that he must pay the general contractor who in turn pays the subcontractor.

Diane Gjerstad, Wichita Public Schools, appeared as an opponent of **HB 2238** (Attachment 6). She said that the legislature should not impose additional contractual constraints on public construction projects. School construction projects are time sensitive and it becomes very disruptive and expensive when jobs are not completed on time.

Representative Kerschen asked what level of retainage the school board used. Diane replied that it was 10%. She said that many times there were long punch lists that indicated that there was still a lot of work to be done after the certificate of occupancy was issued. We believe that 10% is reasonable to get the subcontractor to come back and finish the job.

Representative Brunk ask when that is done everybody gets paid? Diane said yes and that we actually paid as the work is completed so we are not withholding the entire amount.

Joe Waters, Johnson County, presented testimony in opposition to **HB 2238** (Attachment 7). He indicated that they had project types that are unique and require significantly different retainage structures in order to be successful. Johnson County believes that matters of prompt payment and penalties are already addressed thoroughly by statute and should not be included in **HB 2238**.

CONTINUATION SHEET

Minutes of the House Commerce And Labor Committee at 9:00 a.m. on February 11, 2009, in Room 784 of the Docking State Office Building.

Robert Vancrum, Blue Valley Schools, presented his testimony in opposition to **HB 2238** (Attachment 8). He said that 5% retainage was not sufficient in cases where there was more than the usual punch list or if tear out and replacement was required. Then they would have to hire replacements and have a cost overrun.

Dan Morgan, Associated General Contractors, presented testimony in opposition to **HB 2238** (Attachment 9). He urged the committee not to report the bill out favorably for passage.

Representative Grange asked if there was nothing in this proposal that you would consider valid or that we should consider. He said that there was opposition to varying degrees to each part of the bill.

The Chairman closed the hearing on **HB 2238** and indicated that we would consider it again tomorrow morning.

The next meeting is scheduled for February 12, 2009.

The meeting was adjourned at 10:30 a.m.

COMMERCE & LABOR COMMITTEE

DATE: 2-11-09

NAME	REPRESENTING
KURT BRACH	ASA
Ken Keller	ASA
BILL MILLER	ASA
Fredy Gron	Amer INSTITUTE of Architects
Eric Staffort	AGC of Kansas
Dan Morgan	KC Chgo, AGC
Tim Braden	AGC OF KANSAS.
Dennis Kriesel	Kansas Association of Counties
Joe Mosimann	Hein Law Firm
Joe Waters	Johnson County Government
Diane Gjerstad	Wichita Public Schools
Stuart Little	Sedgwick Co. Government
LARRY R BAZZ	LKM
Allen Askew	Federico
Wardyn Williams	KAPA - KRMCA
Darci MEESE	WaterOne
ERIK SARTORIUS	City of Overland Park
Drey Sanchez	KS AFL-CIO
Bob Totten	Ks Contractors Assoc.
Bob Vancrum	Blue Valley USD 229
Stan Ahlerich	KANSAS, I-c
Tom Burgess	ASA

Office of Revisor of Statutes
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MEMORANDUM

To: House Committee on Commerce and Labor
From: Renae Jefferies, Assistant Revisor
Date: February 11, 2009
Subject: HB 2238

HB 2238 amends statutes relating to retention in public and private construction contracts.

Section 1 amends K.S.A. 16-1802 of the Kansas fairness in private construction contract act by adding a definition for alternate security and substantial completion and amending the definition of retention.

Alternate security means “a retainage bond, bank letter of credit, certificate of deposit, cash bond or other mutually acceptable items of value equal to or exceeding the amount of retained funds” by the owner, contractor or subcontractor.

Substantial completion means, “for the purpose of release of retention, the stage of a construction project where the project, or a designated portion thereof, is sufficiently complete in accordance with the contract so that portion thereof, can be used for its intended purpose.”

The definition for retainage “or retention” was amended to mean money earned by a contractor or subcontractor but withheld to ensure proper performance by the contractor or subcontractor “for the remainder of such contractor’s or subcontractor’s work on the project.”

Section 2 amends K.S.A. 16-1804 of the Kansas fairness in private construction contract act to require that an owner, contractor or subcontractor:

- (a) Shall not withhold more than 5% of the amount of a contract as retainage;
- (b) may withhold retained amounts incrementally from each monthly payment as 10% of the first 50% of the contract or as 5% of the total contract;
- (c) shall release retained amounts within 45 days after substantial completion of the contract as a part of the regular payment cycle;

(d) shall not withhold more than 150% of the value of incomplete work provided that the incomplete work is not the fault of the subcontractor. Any amounts retained for incomplete work shall be paid within 45 days after work is completed as part of the regular payment cycle; and

(e) shall not retain any funds from any party to the contract who has provided a 100% payment/performance bond for that party's work on the project.

Additionally, a contractor or subcontractor may provide alternate security at any stage of the contract. If the alternate security is provided before work has begun, no retainage shall be withheld. If the alternate security is provided after the first payment cycle, any retained shall be paid with the next regular payment.

Section 3 amends K.S.A. 16-1902 of the Kansas fairness in public construction contract act which mirrors the language in K.S.A. 16-1802 with the exact amendments that were provided in section 1 of the bill.

Section 4 amends K.S.A. 16-1904 of the Kansas fairness in public construction contract act with amendments similar to the amendments in section 2 of the bill.

The effective date of this bill is upon publication in the statute book.

BUILDING ERECTION SERVICES COMPANY

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

Feb. 11th, 2009

Kansas House Committee on Commerce and Labor
Chairman Steven Brunk and Vice Chairman John Grange

My name is Bill Miller. I am here representing myself and the American Subcontractors Association. I am the owner of Building Erection Services Co. with offices in Olathe and Topeka, Kansas, and in St. Joseph, Mo. ASA is an association of subcontractors and suppliers in Western Missouri and Eastern Kansas. I am speaking in favor of HB2238.

I am using information from a study done by Dr. Dennis C. Bausman, Assistant Professor of Construction Science and Management at Clemson University and personal experience from 32 years in business.

Retainage is a portion of money that has been earned by the contractor or subcontractor that is withheld from the regular monthly payment. It is withheld to ensure future performance by the party that the funds were withheld from as a form of protection for the owner or contractor. It is important to realize the distinction between future performance and warranty work. Opponents to this bill will try to confuse the issue by suggesting that retainage and the warranty are the same to avoid having to release payment of retained funds. Webster's definition of the word warranty is "A written guarantee of the integrity of a product and the maker's responsibility for the repair or replacement of defective parts." Retainage by definition in Kansas law is as written in HB2238. Money earned by a contractor or subcontractor but withheld to ensure proper performance by the contractor or subcontractor *for the remainder of such contractor's or subcontractor's work on the project.* THIS HAS NOTHING TO DO WITH WARRANTY.

This distinction is very important. The warranty is a continuing obligation for a specific period of time AFTER THE PROJECT IS COMPLETED. Retainage should be paid AFTER THE WORK IS COMPLETED not months or in extreme cases, years after the work is done.

There are a number of compelling reasons that the ongoing problem of prolonged withholding of the contractor or subcontractors money needs to be corrected by this Legislature. I will outline the most obvious.



House Commerce & Labor
Date: 2-11-09
Attachment # 2

1. Subcontractors perform 85% or more of the work in today's construction market. As a result, the financial burden imposed by retaining funds that have been earned is disproportionately imposed on subcontractors. Especially on those that finish early in the project. Banks will not loan on retained funds. A profit margin for subs is in the range of 4% to 6% in good times. In difficult times such as we are currently in, the margin is less and often negative. Lack of cash flow is the number one cause of subcontractor failure.
2. Suppliers do not allow retainage. A sub or general contractor is required to pay the supplier in 30 days or they are placed on COD or denied material or supplies at all. This puts the sub or GC in the position of financing the project for no compensation and forces them to borrow from their operating capital line in order to proceed with the work.
3. Lien law in Kansas requires filing within 90 days. An extension for an additional 60 days is granted if a notice is properly filed with the county. A lien must then be filed or lien rights are lost. The lien must be enforced within one year from filing or again, lien rights are lost. The early finishing subs are forced into the position of filing suit against their contractor before the project is completed, and the contractor has not yet been paid. Just the filing creates animosity between the owner, contractor and the sub.

Passage of HB 2238 will solve most of the problems that we in the construction industry have with the abusive practice of retainage. 74% of the states have decreased retainage to 5% or less with one at 0% and seven with 2.5%. Kansas is far behind in correcting this problem that is only getting worse with subcontractors suffering the brunt of the abuse.

In DR. Bausman's report, the average sub gets paid retainage 167 days AFTER THE OWNER OCCUPIES THE PROJECT. The general gets paid retainage 99 days after the owner takes possession. 10.4% of the subcontractors either get none or only part of their retained funds. Passage of HB2238 will stop this abuse.

HB2238 still provides the protection for the owner and general contractor that retainage was designed originally to do. It allows 5% retainage that is the high end compared with 74% of the other states that are at 5% or less. This is more than adequate in that subs are no less than 30 days behind in receiving payment for their work based upon the payment cycle required under Kansas law. HB2238 provides for 2 methods of withholding so long as no more than 5% of the total contract is withheld and no more than 10% of one any payment .

HB2238 establishes alternatives for the subcontractors that protect cash flow and in many cases, assure that the retained funds are not used to fund under funded projects or simply used by owners to finance the project.

An alternative security may be used in lieu of retention. This still provides the same protection that retained funds would, but prevents the abusive practice of

holding retainage long past the completion of the work for which funds were withheld.

No retainage can be withheld if there is a 100% payment/performance bond in place. We have heard the opposition argue repeatedly that they can not collect on a bond, yet we as subcontractors have only that to secure payment from the general contractor. If it is good enough for us, it should be good enough for them. If this is not the case, we will come to the legislature to correct it.

The early finishing subcontractors shall be paid the retained funds within 45 days after the work under their contracts is substantially completed. Substantial completion for this purpose is defined in this Bill. It has nothing to do with substantial completion of the project. No special payment cycle is required.

Opposition will attempt to confuse retainage with warranty. Please remember the difference as I explained earlier. Retainage is money that has been earned and not paid.

They will also say that the banking industry will be at risk and oppose as well. The bankers that I have talked to do not have a concern with HB2238. It will lessen their risk of subcontractor failure.

The bank loans for construction projects are usually two separate loans. One for the actual construction and another for the long term financing. HB2238 places neither at risk. I was assured that they are in the business of loaning money.

It is interesting to note that the Federal Government does not hold retainage from either contractor or sub on their construction projects. Federal Acquisition Regulation 32.103 says that "Retainage should not be used as a substitute for good contract management, and the contracting officer should not withhold funds without cause."

AGC 200(2000) General Conditions Between the Owner and Contractor, sections 9.2.4 and 9.6.4 state that "once an early finishing sub has satisfactorily completed its work, the owner may release retainage for that portion of the Work. After the project is 50% complete, the owner is to withhold no further retainage. Upon substantial completion, owner pays the retainage balance LESS 200% OF ESTIMATED COST TO COMPLETE ALL WORK. In lieu of retainage, the contractor may furnish securities, with interest on these going to the contractor."

It is obvious that the local chapter is not in lock step with the National Association, but it is also obvious that the national trend is to reduce retainage and actually do away with retainage all together in some cases. No other industry has this awful practice.

There is no negative fiscal note to the State. It can only be positive if businesses survive and keep people employed.

I ask that you recommend this bill for passage.

Bill Miller

Government Relations Chair
American Subcontractors Association
President
Building Erection Services Co.



WESTERN EXTRALITE COMPANY

DISTRIBUTORS OF QUALITY ELECTRICAL AND VOICE/DATA PRODUCTS

1470 Liberty St. • Kansas City, MO • 64102

Feb 11, 2009

To: The House Commerce and Labor Committee
Chairman Steven Brunk and Vice Chairman John Grange

Mister Chairman

Thank you for allowing me to address you today in support of HB2238 relating to retainage on public and private construction jobs. I'm Ken Keller, retired Controllor of Western Extralite Company. I served in that capacity for 21 years. Western Extralite Company is an electrical supply house with a large portion of its business derived from the construction industry. We have 19 locations, 8 of which are in Kansas. In addition I represent the American Subcontractors Association, National Association of Credit Managers, the Electric League of Greater Kansas City and other interested parties.

The purpose of this legislation is to bring Kansas into the 21st century as it relates to our retainage laws. But first, for those on the committee who may not be familiar with the construction industry, retainage is an amount withheld from the contractor and subcontractors on monies earned on the construction project. The process is: monthly, the subcontractor submits a bill for work performed in the preceding month. These requests for payment are approved and paid less a percentage, normally 10%. This 10%, is retained by the owner and general contractor as leverage to insure the job is completed satisfactorily and on time. When the job is completed the retainage is paid to the subcontractor.

This practice as it is currently being used in Kansas is antiquated. I have a Summary of Retainage Laws In the Fifty States published by the National American Subcontractors Association, which reports over 30 states that have their retainage fixed at 5% as we are proposing in this bill or less. One state has excluded this practice altogether. Why do we care? First, many of the jobs are taken at less than 10% profit so the subcontractor is losing money until he receives his retainage. His monthly payout is greater than the money he receives. To handle this many subcontractors have operating loans from their bank to cashflow the job. The bank will loan you money as long as you have adequate collateral to support the loan. The main asset used to collateralize your loan is your accounts receivable. The problem is the bank won't let you use receivables over 90 days old as collateral. They question their collectability. Most of your retainage is over 90 days old and can't help you with your cashflow. Reducing the retainage to 5% as proposed will be an enormous help.

Allowing you to use an alternative security in lieu of cash retainage would be an even larger help. This would provide the same protection but not tie up your working capital. The entire amount of the monthly request would be paid 100% and the general and sub contractors could cover their cost on an ongoing basis without having to borrow money to do so thus reducing the cost of the job to the owner and himself. Currently thirteen states provide for this solution.

A few years ago Clemson University did a nationwide study on retainage and discovered the time lag for the final retainage figure to be paid from the completion of the job was 167 days, and 10.4% was not paid in its entirety or at all. This is grossly unfair and needs to be corrected.

Our proposed legislation would correct this. Retainage would be payable in the normal payment cycle within 45 days of substantial completion. Substantial completion is defined as sufficiently complete as to be used for its intended purpose. Why should the early finishing subcontractor have to wait in some cases over a year to get their money? Unfortunately in some cases this money is being used to help finance the job. As one general contractor told us in a meeting, I'm entitled to that money and the interest I can make by investing it in time deposits. That is wrong and needs to be corrected.

I urge your support in correcting these problems. Passage of HB2238 will accomplish that.

Kenneth R Keller
Retired Controllor
Western Extralite Company

www.westernextralite.com

What you need, when you need it ... guaranteed!

House Commerce & Labor

Date: 2-11-09

Attachment # 3

TESTIMONY
Kansas House Committee on Commerce and Labor

House Bill 2238 - Retention In Public, Private Contracts

My Name is Kurt Brack
I am an attorney at the law firm of Holbrook & Osborn
Practice in the area of Construction law

Here to speak today in favor of HB 2238

I represent a number of different contractors and subcontractors in the state of Kansas

In speaking with them - getting paid their retainage is one of their top issues

All too often - subcontractors must wait very long periods of time to be fully paid on a project
sometimes never paid retainage

Example - take the excavator on a commercial project
Excavator one of the first to do work, one of the first to finish work on a project
often - must wait many months later to be fully paid the retainage

What does the subcontractor do?
To protect itself - must file lien
But has only 90 days from date last performed work to do so
Can be extended 60 days - but what if still not paid?
File a mechanic's lien
Owner, lender and GC now irritated

HB2238 corrects this problem - subs such as the excavator are paid within 45 days after work is
substantially complete

No need to file lien unless absolutely necessary

No unhappy owner, lender or GC

Cash flow is another big issue with subcontractors - Most subs have lines of credit they borrow
upon to fund a project

HB2238 assists in this regard by requiring prompt payment of retainage

HB2238 also follows the trend nationwide of reducing retainage to 5% or less on projects

I urge you to pass HB 2238

House Commerce & Labor
Date: 2-11-09
Attachment # 4



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

**TESTIMONY OF
ASSOCIATED GENERAL CONTRACTORS OF KANSAS
BEFORE HOUSE COMMITTEE ON COMMERCE & LABOR
HB 2238**

February 11, 2009

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

Mister Chairman and members of the committee, my name is Eric Stafford. I am the Director of Government Affairs 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).

The AGC of Kansas opposes House Bill 2238 and asks that you do not recommend it favorably for passage.

In 2005, the Kansas Legislature passed the Fairness in Private Construction Contract Act, a sweeping piece of legislation establishing payment guidelines for owners, general contractors and subcontractors. SB 33 was a compromise by all parties and has been recognized across the country for its achievements. Two years later, SB 333 was passed and established similar standards for public sector projects.

While supportive of the final language in both bills, AGC of Kansas had great concern with the Legislature intruding in private contracts. While Senate Bills 33 and 333 were a positive step for the industry, AGC feels that the language in HB 2238 would move the state of Kansas one step closer to establishing a statutory construction contract that all parties must sign, leaving no ability for parties to negotiate.

Rather than coming before the legislature to argue the philosophical differences between groups, AGC would like to get all interested parties to the table this summer to discuss retention and best practices for release of retention.

Again, the AGC of Kansas respectfully requests that you do not recommend HB 2238 favorably for passage. Thank you for your consideration.

House Commerce & Labor
Date: 2-11-09
Attachment # 5



House Commerce & Labor
Representative Brunk, Chair

H. B. 2238 – Public Construction Contract

*Submitted by Diane Gjerstad
Wichita Public Schools*

February 11, 2009

Mr. Chairman, members of the Committee:

Mr. Chairman, we rise in opposition to this bill. On November 4th the voters of the Wichita Public Schools supported a \$384m bond issue. Now it is the Board of Education's responsibility to exercise prudent fiscal oversight over the building projects. We do not believe the legislature should impose additional contractual constraints to public construction projects. In particular the suggested 5% retention is simply not adequate to protect the public's investment in school construction.

School construction projects are time sensitive. Ideally projects are done by the start of school or some type of natural break (like the Christmas holiday). When they are not, it is extremely disruptive (and expensive) to move entire wings of classrooms over a weekend. We have had punch lists which have taken over six months to complete – it is not unreasonable for the owner (the Board of Education) to have retention adequate enough to still entice the contractor to complete the project months after the certificate of occupation has been issued.

Mr. Chairman, we would urge the committee not to take action on this bill. Public construction projects have publicly elected boards who are entrusted with taxpayer dollars. The statutes should not be so constraining as to inhibit the duly elected boards' ability to fulfill their obligation to the voters.

House Commerce & Labor
Date: 2-11-09
Attachment # 6



**Testimony Before the
House Committee on Commerce and Labor**

In Opposition to House Bill 2238

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

**By Joe Waters
Director of Facilities**

February 10, 2009

**House Commerce & Labor
Date: 2-11-09
Attachment # 7**



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 28 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 House Bill 2238.

Johnson County undertakes a wide variety of construction projects; new buildings, renovations, sanitary and storm sewer systems, roads, bridges, airport runways, etc. Our projects are all 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. HB 2238 endeavors to establish important terms and conditions between parties in the execution of construction projects. Fundamentally, we believe those terms and conditions are best determined between the parties to the contract; be that the owner and contractor or the contractor and sub-contractor.

Mandating the option of alternate security in lieu of retainage has a number of problems.

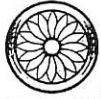
- Project costs will increase for the taxpayers because this added layer of complexity will result in added management time and overhead.
- Taxpayer investments will be unnecessarily placed at risk-
 - reliance upon alternative securities that, in these financial times are simply not secure
 - bonding instruments are not reliable and rarely if ever timely

Requiring no more than 5% retainage is a significant problem for Johnson County.

- We have a number of projects types that are unique and require significantly different retainage structures in order to be successful. Septic tank neighborhood replacement projects are one example where we typically require 30% retainage in order to assure the project is completely closed out as expeditiously as possible.
- The process described in HB 2238 of withholding 10% until a project is 50% complete is a practice we often follow, but it is extremely important that the decision to begin reducing retainage is based upon performance and other contractual responsibilities. One size does not fit all situations.

Finally, Johnson County believes matters of prompt payment and penalties are addressed thoroughly by statute and should not be included in HB 2238.

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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. Ultimately, our ability to complete projects in a timely manner and with adequate security for the public investment is significantly weakened by HB 2238.

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 House Bill 2238 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 TO HOUSE COMMERCE COMMITTEE

By Robert Vancrum Blue Valley USD 229

February 11, 2009

on HB2238

CHAIRMAN BRUNK AND OTHER HONORABLE REPRESENTATIVES:

I am here representing Blue Valley USD 229, a district of 20,500 students which has experienced rapid growth over the last 20 years. We now have over \$200 million either under construction or in the design phase. We therefore have a lot of experience with contractors and subcontractors. The majority of each keep their contracts to the letter as a matter of professional pride. We certainly agree with the subcontractors group on that.

Nevertheless, the reason is clear why nearly all standard contracts provide for a 10% retainage against all subcontractors as well as all contractors. From time to time a general contractor, perhaps relying on representations from his subs, will certify a project, or a portion, as complete when subsequent inspections by the district, or the city or county codes administrator, will show that there are more than the usual punch list of minor defects to be corrected. At times they even require tear out and reconstruction. If there was insufficient retainage and/or if the sub didn't agree, the sub will not come back and fix the problem but just walk away. Then we have to hire someone else and have a cost overrun. The retainage of 10% is the single most important incentive a public entity owner has to insure that projects are completed properly, and that the as built facility matches the design and meets code,

It is no doubt the exception to the rule that some subs behave in this way. And it is apparently true that sometimes contractors and their subs have not been timely paid when they have adequately performed the contract. But it makes no sense to punish all districts for the sins of a very few, especially since we are talking about taxpayers hard-earned property tax dollars in most cases. We should err, if at all, in making sure that the taxpayers are not harmed.

I would be happy to answer questions now or at the Committee's convenience.

913-634-8257

House Commerce & Labor

Date: 2-11-09

Attachment # 8



**TESTIMONY BEFORE THE HOUSE COMMERCE AND LABOR COMMITTEE
REGARDING HOUSE BILL 2238**

By Dan Morgan, Kansas City Chapter, Associated General Contractors (AGC)
February 11, 2009

Thank you, Mister Chairman, and members of the committee. My name is Dan Morgan. I appreciate the opportunity to appear before you this morning on behalf of the Kansas City Chapter, Associated General Contractors. The Kansas City Chapter, AGC represents nearly 100 general contractors, and 50 subcontractors and suppliers engaged in the commercial and industrial building construction industry. Half of our members are located in the Kansas City area and are either based in Kansas or perform work in the state. I appreciate the opportunity to appear in opposition to House Bill 2238.

Like other organizations represented here today, the Kansas City Chapter, AGC was pleased to support the recently adopted public and private prompt payment laws in our state. We worked with many others to help achieve fair and comprehensive prompt payment laws for both the public and private sectors. Throughout that process, interested parties met repeatedly to discuss a variety of issues, including retainage issues, and ultimately reached agreement on payment provisions that all could support. As a result, the "Kansas Fairness in Private Construction Act" was approved in 2005 and the "Kansas Fairness in Public Construction Act" became law in 2007. In contrast, HB 2388 contains a number of provisions that could not be agreed to in negotiations for current law and that cannot be agreed to now.

HB 2238 would cap retention at 5% on both public and private projects. Owners, both public and private, and general contractors oppose an across-the-board cap of 5% on retainage. Current law provides that retainage may not exceed 10%. I am told that, in some instances, 10% is not enough. The bill further provides for so-called "line item" release of retainage by requiring the release of all retention within 45 days of completion of portions of a project. In many cases, construction problems do not manifest themselves until much later in a project. Owners and general contractors support current law which provides for final release of retainage after substantial completion of the entire project. HB 2238 also provides for alternative securities in lieu of retainage. Owners and general contractors strongly prefer the real leverage and security that retainage provides rather than substitutes such as retainage bonds which are often very difficult to collect on. Finally, HB 2238 provides that no retainage may be withheld from any party who has provided a 100% payment performance bond for that party's work on a project. Again, given the difficulty of collecting, such bonds are poor substitute for retainage.

We strongly support the compromises reflected in current Kansas prompt payment statutes and oppose the controversial proposals put forth in HB 2238. We respectfully ask that you do not pass this bill favorably out of committee. Thank you all very much.

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Date: 2-11-09

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