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TESTIMONY

Date: March 19, 2013

By: Woody Moses, Managing Director
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Regarding: House Bill No. 2173, An act concerning liens; relating to supplier's liens

Before: The House Committee on Judiciary

Good afternoon Mister Chair and Members of the Committee:

My name is Woody Moses, Managing Director of the Kansas Aggregate Producers' Association and the Kansas Ready Mixed Concrete Association. The Kansas Aggregate Producer's Association (KAPA) and the Kansas Ready Mixed Concrete Association (KRMCA) is a state wide trade association comprised of over 170 members located or conducting operations in all 165 legislative districts in this state, providing basic building materials to all Kansans. And as such have a vital interest in lien law as without them we could not make a living. I appreciate the opportunity to appear before you today to express our opposition regarding HB 2173.

Over the course of many years we, as a state, have crafted a good lien law structure, which functions just as it was intended to by spreading risk in a balanced manner. Now comes before you, HB 2173 which seeks to upset the carefully crafted balance by shifting the risk from one group (general contractors) to another (subcontractors and suppliers). Ironic, as general contractors profess to make a living out of accepting risk, which justifies their existence. It is even more ironic, as the contractor already enjoys automatic lien protection, pursuant to K.S.A. 60-1101. Yet they seek to limit those of others.

Lien laws have existed in North America for over 400 years and in all 50 states for a good reason, to establish a framework whereby real property can be improved by fairly assigning the

risks and providing a means whereby the fruits of one's labor may be recovered. After all, unlike a refrigerator or automobile, our product becomes a part of the real property and is impossible to recover by simple repossession. It is the faith in our lien law that allows our industry to furnish products to a construction project. HB 2173 significantly reduces our chances to recover by 86% as it essentially reduces the time to file a traditional lien from a potential 150 days to 21. If approved, working under HB 2173 will more resemble going to a casino than furnishing a job.

As you weigh the pros and cons of the measure before you we suggest you may wish to consider the following questions and how the answers bear on the development of good public policy.

Is it necessary to create more government?

At the heart of HB 2173 is the establishment of what is called the State Construction Registry within the office of the Secretary of State. This of course will lead to more government as it will be necessary to add more staff, write more rules and create more bureaucracy to administer a new system that currently does not exist. Proponents will allege that the net effect is zero as it will be paid for by fees; and while this may be true, be rest assured someone will be paying more simply because new regulatory schemes, while innocent at first, just like a newborn child, will find a way to grow. So, there will be more government for someone to support. We seriously question, given the lessons we learned last November, if this is what voters want right now. No matter how one spins it at the end of the day more government is created.

Where is the public good?

The implied purpose of all legislation is to act on behalf of the public good. Yet, while HB 2173 will help a small number of general contractors, it is hard to see where the public good is being advanced. For example, the bill does not protect homeowners arguably the largest group in need of protection under our current lien laws. Our industry has far more problems in this area, as no one likes to foreclose on a homeowner. Additionally, as HB 2173 will shift the risk, in some cases to unknown parties, construction prices will necessarily go up in order to allow for potentially unknown losses; thus raising costs to owners, businesses and the public. It does not appear that much in way of doing public good can be found in this bill, as a matter of fact, just the opposite.

Where is the problem?

All good public policy should, in essence, seek to solve an apparent problem. In the case of the bill before you it is very hard to discern any problem. Where are the bankruptcies? Where are the projects lacking bidders? Construction in Kansas continues to function in Kansas. Contracts

are being advertised and bidders continue to bid every day. If our current lien laws were broke there simply would not be any bids. In other words the free market is functioning fine and until such time as it does not; there is no need to fix a problem that does not exist.

Is it worth upsetting the current system?

Liens laws, first passed in 1632 by the Massachusetts Bay Colony, have been in existence for over 400 years in North America. Since this time much case law has been developed both defining and processing how liens laws work. Ergo, all the players know how lien law works and what the rules are for all. If adopted, HB 2173 will require doing much of this work all over again spending lots of time in court and paying legal fees. After all, it will be the courts that define what a “Notice of Commencement” is, what a “Notice of Furnishings” is and when the 21 days begins or ends. Not much in the way of cost reduction here. Once again, it appears only one small sliver of society (big general contractors) are served, while the rest of society gets to pick up the tab.

Whatever happened to risk?

Our free market system of general construction, developed over the last 200 years, rests upon the acceptance of risk in return for a suitable reward. Ironically, it is the general contractor who offers to the owner a lien free project in return for a reward. It is only through the acceptance of risk that a general contractor can justify their existence. Yet, in HB 2173 while they still seek the reward they now come to you and asked to be relieved of the risk.

For all these reasons and more we urge this committee to reject HB 2173 as its passage would:

- Create more government, create more taxes, and create more liability for the state.
- Basically contrary to our economic system by legislating in the free market,
- Unfairly shifts risk to our industry by reducing the amount of time to file a lien from a potential 150 days to 21 days,
- Raise construction costs as suppliers/subcontractors will be forced to raise prices to compensate for the additional risk,
- Or in the alternative require payment prior to delivery,
- Layers on additional requirements to an already complicated lien law in effect creating a fourth lien law in addition to the current three.
- Creates even more uncertainty in an already uncertain marketplace, and
- Lacks a compelling reason for passage.

While many questions have been posed this afternoon it ultimately comes down to one. **Does HB 2173 really create good public policy?** We think not. Thank you for your time and attention, I will be happy to respond to any questions you may have at the appropriate time.