

CHAPTER 128

HOUSE Substitute SENATE BILL No. 377

AN ACT concerning construction; relating to retention in public and private construction contracts; amending K.S.A. 16-1802, 16-1804, 16-1902 and 16-1904 and repealing the existing sections.

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

Section 1. K.S.A. 16-1802 is hereby amended to read as follows: 16-1802. As used in this act:

(a) *“Alternate security” means an irrevocable bank letter of credit, certificate of deposit, cash bond or other type of asset or security of value equal to or exceeding the amount of retained funds. “Alternate security” shall not include a performance bond or a payment bond.*

~~(a)~~ (b) *“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)~~ (c) *“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)~~ (d) *“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)~~ (e) *“Owner” means a person who holds an ownership interest in real property.*

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

~~(f)~~ (g) *“Retainage” or “retention” means money earned by a contractor or subcontractor but withheld to ensure proper performance by the contractor or subcontractor.*

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

(i) *“Substantial completion” means 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.*

Sec. 2. K.S.A. 16-1804 is hereby amended to read as follows: 16-1804. (a) *Retainage shall not exceed 5% of the value of the contract or subcontract unless the owner or contractor determines 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 or subcontract.*

(b) *If the contractor or subcontractor has failed to meet the terms of the contract, is not performing according to schedule or there is a problem with workmanship or other issues, the owner may increase retainage up to 10%.*

(c) *An owner shall release all remaining retainage on any undisputed payment due to a contractor on a construction project within 30 days after substantial completion of the project; however, if any contractor or subcontractor is still performing work on the project, an owner may withhold that portion of the retainage attributable to such work until 30 days after such work is completed.*

(d) *An owner may withhold not more than 150% of the value of incomplete work, provided that the incomplete work is due to the fault of a contractor. Any amounts retained for incomplete work shall be paid within 45 days after completion of the work as a part of the regular payment cycle.*

(e) *A contractor may withhold not more than 150% of the value of incomplete work, provided that the incomplete work is due to the fault of a subcontractor. Any amounts retained for incomplete work shall be paid within 45 days after completion of the work as part of the regular payment cycle.*

(f) *A subcontractor may withhold not more than 150% of the value of incomplete work that is the responsibility of another subcontractor,*

provided that the incomplete work is due to the fault of such other sub-contractor. Any amounts retained for incomplete work shall be paid within 45 days after completion of the work as a part of the regular payment cycle.

(g) Prior to commencement of work, a general contractor or subcontractor may request an alternate security in lieu of retainage.

(h) If a contractor or subcontractor requests the use of an alternate security, as defined in subsection (a) of section 1, and amendments thereto, in lieu of retainage, the owner or contractor who would otherwise withhold the retainage shall have the right to determine which type of alternate security, as defined in subsection (a) of section 1, and amendments thereto, shall be accepted.

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

~~(b)~~ (j) 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.

(k) 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 or additional cost to the owner or contractor. Once so determined, the contractor shall request such early release of retainage from the owner as necessary to enable the contractor to pay the subcontractor in full. 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.

Sec. 3. K.S.A. 16-1902 is hereby amended to read as follows: 16-1902. As used in this act:

(a) "Alternate security" means an irrevocable bank letter of credit, certificate of deposit, cash bond or other type of asset or security of value equal to or exceeding the amount of retained funds. "Alternate security" shall not include a performance bond or a payment bond.

~~(a)~~ (b) "Construction" means furnishing labor, equipment, material or supplies used or consumed for the design, construction, alteration, renovation, repair or maintenance of a building, water or waste water treatment facility, oil line, gas line, appurtenance or other improvement to real property, including any moving, demolition or excavation of a building. "Construction" shall not mean the design, construction, alteration, renovation, repair or maintenance of a road, highway or bridge.

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

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

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

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

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

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

~~(j)~~ (j) “Undisputed payment” means payments which all parties to the contract agree are owed to the contractor.

Sec. 4. K.S.A. 16-1904 is hereby amended to read as follows: 16-1904. ~~(a) An owner, contractor or subcontractor may withhold no more than 10% retainage from the amount of any undisputed payment due.~~

(a) *Retainage shall not exceed 5% of the value of the contract or subcontract unless the owner or contractor determines 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 or subcontract.*

(b) *If the contractor or subcontractor has failed to meet the terms of the contract, is not performing according to schedule, shows poor workmanship or other issues, the owner may increase retainage up to 10%.*

(c) *An owner may withhold not more than 150% of the value of incomplete work, provided that the incomplete work is due to the fault of a contractor. Any amounts retained for incomplete work shall be paid within 45 days after completion of the work as a part of the regular payment cycle.*

(d) *A contractor may withhold not more than 150% of the value of incomplete work, provided that the incomplete work is due to the fault of a subcontractor. Any amounts retained for incomplete work shall be paid within 45 days after completion of the work as part of the regular payment cycle.*

(e) *A subcontractor may withhold not more than 150% of the value of incomplete work that is the responsibility of another subcontractor, provided that the incomplete work is due to the fault of such other subcontractor. Any amounts retained for incomplete work shall be paid within 45 days after completion of the work as a part of the regular payment cycle.*

(f) *Prior to commencement of work, a contractor or subcontractor may request an alternate security in lieu of retainage.*

(g) *If a contractor or subcontractor requests the use of an alternate security, as defined in subsection (a) of section 3, and amendments thereto, in lieu of retainage, the owner or contractor who would otherwise withhold the retainage shall have the right to determine which type of alternate security, as defined in subsection (a) of section 3, and amendments thereto, shall be accepted.*

~~(h)~~ (h) ~~An owner, contractor or subcontractor must release the all remaining retainage on any undisputed payment due on a construction project within 30 days after substantial completion of the project as part of the regular payment cycle; however, if any contractor or subcontractor is still performing work on the project under its subcontract, an owner may withhold that portion of the retainage attributable to such subcontract work until 30 days after such work is completed.~~

~~(i)~~ (i) ~~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.~~

~~(j)~~ (j) ~~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 or additional cost to the owner or contractor. Once so determined, 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.~~

Sec. 5. K.S.A. 16-1802, 16-1804, 16-1902 and 16-1904 are hereby repealed.

Sec. 6. This act shall take effect and be in force from and after its publication in the statute book.