

SENATE BILL No. 616

By Committee on Commerce

2-15

AN ACT concerning construction contracts, requiring prompt payment thereunder.

Be it enacted by the Legislature of the State of Kansas:

Section 1. As used in this act:

(a) "Construction" means furnishing labor, equipment, material, or supplies used or consumed for the improvement of real property;

(b) "contractor" means a person performing construction and having a contract with an owner of the real property or with a trustee, agent or spouse of an owner;

(c) "owner" includes a person, the State of Kansas, and agencies, instrumentalities, and political subdivisions of the State of Kansas, including counties, cities, towns, districts, boards, and other public bodies;

(d) "person" includes an individual, corporation, estate, trust, partnership, limited liability company, association, joint venture, or any other legal entity;

(e) "retainage" means money earned by a contractor or subcontractor but withheld to ensure proper performance by the contractor or subcontractor;

(f) "subcontractor" means any person performing construction covered by a contract between an owner and a contractor but not having a contract with the owner; and

(g) "substantial completion" means sufficient completion so that an owner can occupy or utilize the improvement or portion of the improvement for its intended use.

Sec. 2. All contracts for construction in Kansas shall provide that payment of amounts due, except retainage, if any, shall be made within ten business days after the owner receives a timely, properly completed, undisputed request for payment. Payment by an owner to a contractor may be made by first-class mail, electronic funds transfer or hand delivery. If an owner fails to pay a contractor within 30 business days after receipt of a timely, properly completed, undisputed request for payment, the owner shall pay interest to the contractor beginning on the 31st business day after payment was due, computed at 1½% of the undisputed amount per month or fraction of a month until the payment is made. If an owner

1 receives an improperly completed request for payment or in good faith
2 disputes a request for payment, the owner shall notify the contractor in
3 writing within ten business days of receipt in what way the request is
4 improperly completed or why it is disputed. The owner then shall have
5 no duty to pay the improperly completed request until it is properly com-
6 pleted and resubmitted and no duty to pay the disputed portion of the
7 disputed request until the dispute is resolved. If an owner does not timely
8 notify a contractor in writing that a request for payment submitted by the
9 contractor is improperly completed or disputed, the owner shall pay the
10 request in accordance with the provisions of this act. Any undisputed
11 portion of the request shall in any event be paid in accordance with the
12 provisions of this act.

13 Sec. 3. All contracts for construction in Kansas shall provide that con-
14 tractors and subcontractors shall make payment to their subcontractors
15 of amounts due them within ten business days after receipt of payment
16 from the owner, contractor or subcontractor for the subcontractor's work.
17 Payment by a contractor or subcontractor to a subcontractor may be made
18 by first-class mail, electronic funds transfer or hand delivery. If a con-
19 tractor or subcontractor fails to pay a subcontractor within five business
20 days after receipt of payment, the contractor or subcontractor shall pay
21 interest to the subcontractor beginning on the 11th business day after
22 payment was due, computed at 1½% of the undisputed amount per
23 month or fraction of a month until the payment is made. If a contractor
24 or subcontractor receives an improperly completed request for payment
25 from a subcontractor or in good faith disputes a subcontractor's request
26 for payment, the contractor or subcontractor shall notify the subcontrac-
27 tor in writing within five business days of receipt in what way the request
28 is improperly completed or why it is disputed. The contractor or subcon-
29 tractor then shall have no duty to include the improperly completed re-
30 quest or the disputed portion of the disputed request in the contractor's
31 or subcontractor's own request for payment until the request is properly
32 completed and resubmitted or the dispute is resolved. If a contractor or
33 subcontractor does not timely notify a subcontractor in writing that a
34 request for payment submitted by the subcontractor is improperly com-
35 pleted or disputed, the contractor or subcontractor shall include the sub-
36 contractor's request for payment in the contractor's or subcontractor's
37 own request for payment. Any undisputed portion of the subcontractor's
38 request for payment shall in any event be included in the contractor's or
39 subcontractor's own request for payment.

40 Sec. 4. Retainage shall not be withheld on any construction in Kansas
41 unless an escrow arrangement complying with this act is used, and ten
42 only in accordance with the provisions of this act.

43 Sec. 5. An owner may retain no more than 5% of the amount of

1 payment otherwise due a contractor. Any such retainage shall be depos-
2 ited into an escrow account complying with this act not later than the
3 time when the payment from which the retainage is withheld is due to
4 the contractor. A contractor or subcontractor shall not withhold more
5 retainage from a subcontractor than is withheld from the contractor by
6 the owner for the subcontractor's work.

7 Sec. 6. Retainage may be withheld only until substantial completion
8 of each separate division of the contract for which a price is stated sep-
9 arately in the contract or for which a separate price can be ascertained
10 from the contractor's schedule of values. Upon such substantial comple-
11 tion, such retainage shall be paid to the contractor within 30 business days
12 after presentation of a written application for payment of the retention.

13 Sec. 7. An escrow account, established pursuant to an escrow agree-
14 ment, shall be entered into only on the following conditions:

15 (a) Only financial institutions legally doing business in Kansas may
16 serve as escrow agent;

17 (b) the investment of funds held in escrow shall be limited to deposits
18 in banks legally doing business in Kansas and obligations of the United
19 States, its agencies, corporations wholly owned by the United States, the
20 State of Kansas, and political subdivisions of the State of Kansas;

21 (c) as interest or other income on investments held in escrow be-
22 comes due, it shall be collected by the escrow agent and paid to the
23 contractor. The contractor and subcontractors shall pay interest or other
24 income as it is received pro rata to the subcontractors;

25 (d) the escrow agent shall provide monthly reports to the owner, the
26 contractor, and the subcontractors of the nature and amounts of the in-
27 vestments in the escrow account and any additions to and payments from
28 the escrow account. Except for interest or other income, payments from
29 the escrow account shall be made only at the direction of the owner;

30 (e) if an owner has entered into more than one construction contract
31 providing for an escrow account, the owner may elect to combine the
32 amounts held as retainage under each contract into one or more escrow
33 accounts or may establish a separate escrow account for each contract;

34 (f) upon default by or overpayment to the contractor, as determined
35 by a court of competent jurisdiction or an arbitrator, the escrow agent
36 shall pay the owner the amount determined to be due the owner on
37 account of the default or overpayment; provided, however, the amount
38 is subject to the redemption value of the investments in the escrow ac-
39 count at the time of disbursement;

40 (g) the escrow account may be terminated upon completion and ac-
41 ceptance of the contract as provided in this act;

42 (h) all fees and expenses of the escrow agent shall be paid by the
43 owner;

1 (i) the escrow account constitutes a specific pledge to the owner, and
2 the contractor or a subcontractor shall not, except to its surety, assign,
3 pledge, discount, sell, or transfer its interest in the escrow account, and
4 the escrow account is not subject to levy, garnishment, attachment, or
5 other process;

6 (j) the form and provisions of the escrow agreement shall be included
7 in all solicitations for construction services and shall be given to the con-
8 tractor and subcontractors prior to entering into a contract;

9 (k) the owner is not liable to the contractor, subcontractors or their
10 sureties for failure of the escrow agent to perform under the escrow
11 agreement, or for failure of a financial institution to honor investments
12 issued by it that are held in the escrow account; and

13 (l) an escrow agent is not liable to a party to the escrow agreement
14 unless the escrow agent is found by a court of competent jurisdiction to
15 have breached its fiduciary duty to a beneficiary of the escrow agreement.

16 Sec. 8. If an owner fails to deposit retainage that is withheld or to
17 cause payment of retainage to the contractor as required by this act, the
18 owner shall pay an additional 1½% of the amount not deposited or paid
19 for each month or part of a month until retainage is deposited or paid.

20 Sec. 9. A contractor may tender to an owner acceptable substitute
21 security with a written request for release of retainage in the amount of
22 the substitute security. To the extent of the security tendered, and pro-
23 vided the contractor is not in default of its contract with the owner, the
24 contractor shall be entitled to receive cash payment of retainage already
25 withheld and shall not be subject to the withholding of further retainage.

26 Sec. 10. If the tender described in section 9, and amendments
27 thereto, is made after retainage has been withheld, the owner shall, within
28 five business days after receipt of the tender, direct the escrow agent to
29 pay over to the contractor the withheld retainage to the extent of the
30 substitute security. If the tender described is made before retainage has
31 been withheld, the owner shall, to the extent of the substitute security,
32 refrain from withholding any retainage from future payments.

33 Sec. 11. A subcontractor may tender to a contractor acceptable sub-
34 stitute security with a written request for release of retainage in the
35 amount of the substitute security. The contractor shall tender the sub-
36 contractor's substitute security to the owner with a like request, pursuant
37 to the provisions of sections 9 and 10, and amendments thereto. Provided
38 that the subcontractor is not in default of its subcontract with the con-
39 tractor, the contractor shall pay over to the subcontractor, within five
40 business days after receipt, any accumulated retainage paid by the owner
41 to the contractor on account of substitute security tendered by the sub-
42 contractor. The contractor shall refrain from withholding retainage from
43 payments to the subcontractor to the extent that the owner has refrained

1 from withholding retainage from payments to the contractor on account
2 of the subcontractor's substituted security. The subcontractor shall be
3 entitled to receive, upon receipt by the contractor, all income received
4 by the contractor from the owner on account of income-producing se-
5 curities deposited by the subcontractor as substitute security. Except as
6 otherwise provided in this section 11, and amendments thereto, the con-
7 tractor shall have no obligation to collect or pay to a subcontractor re-
8 tainage on account of substitute security tendered by the subcontractor.

9 Sec. 12. The following shall constitute acceptable substitute security
10 purposes of sections 9 and 11, and amendments thereto.

11 (a) Securities in form negotiable by the owner, of market value equal
12 to or greater than the amount of retainage released, which are:

13 (i) Obligations of the United States, its agencies, or corporations
14 wholly owned by the United States;

15 (ii) obligations of the State of Kansas or political subdivisions of the
16 State of Kansas; or

17 (iii) certificates of deposit issued by banks legally doing business in
18 Kansas; (b) A retainage bond naming the owner as obligee issued by a
19 surety company authorized to issue surety bonds in Kansas in the amount
20 of the retainage released and conditioned upon substantial completion of
21 the work of the contractor or subcontractor that tendered the bond; or

22 (c) an irrevocable and unconditional letter of credit in favor of the
23 owner, issued by a bank legally doing business in Kansas, in the amount
24 of the retainage released.

25 Sec. 13. A contractor or subcontractor shall be entitled to all interest
26 or other income earned on any securities deposited by the contractor or
27 subcontractor in substitution for retainage.

28 Sec. 14. Upon substantial completion of the work of the contractor
29 or subcontractor that tendered the substitute security, the security shall
30 be returned to the contractor or subcontractor that tendered the security.

31 Sec. 15. Upon final completion, any amounts remaining due the con-
32 tractor shall be paid within ten business days after presentation of the
33 following:

34 (a) A properly completed application for final payment; and

35 (b) a release, if required, of all payment claims and claims of lien
36 against the owner arising under and by virtue of the contract, other than
37 such claims, if any, as may be specifically excepted by the contractor or
38 a subcontractor from the operation of the release.

39 Sec. 16. Within five business days after an owner makes a payment
40 to a contractor or directs an escrow agent to make a payment to a con-
41 tractor, the owner shall give written notice of the date and amount of the
42 payment to any subcontractor who has made a written request to the
43 owner for such notice.

1 Sec. 17. If payment (including payment of retainage) is not made to
2 a contractor or subcontractor as required by this act or if retainage is not
3 deposited in an escrow account as required by this act, the contractor and
4 subcontractors shall be entitled to suspend further performance of con-
5 struction until payment (including applicable interest) is made or retain-
6 age is deposited. The contractor and subcontractors shall be entitled to
7 recover from the owner, contractor, or subcontractor, as the case may be,
8 any costs incurred by the contractor or subcontractors on account of the
9 suspension.

10 Sec. 18. In an action or arbitration to enforce the provisions of this
11 act, the court or an arbitrator shall award costs and reasonable attorney
12 fees to the prevailing party. Venue of such an action shall be in the state
13 or federal court for the district where the real property is located. The
14 hearing in such an arbitration shall be held in the county where the real
15 property is located.

16 Sec. 19. The provisions of this act do not apply to improvement of
17 owner-occupied residential property consisting of not more than two
18 dwelling units.

19 Sec. 20. This act shall take effect and be in force from and after its
20 publication in the statute book.

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