

Testimony to Senate Commerce Committee  
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Blue Valley Unified School District No. 229  
February 19, 2007

Senate Bill 333

Honorable Members of the Committee:

I am here on behalf of the Blue Valley School District located in rapidly growing southeast Johnson County. I appear as an opponent of Senate Bill 516, but the district is certainly a proponent of making sure that any subcontractor working on school construction in its district is being paid and paid promptly. This bill is substantially identical to Senate Bill 516, which passed the Senate last year and was not considered in the House in part due to our opposition. We have therefore had an opportunity to study it for the last year and still find that there are provisions in the bill that we simply can't live with. More importantly, there are provisions that are virtually certain to increase the cost of public building projects at the expense of our taxpayers because they expose the public entity (described as "owner") in the bill to a very real possibility of (a) fines and exorbitant interest for late payments, (b) the district will have to pay both the general contractor which is under contract with the school district and subcontractors for the very same work. Without attempting to describe everything in this bill that we object to, some of the major provisions are:

1. "Construction" is described in such an expansive way that it includes materials, supplies and labor used in repairing and maintaining a building. Is this intended to include all contracts for maintenance supplies and ordinary mechanic's tools and supplies?

2. The bill as a practical matter would require the district to develop its own construction contracts since many of its provisions do not fit the typical contracts developed by AIA and other contractors associations for use in private and public construction. This will be a substantial expense in itself imposed upon the district. One of those provisions is the handling of retainage which is restricted by the bill to no more than 5% from the amount of any undisputed payment due and 10% of the value of the contract. The provisions actually require release of retainage attributable to a subcontractor's work even though the contractor or another subcontractor may still be performing material work on the project. One actually says you can't withhold more than 150% of any such construction work – what if that is less than 10% of total. This also puts the public entity involved in substantial risk that people will simply walk off the job with large items of uncompleted work.

3. A provision for payment of all amounts due within 30 days after a request for payment again runs contrary to typical construction contract forms which generally provide for an agreed upon payment schedule. So long as the entity is meeting the agreed upon payment schedule nothing else should be required. For your information, Blue Valley pays its bills upon a pre-scheduled date during each month. Every contractor, vendor or supplier knows that if the invoice is not in by a certain date they will have to wait an additional 30 days. One reason is that State law requires many of these payments to be specifically approved by our Board of Education that only meets once a month. Provisions in section 3 that contain a laundry list of

provisions that will be deemed to be against public policy again rewrites or attempts to rewrite typical provisions that are used in private and public construction contracts.

4. In addition, it is interesting that highway contractors and subcontractors are specially carved out of this bill by the provisions of subsection 8. The purported reason is that this doesn't meet the standard specifications. Under the same logic, this bill does not meet standard construction contract language.

5. The fact that we are setting up a separate class of vendor to be given protection is also demonstrated by the fact that services under construction contracts described in the Act are being carved out of the Kansas Prompt Payment Act.

I said upfront that while we are opposed to the specific language contained in SB 333, we are not opposed to giving subcontractors on our projects additional tools to use when they are actually defrauded by a general contractor who makes a representation in its application for payment that the subcontractor is through with his work, that the work is undisputed and then does not promptly pay his subcontractors. We would have no problem with language in a bill that imposes upon the general contractor substantial penalties if they (a) misrepresent in their application for payments from a public entity owner that an item of work is completed and undisputed knowing that it is not or (b) obtains payments from the owner for work actually done by a subcontractor as an "undisputed" item and then does not pay a subcontractor promptly. This could be accomplished by simply enacting subsection (f) and subsection (g) of section 3, perhaps with some lead in language helping to determine when a request for payment without dispute has occurred.

I will be happy to answer any questions.