

## CHAPTER 156

### Substitute for SENATE BILL No. 33°

AN ACT concerning private construction contracts, enacting the Kansas fairness in private construction contract act.

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

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

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

Sec. 2. As used in this act:

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

(b) "Contract" means a contract or agreement concerning construction made and entered into by and between an owner and a contractor, a contractor and a subcontractor or a subcontractor and another subcontractor.

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

(d) "Owner" means a person who holds an ownership interest in real property.

(e) "Person" means an individual, corporation, estate, trust, partnership, limited liability company, association, joint venture or any other legal entity.

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

(g) "Subcontractor" means any person performing construction covered by a contract between an owner and a contractor but not having a contract with the owner.

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

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

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

(2) a provision that purports to waive, release or extinguish rights provided by article 11 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto, except that a contract may require a contractor or subcontractor to provide a waiver or release of such rights as a condition for payment, but only to the extent of the amount of payment received; and

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

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

(d) All contracts for private construction shall provide that payment

of amounts due a contractor from an owner, except retainage, shall be made within 30 days after the owner receives a timely, properly completed, undisputed request for payment.

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

(f) 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.

(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.

(h) The provisions of subsections (f) and (g) shall apply to all payments from subcontractors to their subcontractors.

Sec. 4. (a) An owner, contractor or subcontractor may withhold no more than 10% retainage from the amount of any undisputed payment due.

(b) If an owner, contractor or subcontractor fails to pay retainage, if any, pursuant to the terms of a contract for private 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.

Sec. 5. If any undisputed payment is not made within seven business days after the payment date established in a contract for private construction or in this act, the contractor and any subcontractors, regardless of tier, upon seven additional business days' written notice to the owner and, in the case of a subcontractor, written notice to the contractor, shall, without prejudice to any other available remedy, be entitled to suspend further performance until payment, including applicable interest, is made. The contract time for each contract affected by the suspension shall be extended appropriately and the contract sum for each affected contract shall be increased by the suspending party's reasonable costs of demobilization, delay and remobilization.

Sec. 6. In any action to enforce section 3, 4 or 5, and amendments thereto, including arbitration, the court or arbitrator shall award costs and reasonable attorney fees to the prevailing party. Venue of such an action shall be in the county where the real property is located. The hearing in such an arbitration shall be held in the county where the real property is located.

Sec. 7. The provisions of this act shall not apply to single family residential housing and multifamily residential housing of four units or less. The provisions of this act shall not apply to public works projects. The provisions of this act shall not apply to contracts entered into prior to the effective date of this act.

Sec. 8. This act shall take effect and be in force from and after its publication in the statute book.

Approved April 18, 2005.

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