

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Karin Brownlee at 8:30 a.m. on March 11, 2004 in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Kathie Sparks, Legislative Research
Susan Kannarr, Legislative Research
Helen Pedigo, Revisor of Statutes
Nikki Kraus, Committee Secretary

Conferees appearing before the committee:

Richard Cram, Department of Revenue
Trudy Aron, American Institute of Architects
Ken Daniel, Midway Wholesale
Chris Wilson, Kansas Building Industry Association

Others attending:

See Attached List.

Chairperson Brownlee brought the meeting to order.

In regard to the previous day, Senator Barone asked if there is any way to see fiscal impact of private letter rulings on the state revenue.

Richard Cram, Department of Revenue, stated that it was a conflict of interest to say that the state has lost revenue because the state issues the letters.

Senator Emler stated that his clients had nothing in writing; there was no private letter ruling for them, and therefore, there could be nothing based on previous private letter rulings. If these companies were audited and had not been in compliance, the state would have said, "You should have been paying taxes."

Senator Barone pointed out that there are many examples as to why this is not fair because some rulings would allow some to pay taxes and others not. Chairperson Brownlee stated that the law changed last year because the Legislature passed the nexus law and it is with that Amazon.com and Cabela's should be complying. She stated that the law is on the side of the Department of Revenue to make sure that Cabela's pays.

Senator Brungardt asked if there is change in the law, would that overrule private letter rulings. Chairperson Brownlee replied that subsequent law trumps previous law, and specific also tends to trump general; **HB 2005** was silent on streamline sales tax last year.

Senator Steineger asked Mr. Cram about more information, and Mr. Cram replied that the department cannot provide specific taxpayer information in any situation because of confidentiality. He stated that in this situation, however, it would give us more flexibility to say this is what happened in this situation.

Chairperson Brownlee directed the committee's attention to working:

SB 395—Payment sources of sales tax revenue bonds

The Chair stated that yesterday's motion to amend the bill failed.

Senator Steineger moved the bill favorable for passage; Senator Buntun seconded.

Following discussion, both withdrew their motion and second.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMERCE COMMITTEE at 8:30 a.m. on March 11, 2004 in Room 123-S of the Capitol.

Senator Wagle stated that she would hate to see this apply only to Wyandotte county. Senator Kerr stated that he was not favorable on legislation, but he did not want to hold it up at this stage because he did not wish to discriminate against Sedgwick county. He stated that he would be favorable to this if he thought the committee had the tax issue cleared up.

Senator Kerr moved to amend **SB 395** with the balloon and recommend favorable for passage; Senator Buntun seconded the motion.

Chairperson Brownlee commented that there was going to be a meeting with the Secretary Wagnon and Cabela's tomorrow. Senator Barone stated that he would hope that the committee could send the Secretary a message that the issue should also be retroactive. Chairperson Brownlee stated that Mr. Cram would be accompanying the Secretary tomorrow, so he could pass along that message.

Chairperson Brownlee stated that it had been moved and seconded to accept language that affects those bonds already sold.

Motion to amend passed and **SB 395** was recommended favorably.

Chairperson Brownlee continued the public hearing on:

SB 445–Fairness in private construction contracts

Ms. Aron gave testimony as an opponent of the bill. (Attachment 1)

Senator Emler stated that he had read some stories about egregious errors, but not issues concerning subcontractors. Ms. Aron stated that the owner is not party to contracts between contractor and sub contractors; all are subject to contracts and their agreements should all be spelled out in those contracts. She stated that it is all open to negotiations, and there can be different levels of retainage in contracts in this process of negotiation.

Senator Emler asked if the real issue is retainage; Ms. Aron stated that retainage and how the security, and indemnification process applies. She stated that the AIA has problems with many parts of the bill.

Chairperson Brownlee asked if there were any other questions. She pointed out that a lot of the bill is actually based on AIA documents. Ms. Aron replied that not everyone uses AIA documents. Chairperson Brownlee stated that what is at issue is that contractors can be in a predatory relationship with the subcontractors and the general contractors' non-payment is why that issue is before us. Ms. Aron stated that the AIA represents the owners, and for them, the only leverage they have is to withhold retainage or else there is no leverage.

Chairperson Brownlee stated that then the subcontractors don't get paid. Ms. Aron replied that they could put a lien on the property, but the Chair asked when liens pay out and Ms. Aron said that she could not answer that. Senator Emler stated that sometimes a subcontractor loses a lien because there is a filing time period of 5 months; if they are not paid in 5 months because the general contractor thinks that there is no need to file a lien, the subcontractors lose those rights and then can only sue without lien rights.

Ms. Aron stated that certainly an owner would not want the title to the property to be held up, and would therefore want to put pressure on the general contractor. Chairperson Brownlee stated that many big projects would not be sold. Ms. Aron replied that they would still need financing, and that would be affected.

Senator Barone stated that Ms. Aron's testimony refers to "one more reason not to do business in Kansas." He said that the Legislature has had people say that if Kansas could just be like Missouri, we would be okay; there has been testimony to the contrary regarding the East side of state, though. Ms. Aron stated that owners have a option when coming into a state for the first time, and we need to make sure that we provide a friendly atmosphere. Senator Barone asked Ms. Aron if she was familiar with Missouri law, and she replied that she was not.

Chairperson Brownlee stated that there were around 25 other states who have this type of prompt pay

CONTINUATION SHEET

MINUTES OF THE SENATE COMMERCE COMMITTEE at 8:30 a.m. on March 11, 2004 in Room 123-S of the Capitol.

legislation.

Mr. Daniel presented testimony in favor of the bill. (Attachment 2) He commented that he also does business in Missouri, and the world has not ended there because of similar laws.

Senator Emler stated that Missouri has a contractor and subcontractor law, but not one dealing with private contracts and subcontractors. The committee discussed private contracts further.

In response to a question from Senator Emler, Mr. Daniel stated that his company names people on their policy as additional insured. He stated that in California, they literally come after the subcontractors' insurance when subcontractor has done nothing wrong; the insurance of the subcontractor is used to defend the general contractor. He stated that in his businesses, one has to be heavily insured, but, at the same time, subcontractors just want to pay for themselves, not for other people.

Chairperson Brownlee clarified that subcontractors are being forced to indemnify the general contractors.

The Chair stated that the committee would not be able to work **HB 2719** today; she instructed the committee to note the "Construction Project Payment Timeline." (Attachment 3)

Ms. Pedigo presented the committee with possible amendments (Attachment 4)

Senator Barone commented that the amendment had good language because it allows owner to have more than one escrow account if desired, but it does not mandate more than one.

Ms. Pedigo stated that if the committee decided to make the period longer than 30 days notice, they may have intended to just say 30 days, not 30 business days.

Emler moved to amend **SB 445** to strike business in line 26 and 28; Senator Bunten seconded. The motion passed.

Chairperson Brownlee stated that the following day, the committee would be shifting to biosciences, and would meet at 8:15 a.m.

Senator Wagle stated that she could not be at the committee meeting tomorrow, but she wanted to voice opposition to bill **SB 445** because it seemed the bills was medaling in private in contracts.

Chairperson Brownlee pointed out several examples of the state intervening in private contracts and stated that medaling in private contracts was somewhat common.

Ms. Sparks gave the committee several examples including lawn and garden rental agreement laws, uniform commercial codes, and several others.

Chairperson Brownlee adjourned the meeting at 9:30 a.m. The next meeting will be at 8:30 a.m. on March 12, 2004 in Room 123-S of the Capitol.