

SESSION OF 2005

**CONFERENCE COMMITTEE REPORT BRIEF  
SUBSTITUTE FOR SENATE BILL NO. 33**

As Agreed to March 29, 2005

**Brief \***

Sub. for SB 33 would create the Kansas Fairness in Private Construction Contract Act. The bill would require that all persons who enter into a contract for private construction after the Act is published in the statute book, would be required to make all payments pursuant to the terms of the contract; however, the following provisions would be void and unenforceable in a contract:

- A provision that waives, releases, or extinguishes the right to resolve disputes through litigation in court; however, the contract may require binding arbitration as a substitute for litigation or require non-binding alternative dispute resolution as a prerequisite to litigation.
- A provision that waives, releases, or extinguishes rights of mechanic's liens, or bonds to secure payment of claims, except that a contract may require a contractor or subcontractor to provide a waiver or release of such rights as a condition for payment, but only to the extent of the amount of payment received.
- A provision that waives, releases, or extinguishes rights of subrogation for losses or claims covered or paid by liability or workers compensation insurance; provided however, that a contract may require waiver of subrogation for losses or claims paid by a consolidated or wrap-up insurance program, owners and contractors protective liability insurance, or project management protective liability insurance.

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\*Conference committee report briefs are prepared by the Legislative Research Department and do not express legislative intent. No summary is prepared when the report is an agreement to disagree. The conference committee summary report may be accessed on the Internet at <http://www.kslegislature.org>

Contract is defined to mean a contract or agreement concerning construction by and between an owner and a contractor, a contractor and a subcontractor, or a subcontractor and another subcontractor.

Any provision for private construction providing that a payment from a contractor or subcontractor to a subcontractor is contingent or conditioned upon receipt of a payment from any other private party, including a private owner, is no defense to a claim to enforce a mechanic's lien or bond to secure payment of claims.

The required payment schedule would be as follows:

- The owner would be required to make payment to a contractor within 30 days after the owner receives an undisputed request for payment. If the owner fails to pay the contractor within the 30 days, of an undisputed request for payment, the owner would be required to pay interest at the rate of 18 percent per annum.
- The contractor would be required to pay the subcontractors within seven business days of receipt of payment from the owner, including retainage, if the retainage is released by the owner. If the contractor fails to pay a subcontractor within the time requirement, the contractor would be required to pay interest at the rate of 18 percent per annum.
- The subcontractors also would be required to pay their subcontractors within seven business days or the interest payment would be required.

The bill also would set the maximum retainage an owner, contractor, or subcontractor may withhold at 10 percent. Failure to pay the released retainage by any party within the appropriate time frame also would trigger the interest provision. If any payment is not made within seven business days after the payment date established in a contract, the contractor and any subcontractors, regardless of tier, upon seven additional business days' written notice would be entitled to suspend further work until payment, including applicable interest, is paid. The contract time for each contract affected by the suspension would be extended and the contract sum for each affected contract would be increased by the suspending party's reasonable costs of demobilization, delay, and remobilization.

The bill also would require that the court or arbitrator award costs and reasonable attorney fees to the prevailing party and the venue of any action would be in the county where the real property is located. The provisions of the Act would not apply to single family residential housing, multi-family residential housing of four units or less, or public works projects. Further, the provisions of the Act would not apply to contracts entered into prior to the effective date of the Act.

### **Conference Committee Action**

In Conference Committee, the Senate conferees agreed to the House amendments to the bill, with the following exceptions and revisions:

- Deleted the provision that retainage must be paid to a subcontractor, in any case, not later than 60 days after the subcontractor has satisfactorily completed the work.
- Reinserted the language that a court or arbitrator could award reasonable attorneys fees to the prevailing party.

### **Background**

The Senate substitute bill was a combined effort of the representatives of the American Sub-Contractors, National Association of Credit Managers, AFL-CIO, Kansas Area Chamber of Commerce, individual general contractors, and individual subcontractors, all of whom testified on the bill.

The House Committee amended the bill to do the following:

- Amplify the definition of contract;
- Strike the definition of lender;
- Add the provision that retainage must be paid to a subcontractor, in any case, not later than 60 days after the subcontractor has satisfactorily completed the work.
- Add an exception to the prohibition against a waiver, release, or extinguishment of rights provision;

- Change the interest rate to 18 percent per annum;
- Change the time frame for payments to begin from five to seven business days;
- Change the time frame, after non-payment, for interest to begin from six to eight days;
- Strike the court or arbitrator could award reasonable attorneys fees; and
- Other amendments are clarifying in nature.

The fiscal note states that the Kansas Association of Counties is unable to estimate the fiscal effect of the original bill. The Office of Judicial Administration indicates that there could be an increase in court hearings; however, it expects the fiscal effect to be negligible.