

HOUSE BILL No. 2828

By Representative Patterson

2-11

9 AN ACT concerning commerce; relating to fairness in contracting for
10 public construction projects; amending K.S.A. 75-6402 and 75-6403
11 and repealing the existing sections.
12

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

14 New Section 1. This act may be known and cited as the fairness in
15 contracting for public construction projects act.

16 New Sec. 2. As used in this act:

17 (a) "Bank" means an institution in which the deposits are insured by
18 the federal deposit insurance corporation and which is legally doing busi-
19 ness in this state.

20 (b) "Construction" means furnishing materials, equipment, labor,
21 supplies or services for the design, planning, construction, reconstruction,
22 installation, alteration, remodeling, repair, demolition or maintenance
23 work on any real property, including, without limitation, excavation, back-
24 filling or grading.

25 (c) "Contract" means an agreement made and entered into by a gov-
26 ernment agency, contractor or subcontractor concerning construction, as
27 defined in subsection (b), on any real property.

28 (d) "Contractor" means a person who performs construction and who
29 has entered into a contract with a government agency.

30 (e) "Person" means an individual, corporation, estate, trust, partner-
31 ship, limited liability company, association, joint venture, or any other
32 legal entity, including the state of Kansas.

33 (f) "Real property" means any building, road, bridge, tunnel, sewer,
34 water or other utility line.

35 (g) "Retainage" means the amount of money earned but withheld
36 from each payment by the state to a contractor or subcontractor to ensure
37 proper performance by such contractor or subcontractor on a construc-
38 tion project.

39 (h) "State" or "State of Kansas" means the state of Kansas and its
40 agencies, instrumentalities and political subdivisions, counties, cities,
41 towns, districts, boards and other public bodies.

42 (i) "Subcontractor" means any person who does not have a contract
43 with the government agency but provides materials, equipment, labor,

1 supplies or services for the design, planning, construction, reconstruction,
2 installation, alteration, remodeling, repair, demolition or maintenance
3 work, including, without limitation, excavation, backfilling or grading on
4 any real property covered by a contract between an owner and a
5 contractor.

6 (j) “Substantial completion” means sufficient completion so that the
7 improvement or portion of the improvement can be occupied or utilized
8 for its intended use.

9 (k) “United States government” means the federal government of the
10 United States of America, its departments, agencies and corporations
11 wholly owned by the United States.

12 New Sec. 3. (a) Retainage shall not be withheld on any public con-
13 struction project contracted for by a government agency, as defined in
14 K.S.A. 75-6402, and amendments thereto, in accordance with the provi-
15 sions of this act.

16 (b) A government agency may retain no more than 5% of the amount
17 of any payment due a contractor.

18 (c) A contractor shall not withhold from a subcontractor, nor a sub-
19 contractor from a lower-tier subcontractor, more retainage than the gov-
20 ernment agency withholds from the contractor or the contractor from the
21 subcontractor, for that party’s work.

22 (d) Retainage may be withheld only until substantial completion of
23 each separate division of the contract for which a price is separately stated
24 in the contract or for which a separate price can be ascertained from the
25 contractor’s schedule of values. Upon such substantial completion such
26 retainage shall be paid by the government agency to the contractor in the
27 manner and within the time set forth in K.S.A. 75-6403, and amendments
28 thereto.

29 (e) A contractor may tender to the government agency acceptable
30 substitute security with a written request for release of retainage in the
31 amount of the value of the substitute security. To the extent of the security
32 tendered, and provided the contractor is not in default of any of its ob-
33 ligations under the contract, the contractor shall be entitled to receive
34 cash payment of retainage already withheld and shall not be subject to
35 the withholding of further retainage.

36 (f) A subcontractor may tender to a contractor acceptable substitute
37 security with a written request for release of retainage in the amount of
38 the substitute security. The contractor shall tender the subcontractor’s
39 substitute security to the government agency with a like request, pursuant
40 to the provisions of subsections (e) and (f). Provided that the subcontrac-
41 tor is not in default of its subcontract with the contractor, the contractor
42 shall pay over to the subcontractor, within five business days after receipt,
43 any accumulated retainage paid by the government agency to the con-

1 tractor on account of substitute security tendered by the subcontractor.
2 The contractor shall refrain from withholding retainage from payments
3 to the subcontractor to the extent that the government agency has re-
4 frained from withholding retainage from payments to the contractor on
5 account of the subcontractor's substitute security. The subcontractor shall
6 be entitled to receive, upon receipt by the contractor, all income received
7 by the contractor from the government agency on account of income-
8 producing securities deposited by the subcontractor as substitute security.
9 Except as otherwise provided in this subsection, the contractor shall have
10 no obligation to collect or pay to a subcontractor retainage on account of
11 substitute security tendered by the subcontractor.

12 (g) If the tender described in (e) above is made after retainage has
13 been withheld, the government agency shall, within five business days
14 after receipt of the tender, pay over to the tendering party the withheld
15 retainage to the extent of the value of the substitute security. If the tender
16 of substitute security is made before retainage has been withheld, the
17 government agency shall, to the extent of the value of the substitute se-
18 curity, refrain from withholding any retainage from all future payments
19 properly due.

20 (h) The following shall constitute acceptable substitute security for
21 purposes of this section:

22 (1) Securities in a form negotiable by the government agency, of mar-
23 ket value equal to or greater than the amount of retainage, including:

24 (A) Obligations of the United States government;

25 (B) obligations of the state of Kansas; and

26 (C) certificates of deposit issued by banks;

27 (2) a retainage bond naming the government agency as obligee, is-
28 sued by a company authorized to issue surety bonds in the state of Kansas,
29 in the amount of the retainage to be released and conditioned upon sub-
30 stantial completion of the work of the party tendering the bond; or

31 (3) an irrevocable and unconditional letter of credit in favor of the
32 government agency, issued by a bank, in the amount of the retainage to
33 be released.

34 (i) The party depositing the substitute security shall be entitled to all
35 interest or other income earned on any such substitute security deposited
36 by such party.

37 (j) Upon substantial completion of the work of the party tendering
38 the substitute security, such substitute security shall be returned to such
39 party.

40 (k) Upon final completion of the construction project, any amounts
41 remaining due shall be paid within the time frames established in K.S.A.
42 75-6403, and amendments thereto, conditioned upon the receipt of the
43 following by the party from whom payment is requested:

- 1 (1) A properly completed request for final payment; or
2 (2) a release, if required, of all payment claims and claims of lien
3 against the government agency arising under and by virtue of the contract
4 in question, other than such claims, if any, as may be specifically excepted
5 by the contractor, subcontractor or supplier from the operation of the
6 release.
- 7 (l) If a government agency fails to make payments as required by this
8 section, the government agency shall pay an interest penalty as provided
9 in K.S.A. 75-6403, and amendments thereto.
- 10 (m) If a contractor or subcontractor fails to make payments as re-
11 quired by this section, it shall pay an additional 1½%, of the amount not
12 paid, for each month or fraction of month until payment is properly made.
- 13 (n) Within five business days after the government agency makes any
14 payment to a contractor, the government agency shall give notice of the
15 date and amount of the payment to any subcontractor who makes a writ-
16 ten request to the government agency for such notice.
- 17 (o) In no event shall any retainage be withheld from payment oth-
18 erwise due for work performed by a contractor or subcontractor that has
19 provided payment and performance bonds naming the government
20 agency as obligee, issued by a surety company authorized to issue surety
21 bonds in the state of Kansas, in the full amount of the contract or sub-
22 contract of the contractor or subcontractor.
- 23 New Sec. 4. If any payment properly due, including payment of re-
24 tainage, is not made in accordance with the provisions of K.S.A. 75-6403
25 or section 5, and amendments thereto, of this act, the contractor and any
26 and all subcontractors, regardless of tier, shall be entitled to suspend
27 further performance under any contract for construction until payment,
28 including applicable interest, is made. Any party to whom payment is
29 properly due shall be entitled to recover from the party obligated to make
30 payment any costs incurred on account of the suspension.
- 31 New Sec. 5. (a) No provision in a contract or subcontract for con-
32 struction may waive, release or extinguish the right of a contractor or
33 subcontractor to recover costs, damages or an equitable adjustment for
34 delay in performing the contract or subcontract, if the delay is caused in
35 whole or in part by acts or omissions within the control of the other party
36 to the contract or subcontract or persons acting on behalf of the other
37 party. This section does not affect the validity or enforceability of any
38 contract provision that (1) precludes a contractor or subcontractor from
39 recovering the portion of any delay costs or damages that is caused by
40 acts or omissions within the control of the party claiming costs or damages
41 for the delay or persons acting on behalf of that party or (2) requires the
42 party claiming costs or damages for the delay to give notice of any delay.
- 43 (b) Any provision in a contract for construction for a government

1 agency that requires a contractor or subcontractor or that person's surety
2 or insurer to indemnify any party for death or injury to persons or damage
3 to property not caused by the contractor or subcontractor or its employ-
4 ees, agents, subcontractors or suppliers, shall be void as against public
5 policy and wholly unenforceable.

6 New Sec. 6. In any action, including arbitration, to enforce the
7 provisions of this act, the court or arbitrator shall award costs and reasonable
8 attorneys fees to the prevailing party. Venue shall be in the state or federal
9 court for the district or county where the real property is located.

10 Sec. 7. K.S.A. 75-6402 is hereby amended to read as follows: 75-
11 6402. As used in the Kansas prompt payment act, unless the context
12 clearly requires otherwise, the following words and phrases shall have the
13 meanings respectively ascribed thereto.

14 (a) "State agency" means the state and any state agency, department,
15 division or authority thereof.

16 (b) "Government agency" means any state agency, library, commu-
17 nity college or unified school district *or political subdivision, including*
18 *counties, cities, towns, districts, boards and other public bodies.*

19 (c) "Vendor" means any person, corporation, association or other
20 business concern engaged in a trade or business, either on a profit or not-
21 for-profit basis, and providing any goods or services to a government
22 agency.

23 (d) "Goods" means any goods, supplies, materials, equipment or
24 other personal property, but does not mean any real property.

25 (e) "Services" means any contractual services including architectural,
26 engineering, medical, financial, consulting or other professional services,
27 any construction services and any other personal services, but does not
28 mean any services performed as an officer or employee of any government
29 agency.

30 (f) "Bill" means a proper billing which requests payment and which
31 contains or is accompanied by such substantiating documentation as may
32 be required for payment for the goods or services.

33 (g) "Community college" means any community college organized
34 and operating under the laws of this state.

35 (h) "Library" means a library which serves the general public and is
36 supported in whole or in part with tax money.

37 (i) "*Subcontractor*" means *any person, corporation, association or*
38 *other business concern engaged in a trade or business, either on a profit*
39 *or not-for-profit basis, and providing any goods or services purchased or*
40 *contracted for by a government agency but not having a contract directly*
41 *with the government agency.*

42 Sec. 8. K.S.A. 75-6403 is hereby amended to read as follows: 75-
43 6403. (a) Each government agency purchasing or contracting for goods

1 or services from a vendor shall make prompt payment ~~therefor~~ *for such*
2 *goods or services*, including payment of any interest penalties due, in
3 accordance with this section.

4 (b) Each government agency which has received goods or services
5 from a vendor and which does not make payment therefor as prescribed
6 by this subsection shall be subject to an interest payment penalty if the
7 vendor makes a request for payment in accordance with subsection (c).
8 Each government agency shall make payment of the full amount due for
9 such goods or services on or before the 30th calendar day after the date
10 of receipt by the government agency of the goods and services or the
11 date of receipt by the government agency of the bill therefor, whichever
12 is later, unless other provisions for payment are agreed to in writing by
13 the vendor and the government agency. No goods or services shall be
14 deemed to be received by a government agency until all such goods or
15 services are completely delivered and finally accepted by the government
16 agency. For purposes of determining whether a payment was made in
17 accordance with this subsection, a payment by a government agency shall
18 be considered to be made on the date on which the warrant or check for
19 such payment is dated.

20 (c) (1) Any vendor to which payment has not been made within the
21 time prescribed by subsection (b) may make a written request for pay-
22 ment to the chief executive officer of the government agency obligated
23 to make the payment with interest thereon. Such request shall indicate
24 the government agency obligated to make the payment, the date of re-
25 ceipt of the goods or services by the government agency, the date the
26 vendor sent the government agency the bill for such goods or services
27 and, in the case of a state agency, such other information as may be
28 prescribed by rules and regulations adopted under K.S.A. 75-6407, *and*
29 *amendments thereto*.

30 (2) Each state agency shall forward a copy of each vendor's request
31 for payment to the director of accounts and reports along with the
32 voucher prepared by the state agency to make payment to the vendor,
33 including payment of the interest penalty prescribed by this subsection.
34 For purposes of computing the interest penalty due a vendor, the state
35 agency shall add seven days from the date the voucher is sent to the
36 director of accounts and reports for payment. Interest penalties on
37 amounts due to a vendor by a state agency shall be paid to the vendor
38 beginning on the day after the required payment date under subsection
39 (b) and ending seven days after the voucher for payment is sent to the
40 director of accounts and reports, except that no interest penalty shall be
41 paid if full payment of the amount due for such goods or services is made
42 on or before the 15th calendar day after the required payment date under
43 subsection (b).

1 (3) The chief executive officer of the unified school district shall for-
2 ward a copy of each vendor's request for payment to the governing body
3 thereof, if any, along with the documents prepared to make payment to
4 the vendor, including payment of the interest penalty prescribed by this
5 subsection. Interest penalties on amounts due to a vendor by a unified
6 school district shall be paid to the vendor beginning on the day after the
7 required payment date under subsection (b) and ending on the date on
8 which payment of the amount due is made, except that no interest penalty
9 shall be paid if full payment of the amount due for such goods or services
10 is made on or before the 15th calendar day after the required payment
11 date under subsection (b).

12 (d) The interest penalty under this section shall be computed at the
13 rate of 1.5% per month on the amount of the payment which is due in
14 accordance with this section. Any amount of an interest penalty which
15 remains unpaid at the end of any thirty-day period after the required
16 payment date under subsection (b) shall be added to the principal amount
17 of the debt and thereafter interest penalties shall accrue on such added
18 amount.

19 (e) In the event a state agency denies liability and alleges grounds to
20 not make payment after a vendor has requested payment therefor in
21 accordance with subsection (c), the state agency shall inform the vendor
22 in writing of the reasons therefor and that the vendor has the right to file
23 a claim on the dispute with the joint committee on special claims against
24 the state.

25 (f) No interest penalty shall be payable if a vendor fails to request
26 payment in accordance with subsection (c) within four months after the
27 payment date prescribed by subsection (b).

28 (g) *A vendor shall pay its subcontractors any amount due within*
29 *seven days of receipt of payment from the government agency, provided*
30 *that the subcontractor has provided a timely, properly completed, undis-*
31 *puted request for payment to the vendor.*

32 (h) *If the vendor fails to pay a subcontractor within such seven day*
33 *period the vendor shall pay interest to the subcontractor, beginning on*
34 *the eighth day after receipt of payment by vendor, computed at 1½% of*
35 *the undisputed amount per month or fraction of a month until the pay-*
36 *ment is made.*

37 (i) *If the vendor receives an improperly completed request for pay-*
38 *ment or in good faith disputes a request for payment from a subcontractor,*
39 *then the vendor shall notify the subcontractor within five business days*
40 *of receipt of the improperly completed or disputed request for payment.*
41 *No payment shall become due on such a request until such request is*
42 *properly completed or the dispute is resolved. If the vendor fails to notify*
43 *the subcontractor within such five day period of any improper completion*

1 *or dispute, the request for payment shall be considered proper and the*
2 *contractor shall make payment thereon in accordance with subsection (g)*
3 *above. Any undisputed portion of any request shall in any event be paid*
4 *in accordance with subsection (g) above.*

5 *(j) The provisions of subsections (g), (h) and (i) above shall apply to*
6 *all payments from subcontractors to their subcontractors.*

7 *(k) In any action or arbitration to enforce this section, the court ar-*
8 *bitrator shall award costs and reasonable attorney fees to the prevailing*
9 *party.*

10 Sec. 9. K.S.A. 75-6402 and 75-6403 are hereby repealed.

11 Sec. 10. This act shall take effect and be in force from and after its
publication in the statute book.