

## HOUSE BILL No. 2829

By Representative Patterson

2-11

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9 AN ACT concerning commerce; relating to fairness in contracting for  
10 private construction projects.

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

13 Section 1. This act may be known and cited as the fairness in con-  
14 tracting for private construction projects act.

15 Sec. 2. As used in this act:

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

19 (b) "Building" means any structure except single-family residential  
20 housing and multi-residential structures comprised of four units or less.

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

26 (d) "Contract" means an agreement made and entered into by an  
27 owner, contractor or subcontractor concerning construction, as defined  
28 in subsection (c), on any real property.

29 (e) "Contractor" means a person who performs construction and who  
30 has entered into a contract with an owner of real property or with such  
31 owner's trustee or agent.

32 (f) "Owner" means a person who holds an ownership interest in real  
33 property.

34 (g) "Person" means an individual, corporation, estate, trust, partner-  
35 ship, limited liability company, association, joint venture, or any other  
36 legal entity, including the state of Kansas.

37 (h) "Real property" means any building, road, bridge, tunnel, sewer,  
38 water or other utility line.

39 (i) "Retainage" means the amount of money withheld from each pay-  
40 ment by an owner or a contractor on a given construction project, from  
41 the amount owed to a contractor or subcontractor.

42 (j) "State" or "State of Kansas" means the state of Kansas and its  
43 agencies, instrumentalities and political subdivisions, counties, cities,

1 towns, districts, boards and other public bodies.

2 (k) "Subcontractor" means any person who does not have a contract  
3 with an owner but provides materials, equipment, labor, supplies or serv-  
4 ices for the design, planning, construction, reconstruction, installation,  
5 alteration, remodeling, repair, demolition or maintenance work, includ-  
6 ing, without limitation, excavation, backfilling or grading on any real prop-  
7 erty covered by a contract between an owner and a contractor.

8 (l) "Substantial completion" means sufficient completion so that an  
9 owner can occupy or utilize the improvement or portion of the improve-  
10 ment for its intended use.

11 (m) "United States government" means the federal government of  
12 the United States of America, its departments, agencies and corporations  
13 wholly owned by the United States.

14 Sec. 3. (a) All contracts for private construction shall provide that  
15 payment of amounts due a contractor from an owner, except retainage,  
16 shall be made within 30 business days after the owner receives a timely,  
17 properly completed, undisputed request for payment.

18 (b) If the owner fails to pay a contractor within 30 business days  
19 following receipt of a timely, properly completed, undisputed request for  
20 payment, the owner shall pay interest to the contractor beginning on the  
21 31st business day after payment was due. The interest shall be computed  
22 at 1½% of the undisputed amount per month or fraction of a month until  
23 the payment is made.

24 (c) If the owner receives an improperly completed request for pay-  
25 ment or in good faith disputes a request for payment, then the owner  
26 shall notify the contractor within five business days of receipt of the im-  
27 properly completed or disputed request for payment. No payment shall  
28 become due on such a request until such request is properly completed  
29 or the dispute is resolved. If the owner fails to notify the contractor within  
30 such five-day period of any improper completion or dispute, the request  
31 for payment shall be considered proper and the owner shall make pay-  
32 ment thereon in accordance with subsection (a). Any undisputed portion  
33 of any request shall be paid in accordance with subsection (a).

34 (d) A contractor shall pay its subcontractors any amounts due within  
35 seven days of receipt of payment from the owner, provided that the sub-  
36 contractor has provided a timely, properly completed, undisputed request  
37 for payment to the contractor.

38 (e) If the contractor fails to pay a subcontractor within such seven-  
39 day period the contractor shall pay interest on the amount due to the  
40 subcontractor beginning on the eighth day after receipt of payment by  
41 the contractor, computed at 1½% of the undisputed amount per month  
42 or fraction of a month until the payment is made.

43 (f) If the contractor receives an improperly completed request for

1 payment or in good faith disputes a request for payment from a subcon-  
2 tractor, the contractor shall notify the subcontractor within five business  
3 days of receipt of the improperly completed or disputed request for pay-  
4 ment. No payment shall become due on such a request until such request  
5 is properly completed or the dispute is resolved. If the contractor fails to  
6 notify the subcontractor within such five-day period of any improper com-  
7 pletion or dispute, the request for payment shall be considered proper  
8 and the contractor shall make payment thereon in accordance with sub-  
9 section (d). Any undisputed portion of any request shall be paid in ac-  
10 cordance with subsection (d).

11 (g) The provisions in subsections (d), (e) and (f) shall apply to all  
12 payments from a subcontractor to their sub-subcontractors and suppliers.

13 Sec. 4. (a) Retainage shall not be withheld on any private construc-  
14 tion project performed in the state of Kansas, unless an escrow arrange-  
15 ment complying with this section is implemented, and then only in ac-  
16 cordance with the provisions of this act.

17 (b) An owner may retain no more than 5% of the amount of any  
18 payment due a contractor. Any such retainage shall be deposited into an  
19 escrow account complying with this section no later than the time when  
20 the payment from which the retainage is being withheld is due to the  
21 contractor.

22 (c) A contractor shall not withhold from a subcontractor, nor a sub-  
23 contractor from a lower-tier subcontractor, more retainage than the  
24 owner withholds from the contractor or the contractor from the subcon-  
25 tractor, for that party's work.

26 (d) Retainage may be withheld only until substantial completion of  
27 each separate division of the contract for which a price is stated separately  
28 in the contract or for which a separate price can be ascertained from the  
29 contractor's schedule of values. Upon such substantial completion such  
30 retainage shall be paid by the owner to the contractor in the manner and  
31 within the time set forth in section 3, and amendments thereto.

32 (e) Pursuant to a valid escrow agreement, an escrow account shall be  
33 entered into between the escrow agent, the owner and the contractor  
34 upon the following conditions:

35 (1) Only banks shall serve as escrow agents;

36 (2) the investment of funds held in escrow shall be limited to deposits  
37 in banks and obligations of the United States government and of the state  
38 of Kansas;

39 (3) as the interest or other income accrues on investments held in  
40 escrow becomes due, it shall be collected by the escrow agent and paid  
41 to the contractor;

42 (4) the escrow agent shall provide monthly reports to the owner, the  
43 contractor and the subcontractor regarding the nature and amounts of

- 1 the investments in the escrow account and any additions to or payments  
2 made from the escrow account. Payments from the escrow account shall  
3 be made only at the direction of the owner who has established such  
4 escrow account and as provided in paragraph (3) of this subsection;
- 5 (5) if an owner has entered into more than one construction contract  
6 providing for an escrow account, the owner may elect to combine the  
7 amounts held as retainage under each contract into one or more escrow  
8 accounts or may establish a separate escrow account for each contract;
- 9 (6) upon default by or overpayment to the contractor as determined  
10 by a court of competent jurisdiction or an arbitrator, the escrow agent  
11 shall pay the owner the amount determined to be due on account of the  
12 default or overpayment; provided, however, that the amount shall be sub-  
13 ject to the redemption value of the investments in the escrow account at  
14 the time of disbursement;
- 15 (7) the escrow account may be terminated upon completion and ac-  
16 ceptance of the construction project as provided in this act;
- 17 (8) all fees and expenses of the escrow agent shall be paid by the  
18 owner;
- 19 (9) the escrow account shall constitute a specific pledge to the owner.  
20 A contractor or subcontractor shall not assign, pledge, discount, sell or  
21 transfer its interest in said escrow account, except to its surety, and the  
22 escrow account shall not be subject to levy, garnishment, attachment, lien  
23 or any other process;
- 24 (10) the form and provision of the escrow agreement shall be in-  
25 cluded in all solicitations for construction projects and shall be given to  
26 the contractor prior to entering into a contract;
- 27 (11) the owner shall not be liable for a breach of fiduciary duty or a  
28 failure to perform by the escrow agent under the escrow agreement or  
29 for the failure of a financial institution to honor investments issued by  
30 such institution that are held in the escrow account; and
- 31 (12) an escrow agent shall not be liable to a party to the escrow agree-  
32 ment unless the escrow agent is found by a court of competent jurisdiction  
33 to have breached its fiduciary duty to a beneficiary of the escrow  
34 agreement.
- 35 (f) If an owner fails to deposit the retainage that is being withheld or  
36 fails to make payments due as required by subsection (e), the owner shall  
37 pay an additional 1½%, of the amount not deposited or paid, for each  
38 month or fraction of a month until such retainage is deposited or paid.
- 39 (g) (1) A contractor may tender to an owner acceptable substitute  
40 security along with a written request for release of retainage in the  
41 amount of the value of the substitute security. To the extent of the security  
42 tendered, and provided the contractor is not in default of any of its ob-  
43 ligations under the contract, the contractor shall be entitled to receive

1 cash payment of retainage already withheld and shall not be subject to  
2 the withholding of further retainage.

3 (2) A subcontractor may tender to a contractor acceptable substitute  
4 security along with a written request for release of retainage in the  
5 amount of the value of the substitute security. To the extent of the security  
6 tendered, and provided the subcontractor is not in default of any of its  
7 obligations under the contract, the subcontractor shall be entitled to re-  
8 ceive cash payment of retainage already withheld and shall not be subject  
9 to the withholding of further retainage.

10 (h) If the tender described in (g) above is made after retainage has  
11 been withheld, the party holding the retainage shall, within five business  
12 days after receipt of the tender, direct the escrow agent to pay over to  
13 the tendering party the withheld retainage to the extent of the value of  
14 the substitute security. If the tender of substitute security is made before  
15 retainage has been withheld, the party entitled to hold retainage shall, to  
16 the extent of the value of the substitute security, refrain from withholding  
17 any retainage from all future payments properly due.

18 (i) The following shall constitute acceptable substitute security for  
19 purposes of this section:

20 (1) Securities in a form negotiable by the owner entitled to withhold  
21 retainage, of market value equal to or greater than the amount of retain-  
22 age, including:

23 (A) Obligations of the United States government;

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

25 (C) certificates of deposit issued by banks;

26 (2) a retainage bond naming the owner as obligee, issued by a com-  
27 pany authorized to issue surety bonds in the state of Kansas, in the amount  
28 of the retainage to be released and conditioned upon substantial comple-  
29 tion of the work of the party tendering the bond; or

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

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

35 (k) Upon substantial completion of the work of the party tendering  
36 the substitute security, such substitute security shall be returned to such  
37 party.

38 (l) Upon final completion of the construction project, any amounts  
39 remaining due shall be paid within the time frames established in section  
40 3, and amendments thereto, conditioned upon the receipt of the following  
41 by the party from whom payment is requested:

42 (1) A properly completed request for final payment; or

43 (2) a release, if required, of all payment claims and claims of lien

1 against the owner arising under and by virtue of the contract in question,  
2 other than such claims, if any, as may be specifically excepted by the  
3 contractor, subcontractor or supplier from the operation of the release.

4 (m) If a party obliged to make payment fails to pay such amounts  
5 within the period provided for in this section, such party shall pay an  
6 additional 1½%, of the amount not paid, for each month or fraction of  
7 month until payment is properly made.

8 (n) Within five business days after the owner makes a payment or  
9 when the owner directs disbursement from an escrow account, the owner  
10 shall give notice of the date and amount of the payment to any subcon-  
11 tractor who makes a written request to the owner for such notice.

12 (o) In no event shall any retainage be withheld when a payment or  
13 performance bond has been provided by the contractor or subcontractor.

14 Sec. 5. If any payment properly due, including payment of retainage,  
15 is not made or if retainage is not deposited in an escrow account in ac-  
16 cordance with the provisions of this act, the contractor and any and all  
17 subcontractors, regardless of tier, shall be entitled to suspend further  
18 performance under any contract for construction until payment, including  
19 applicable interest, is made or retainage, including applicable interest, is  
20 deposited. Any party to whom payment is properly due shall be entitled  
21 to recover from the party obligated to make payment any costs incurred  
22 on account of the suspension.

23 Sec. 6. (a) No provision in a contract or subcontract for construc-  
24 tion may waive, release or extinguish the right of a contractor or subcon-  
25 tractor to recover costs, damages or an equitable adjustment for delay in  
26 performing the contract or subcontract, if the delay is caused in whole or  
27 in part by acts or omissions within the control of the other party to the  
28 contract or subcontract or persons acting on behalf of the other party.  
29 This section does not affect the validity or enforceability of any contract  
30 provision that (1) precludes a contractor or subcontractor from recovering  
31 the portion of any delay costs or damages that is caused by acts or  
32 omissions within the control of the contractor or subcontractor or persons  
33 acting on behalf of the contractor or subcontractor or (2) requires the  
34 contractor or subcontractor to give notice of any delay.

35 (b) Any provision for or in connection with a contract for construction  
36 which requires a contractor or subcontractor or that person's surety or  
37 insurer to indemnify any party for death or injury to persons or damage  
38 to property not caused by the contractor or subcontractor or its employ-  
39 ees, agents, subcontractors or suppliers, shall be void as against public  
40 policy and wholly unenforceable.

41 Sec. 7. (a) In any action, including arbitration, to enforce sections  
42 4 and 5, and amendments thereto, the court or arbitrator shall award  
43 costs and reasonable attorneys fees to the prevailing party. Venue shall

1 be in the state or federal court for the district or county where the real  
2 property is located.  
3 (b) The provisions of this act shall not apply to the improvement of  
4 single-family housing and multi-family housing of four units or less.  
5 Sec. 8. This act shall take effect and be in force from and after its  
6 publication in the statute book.