

**WRITTEN TESTIMONY IN  
OPPOSITION TO SENATE BILL NO. 333**

To: Members of the Senate Commerce Committee

From: Darci Meese, Governmental Affairs Coordinator

Date: February 19, 2007

RE: Senate Bill 333 – Public Construction Contracts

On behalf of Water District No. 1 of Johnson County, Kansas, (“WaterOne”), I would like to thank you for consideration of our comments regarding Senate Bill 333. The problem that Senate Bill 333 attempts to address may be a valid one, but one that exists between general contractors and subcontractors, not the public entity contracting for the work. It is not clear that SB 333 will make that situation any better. Furthermore, it seems that Senate Bill 333 would constitute an attempt to interfere with the constitutional right of contracting. We are very concerned with the impact of SB 333 on the ability of public entities to properly manage public construction contracts.

Article 1 Section 10 of the United States Constitution reads in relevant part “No state shall...pass any...law impairing the obligations of contracts...” First and foremost, Senate Bill 333 expressly states that its provisions cannot be waived by contract. Such language certainly must lend itself to the conclusion that the State is acting contrary to the Constitutional language that limits its ability to interfere with contracts. This is likely why the already existing Prompt Pay law of Kansas, found in K.S.A. 75-6401 et seq., requires certain payment obligations of state and government agencies but qualifies those requirements by stating that the agency and vendor or contractor are free to enter into contracts with different terms.

Aside from the questionable constitutionality of SB 333, the bill’s effect will seriously impede public entities from entering into solid contracts for public improvement that protect the interest of the tax-paying or rate-paying citizens. SB 333 requires payment to contractors within 30 days of a completed and undisputed pay request or face an interest penalty of 18% per annum. Thirty days is an extremely short period of time to receive, analyze, confirm and process a pay request from a contractor. In WaterOne’s experience it is not uncommon for the pay request to include errors that must be corrected before payment can be initiated. We believe it is not good public policy to place public entities into a position of expediting pay requests in order to avoid interest penalties.

Next, SB 333 reduces retainage to no more than 5% in section 4(a). Currently, WaterOne uses model construction documents created by the Engineering Joint Contract Documents Committee (EJCDC). The EJCDC construction documents are generally accepted and used nationally and are prepared by a joint committee of engineers, public agencies and contractors. With respect to retainage, WaterOne follows the recommendation of EJCDC and calculates retainage at 10%. By limiting retainage to 5%, we believe SB 333 falls below well reasoned national standards and local practice. The EJCDC construction documents carefully balance the legitimate business needs of contractors with the equally legitimate needs of the owner to result in a fair payment process. SB 333 unnecessarily interferes with that process and alters the balance created by the use of reasonable retainage by a public entity.

In summary, Water District No. 1 of Johnson County, Kansas opposes SB 333. It is our opinion that SB 333 is an unconstitutional interference with the right to contract and furthermore seeks to solve a problem that should be resolved outside of the legislative process. Reducing retainage and limiting the time to verify payment requests would only serve to place the public at more risk by reducing the ability of public entities to efficiently manage public construction contracts.

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