

SESSION OF 2006

SUPPLEMENTAL NOTE ON SENATE BILL NO. 516

As Amended by Senate Committee of the Whole

Brief*

SB 516, as amended, would create the Kansas Fairness in Public Construction Contract Act. The bill would require that all persons who enter into a contract for public construction after the Act is published will be required to make all payments pursuant to the terms of the contract; however, the following provisions are 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 non-binding alternative dispute resolution as a prerequisite to litigation.
- 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.
- 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.

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

Any provision for public 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 party, including a owner, is no defense to a claim to enforce a mechanic's lien or bond to secure payment of claims.

The payment schedule is as follows:

- The architect or engineer of record will review, approve and forward undisputed requests for payment to the owner within seven business days. The owner is required to make payment to a contractor within 30 days after the owner receives an undisputed request for payment, unless extenuating circumstances exist which would preclude approval of payment within 30 days. If such extenuating circumstances exist, then payment would be made within 45 days after the owner receives the payment request. If the owner fails to pay the contractor within the time period, for an undisputed request for payment, the owner will be required to pay interest at the rate of 18 percent per annum.
- The contractor is 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 will be required to pay interest at the rate of 18 percent per annum.
- The subcontractors also are required to pay their subcontractors within seven business days or the interest payment will be required.

The bill also sets the maximum retainage an owner, contractor, or subcontractor may withhold at 10 percent. The bill provides that nothing in the act prevents the early release of payment for a subcontractor and the early payment is at the discretion of the owner. Failure to pay the released retainage by any party within the appropriate time frame also will 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 will be entitled to suspend further work until payment, including applicable interest, is paid. The contract time for each contract affected by the suspension will be extended and the contract sum for each affected contract will be increased by the suspending party's reasonable costs of demobilization, delay, and remobilization.

The bill requires that the court or arbitrator award costs and reasonable attorney fees to the prevailing party and the venue of any action will be in the county where the real property is located.

Background

Proponents of the bill included representatives of Western Extralite, Building Erection Services, VHC Mechanical, Bair Excavating, Haake Foundations, Mark One Electric, Credit Professionals, and McCarty Mechanical. Proponents that provided written testimony included Industrial Sales and Service Manger, Bob D. Campbell & Co., C & O Electric Sales company and Kaw Roofing and Sheet Metal.

Opponents of the bill included representatives of Associated General Contractors of Kansas and the City of Overland Park. Opponents providing written testimony included Martin K. Eby Construction Co., Inc.; Farrell Construction, Kelley Construction, Central Mechanical of Wichita, City of Lenexa, Water District No. 1 of Johnson County and Kansas Contractors Association.

The Senate Committee made several amendments to the bill including changing the definition of construction; adding a definition for substantial completion; providing for payment when extenuating circumstances exist, providing for review, approval, and forward of undisputed requests for payment to the owner by the architect/engineer of record; allowing the owner and the architect or engineer to determine that a higher rate of retainage may be required but not to exceed 10 percent of the value of the contract; and the provision that nothing in the act is to be determined to prevent the early release of payment clause.

The fiscal note indicates that passage of the bill would not change revenues or expenditures for any party involved in public construction contracts.