

SESSION OF 2010

**SUPPLEMENTAL NOTE ON
SUBSTITUTE FOR HOUSE BILL NO. 2238**

As Recommended by House Committee on
Commerce and Labor

Brief*

Sub. for HB 2238 would amend the Kansas Fairness in Private Construction Act and the Kansas Fairness in Public Construction Act dealing with retainage and alternate security.

Under current law, the statute defines “retainage” as money earned by a contractor or subcontractor, but withheld to ensure proper performance by the contractor or subcontractor.

The bill would amend the Kansas Fairness in Private Construction Act and the Kansas Fairness in Public Construction Act to require that an owner, contractor or subcontractor:

- Shall not withhold more than a five percent limit of the amount of the contract as retainage unless they determine that a higher rate of up to ten percent of the contract as retainage is required to ensure performance of the contract. The bill would cap the retainage at ten percent;
- Shall be required to release the retainage on any undisputed payment due on a contract within 30 days after substantial completion of the contract. If the subcontractor has not completed the project, an owner may withhold that portion of the retainage attributable to the contract until 30 days after the work is completed. Substantial completion would mean the stage of a construction project, or a designated portion thereof, where the project is sufficiently

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

complete, in accordance with the contract, so that the owner can use the completed portion for its intended use; and

- Shall not withhold more than 150 percent of the value of the incomplete work provided that the incomplete work is the fault of the subcontractor. Any amounts retained for incomplete work shall be paid within 45 days after the work is completed as part of the regular payment cycle.

Under the bill, a general contractor or subcontractor may request an alternate security in lieu of retainage. The bill would define “alternate security” as a retainage bond, 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 the retained funds. Alternate security would not include performance and payment bonds. If the owner or general contractor or subcontractor accepts an alternate security, they have the right to determine which type of alternate security shall be accepted.

The bill would reconcile the language of the Kansas Fairness in Public Construction Act and the Kansas Fairness in Private Construction Act so that the acts dealing with retainage would be similar.

Background

Proponents of the bill, as introduced, included representatives of the Associated General Contractors of Kansas, the American Sub-Contractors Association, and the Western Extralite Company.

Opponents of the bill, as introduced, included representatives of the Johnson County Government, the Unified Government of Wyandotte County, the Blue Valley School District, the Kansas Association of School Districts, the City of Lenexa, the Wichita Public Schools, Water District No. 1 of

Johnson County, the American Institute of Architects, the Kansas Association of Counties, the City of Wichita, the League of Kansas Municipalities, the City of Overland Park, the Kansas Association of Counties, and Westar Energy.

This House Committee created a substitute bill to conform language of the Kansas Fairness in Public Construction Act to the Kansas Fairness in Private Construction Act.

The Division of Budget's fiscal note was unavailable on the substitute bill.