

SENATE BILL No. 445

By Committee on Federal and State Affairs

2-5

AN ACT concerning private construction contracts; enacting the Kansas fairness in private construction contract act.

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

Section 1. (a) Section 1 through 8, and amendments thereto, shall be known and may be cited as the Kansas fairness in private construction contract act.

(b) The rights and duties prescribed by this act shall not be waivable or varied under the terms of a contract. The terms of any contract waiving the rights and duties prescribed by this act shall be unenforceable.

Sec. 2. As used in the Kansas fairness in private construction contract act:

(a) "Act" means the Kansas fairness in contracting act.

(b) "Bank" means an institution the deposits of which are insured by the federal deposit insurance corporation and which legally is doing business in the state of Kansas.

(c) "Building" shall not mean single-family residential housing and multi-family residential housing of four units or less.

(d) "Construction" means furnishing materials, equipment, labor, supplies or services for the design, planning, construction, reconstruction, installation, alteration, remodeling, repair, demolition or maintenance work, including, without limitation, excavation, backfilling or grading on any real property.

(e) "Contract" means a contract or agreement made and entered into by an owner, contractor or subcontractor concerning construction on real property.

(f) "Contractor" means a person performing construction and having a contract with an owner of real property or with a trustee, agent or spouse of an owner.

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

(h) "Person" means an individual, corporation, estate, trust, partnership, limited liability company, association, joint venture or any other legal entity including the state of Kansas.

(i) "Real property" means any building, road, bridge, tunnel, sewer,

1 water or other utility line.

2 (j) “Retainage” means the amount of money withheld from each pay-
3 ment from an owner or contractor due under a construction project.

4 (k) “State” means the state of Kansas and any department or branch
5 of state government or any agency, authority, institution or other instru-
6 mentality of the state.

7 (l) “Municipality” means any city, county, township, school district or
8 other political or taxing subdivision of the state of any agency, authority,
9 institution or other instrumentality of a municipality.

10 (m) “Government entity” means the state or any municipality.

11 (n) “Subcontractor” means any person providing materials, equip-
12 ment, labor, supplies or services for the design, planning, construction,
13 reconstruction, installation, alteration, remodeling, repair, demolition or
14 maintenance work, including, but not limited to, excavation, backfilling
15 or grading on any real property covered by a contract between an owner
16 and a contractor but not having a contract with the owner.

17 (o) “United States” means the federal government of the United
18 States and any department or branch of the federal government or any
19 agency, authority, institution or other instrumentality of the federal gov-
20 ernment and any corporation wholly-owned by the United States.

21 (p) “Substantial completion” means sufficient completion so that an
22 owner can occupy or utilize the improvement or portion of the improve-
23 ment for its intended use.

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

28 (b) If the owner fails to pay a contractor within 30 business days
29 following receipt of a timely, properly completed, undisputed request for
30 payment, the owner shall pay interest to the contractor beginning on the
31 thirty-first business day after payment was due, computed at 1.5% of the
32 undisputed amount per month or fraction of a month until the payment
33 is made.

34 (c) If the owner receives an improperly completed request for pay-
35 ment or in good faith disputes a request for payment, the owner shall
36 notify the contractor within five business days of receipt of the improperly
37 completed or disputed request for payment. No payment shall become
38 due on such a request until such request is properly completed or the
39 dispute is resolved. If the owner fails to notify the contractor within the
40 five-day period of any improper completion or dispute, the request for
41 payment shall be considered proper and the owner shall make payment
42 thereon in accordance with subsection (a). Any undisputed portion of any
43 request shall be paid in accordance with subsection (a).

1 (d) A contractor shall pay its subcontractors any amounts due within
2 seven days of receipt of payment from the owner, if the subcontractor
3 has provided a timely, properly completed, undisputed request for pay-
4 ment to contractor.

5 (e) If the contractor fails to pay a subcontractor within the seven-day
6 period, the contractor shall pay interest to the subcontractor beginning
7 on the eighth day after receipt of payment by the contractor, computed
8 at 1.5% of the undisputed amount per month or fraction of a month until
9 the payment is made.

10 (f) If the contractor receives an improperly completed request for
11 payment or in good faith disputes a request for payment from a subcon-
12 tractor, the contractor shall notify the subcontractor within five business
13 days of receipt of the improperly completed or disputed request for pay-
14 ment. No payment shall become due on such a request until such request
15 is properly completed or the dispute is resolved. If the contractor fails to
16 notify the subcontractor within the five-day period of any improper com-
17 pletion or dispute, the request for payment shall be considered proper
18 and the contractor shall make payment thereon in accordance with sub-
19 section (d). Any undisputed portion of any request shall be paid in ac-
20 cordance with subsection (d).

21 (g) The provisions of subsections (d), (e) and (f) shall apply to all
22 payments from subcontractors to their sub-subcontractors and suppliers.

23 Sec. 4. (a) Retainage shall not be withheld on any private construc-
24 tion project in the state of Kansas, unless an escrow arrangement com-
25 plying with this act is implemented.

26 (b) An owner may retain no more than 5% of the amount of any
27 payment due a contractor. Any such retainage shall be deposited into an
28 escrow account complying with this act no later than the time when the
29 payment from which the retainage is being withheld is due to the
30 contractor.

31 (c) A contractor shall not withhold from a subcontractor, and a sub-
32 contractor from a lower-tier subcontractor, more retainage than the
33 owner withholds from the contractor, or the contractor from the subcon-
34 tractor, for that party's work.

35 (d) Retainage may be withheld only until substantial completion of
36 each separate division of the contract for which a price is stated separately
37 in the contract or for which a separate price can be ascertained from the
38 contractor's schedule of values. Upon such substantial completion, such
39 retainage shall be paid by the owner to the contractor in the manner and
40 within the time specified in section 3, and amendments thereto.

41 (e) An escrow account, established pursuant to a valid escrow agree-
42 ment, shall be entered between the escrow agent, the owner and con-
43 tractor upon the following conditions:

- 1 (1) Only banks shall serve as escrow agents.
- 2 (2) The investment of funds held in escrow shall be limited to de-
3 posits in banks and obligations of the United States government and the
4 state of Kansas.
- 5 (3) As interest or other income on investments held in escrow be-
6 comes due, it shall be collected by the escrow agent and paid to the
7 contractor.
- 8 (4) The escrow agent shall provide monthly reports to the owner,
9 contractor and any subcontractor of the nature and amounts of the in-
10 vestments in the escrow account and any additions to or payments from
11 the escrow account. Payments from the escrow account shall be made
12 only at the direction of the owner who has established the escrow account.
- 13 (5) If an owner has entered into more than one construction contract
14 providing for an escrow account, the owner may elect to combine the
15 amounts held as retainage under each contract into one or more escrow
16 accounts or may establish a separate escrow account for each contract.
- 17 (6) Upon default by or overpayment to the contractor as determined
18 by a court of competent jurisdiction or an arbitrator, the escrow agent
19 shall pay the owner the amount determined to be due on account of the
20 default or overpayment. Such amount shall be subject to the redemption
21 value of the investments in the escrow account at the time of
22 disbursement.
- 23 (7) The escrow account may be terminated upon completion and ac-
24 ceptance of the construction project as provided in this act.
- 25 (8) All fees and expenses of the escrow agent shall be paid by the
26 owner.
- 27 (9) The escrow account shall constitute a specific pledge to the
28 owner. A contractor or subcontractor shall not assign, pledge, discount,
29 sell or transfer its interest in an escrow account except to its surety. The
30 escrow account shall not be subject to levy, garnishment, attachment, lien
31 or any other process.
- 32 (10) The form and terms of the escrow agreement shall be included
33 in all solicitations for construction projects and shall be given to the con-
34 tractor prior to entering into a contract.
- 35 (11) The owner shall not be liable for a breach of fiduciary duty of,
36 or a failure to perform by, the escrow agent under the escrow agreement
37 as established by a court of competent jurisdiction, or for failure of a
38 financial institution to honor investments issued by it that are held in the
39 escrow account.
- 40 (12) An escrow agent shall not be liable to a party to the escrow
41 agreement unless the escrow agent is found by a court of competent
42 jurisdiction to have breached its fiduciary duty to a beneficiary of the
43 escrow agreement.

1 (f) If an owner fails to deposit retainage that is being withheld or fails
2 to make payments due as required by this act, the owner shall pay an
3 additional 1.5% of the amount not deposited or paid for each month or
4 fraction of a month until such retainage is deposited or paid.

5 (g) (1) A contractor may tender to an owner acceptable substitute
6 security with a written request for release of retainage in the amount of
7 the substitute security. To the extent of the security tendered, and pro-
8 vided the contractor is not in default of any of its obligations under the
9 contract, the contractor shall be entitled to receive cash payment of re-
10 tainage already withheld and shall not be subject to the withholding of
11 further retainage.

12 (2) A subcontractor may tender to a contractor acceptable substitute
13 security with a written request for release of retainage in the amount of
14 the substitute security. To the extent of the security tendered, and pro-
15 vided the subcontractor is not in default of any of its obligations under
16 the contract, the subcontractor shall be entitled to receive cash payment
17 of retainage already withheld and shall not be subject to the withholding
18 of further retainage.

19 (h) If the tender described in subsection (g) is made after retainage
20 has been withheld, the party holding the retainage, within five business
21 days after receipt of the tender shall direct the escrow agent to pay over
22 to the tendering party the withheld retainage to the extent of the substi-
23 tute security. If the tender of substitute security is made before retainage
24 has been withheld, the party entitled to hold retainage, to the extent of
25 the substitute security, shall refrain from withholding any retainage from
26 all future payments properly due.

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

29 (1) Negotiable securities with a market value equal to or greater than
30 the amount of retainage, including:

31 (A) Obligations of the United States government;

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

33 (C) certificates of deposit issued by banks.

34 (2) A retainage bond naming the owner as obligee, issued by a surety
35 company authorized to issue surety bonds in the state of Kansas, in the
36 amount of the retainage to be released and conditioned upon substantial
37 completion of the work of the party tendering the bond.

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

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

43 (k) Upon substantial completion of the work of the party tendering

1 the substitute security, such substitute security shall be returned to such
2 party.

3 (l) Upon final completion of the construction project, any amounts
4 remaining due shall be paid within the time specified by section 4, and
5 amendments thereto, conditioned upon the receipt of the following by
6 the party from whom payment is requested:

7 (1) A properly completed application for final payment.

8 (2) A release, if required, of all payment claims and claims of lien
9 against the owner arising under and by virtue of the contract in question,
10 other than such claims, if any, as may be specifically excepted by the
11 contractor or subcontractor or supplier from the operation of the release.

12 (m) If a party obligated to make payment fails to pay such amounts
13 within the time specified in section 4, and amendments thereto, such
14 party shall pay an additional 1.5% of the amount not paid for each month
15 or fraction of month until payment is properly made.

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

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

22 Sec. 5. If any payment properly due, including payment of retainage,
23 is not made or if retainage is not deposited in an escrow account in ac-
24 cordance with the provisions of this act, the contractor and any subcon-
25 tractors, regardless of tier, shall be entitled to suspend further perform-
26 ance under any contract for construction until payment, including
27 applicable interest, is made or retainage, including applicable interest, is
28 deposited. Any party to whom payment is due shall be entitled to recover
29 from the party obligated to make payment any costs incurred on account
30 of the suspension.

31 Sec. 6. (a) No provision in a contract or subcontract for construction
32 in the state of Kansas that purports to waive, release or extinguish the
33 right of a contractor or subcontractor to recover costs or damages, or
34 obtain an equitable adjustment, for delay in performing the contract or
35 subcontract, if the delay is caused in whole or in part by acts or omissions
36 within the control of the other party to the contract or subcontract or
37 persons acting on behalf of the other party, is against public policy and
38 void and unenforceable. The section shall not affect the validity or en-
39 forceability of any contract provision that (1) precludes a contractor or
40 subcontractor from recovering the portion of any delay costs or damages
41 that are caused by acts or omissions within the control of the contractor
42 or subcontractor or persons acting on behalf of the contractor or subcon-
43 tractor or (2) requires the contractor or subcontractor to give notice of

1 any delay.

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

8 Sec. 7. In any action to enforce sections 4 and 5, and amendments
9 thereto, including arbitration, the court, or arbitrator shall award costs
10 and reasonable attorneys fees to the prevailing party. Venue of such an
11 action shall be in the state or federal court for the district or county where
12 the real property is located.

13 Sec. 8. The provisions of the Kansas fairness in private construction
14 contract act shall not apply to the improvement of single-family residential
15 housing and multi-family residential housing of four units or less.

16 Sec. 9. This act shall take effect and be in force from and after its
17 publication in the statute book.

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