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Testimony Before The
Senate Commerce Committee
Regarding
Senate Bill 333
By
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February 19, 2007

The City of Overland Park appreciates the opportunity to appear before you in opposition to Senate Bill 333. The City instead supports retaining our current practices for paying contractors.

The City of Overland Park maintains a strong relationship with a multitude of contractors who perform work vital to the growth of the City. To do so, the City must be able to take local conditions into account when formulating contracts for the performance of work to be done. Artificial measures for timely payment, work completion, and retainage compromise the City's ability to ensure that work is performed at a standard expected by taxpayers.

Unlike contracts entered into between private entities, public construction contracts are funded by taxpayers, to which the governmental entities are ultimately accountable. City ordinances, policy resolutions and contracting procedures prescribe how the interests of all parties to the construction contracts are balanced – and protected.

Public construction contracting is also regulated by federal acquisition regulations, state statutes, Kansas Department of Transportation policies and procedures, and in some cases, county requirements. In order to assure compliance with all applicable contracting requirements, the City of Overland Park has a standard construction contract, which among other provisions, addresses prompt payment, retainage and dispute resolution. Many of the contract provisions required by federal and state legislation require accommodations not found in private construction contracts – such as the Buy American Act, Disadvantaged Business Enterprise, and Davis-Bacon Act, to name just three. These provisions are not applicable in private construction contracting.

In addition, competitive bidding is required on all public construction contracting where the lowest, responsive bid determines the contractor selected to perform. For this reason, all contractual requirements and protections are included in the contract documents, including provisions related to retainage and prompt pay.

Finally, public construction contracting is done in the interest of the public good. Governmental agencies operate from a long-term perspective – serving citizens today and well into the future. Cities seek to develop long-term constructive relationships with the contractor community, on the basis that a mutually beneficial partnership serves the best interests of the citizens, cities and contractors.

Should the committee see fit to move forward with this legislation, the City believes changes must be made to the bill. For instance, Senate Bill 33 from 2005, which dealt with private construction contracts, allowed for 10% retainage. Senate Bill 333, as drafted in Section 4(a), assumes retainage to be set at five percent, unless the owner and architect or engineer determine a higher amount is necessary. In that instance, 10% retainage may be required. We believe this section should be reversed, and that the presumption should be ten percent retainage. We can see no valid public policy for treating retainage requirements for public and private construction differently.

Section 5 of the bill suggests a payment schedule that is difficult to imagine in a public construction project. Seven business days is an impossibly tight timeline. With taxpayer funds, a City or other public entity cannot rush payments and jeopardize accountability or proper expenditure of public tax dollars. We would suggest that thirty days is a more reasonable figure, as most of our payments are now made within that timeframe. Thirty days is also the figure used in Section 3(c) for payment to contractors.

The City of Overland Park believes that adequate protections exist in current law for all parties engaged in public construction. We request that you not recommend Senate Bill 333 favorably for passage.