

SENATE BILL No. 333

By Committee on Commerce

2-7

Proposed  
Compromise  
- Balloon  
2/27/07

9 AN ACT concerning public building construction contracts; enacting the  
10 Kansas fairness in public building construction contract act; amending  
11 K.S.A. 75-6402 and repealing the existing section.

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

14 New Section 1. (a) Sections 1 through 8, and amendments thereto,  
15 shall be known and may be cited as the Kansas fairness in public building  
16 construction contract act.

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

20 New Sec. 2. As used in this act:

21 (a) "Construction" means furnishing labor, equipment, material or  
22 supplies used or consumed for the design, construction, alteration, ren-  
23 novation, repair or maintenance of a building, oil line, gas line, appurte-  
24 nance or other improvement to real property, including any moving, dem-  
25 olition or excavation of a building.

road, highway, bridge,

26 (b) "Contract" means a contract or agreement concerning construc-  
27 tion made and entered into by and between an owner and a contractor,  
28 a contractor and a subcontractor or a subcontractor and another  
29 subcontractor.

30 (c) "Contractor" means a person performing construction and having  
31 a contract with an owner of the real property or with a trustee or agent  
32 of an owner.

33 (d) "Owner" means a public entity that holds an ownership interest  
34 in real property.

35 (e) "Public entity" means the state of Kansas, political subdivisions,  
36 cities, counties, state universities or colleges, school districts, all special  
37 districts, joint agreement entities, public authorities, public trusts, non-  
38 profit corporations and other organizations which are operated with pub-  
39 lic money for the public good.

40 (f) "Retainage" means money earned by a contractor or subcontractor  
41 but withheld to ensure timely performance by the contractor or  
42 subcontractor.

43 (g) "Subcontractor" means any person performing construction cov-

1       ered by a contract between an owner and a contractor but not having a  
2       contract with the owner.

3       (h) "Substantial completion" means the stage of a construction pro-  
4       ject where the project, or a designated portion thereof, is sufficiently  
5       complete in accordance with the contract, so that the owner can occupy  
6       or utilize the constructed project for its intended use.

7       New Sec. 3. (a) Subject to the provisions of subsections (b), (c), (d),  
8       (e), (f), (g), (h) and sections 4 and 5, and amendments thereto, all owners,  
9       contractors and subcontractors, who enter into a contract for public con-  
10      struction after the effective date of this act, shall make all payments pur-  
11      suant to the terms of the contract.

12      (b) The following provisions in a contract for public construction shall  
13      be against public policy and shall be void and unenforceable:

14      (1) A provision that purports to waive, release or extinguish the right  
15      to resolve disputes through litigation in court or substantive or procedural  
16      rights in connection with such litigation except that a contract may require  
17      nonbinding alternative dispute resolution as a prerequisite to litigation;

18      (2) a provision that purports to waive, release or extinguish rights to  
19      file a claim against a payment or performance bond, except that a contract  
20      may require a contractor or subcontractor to provide a waiver or release  
21      of such rights as a condition for payment, but only to the extent of the  
22      amount of payment received; and

23      (3) a provision that purports to waive, release or extinguish rights of  
24      subrogation for losses or claims covered or paid by liability or workers  
25      compensation insurance except that a contract may require waiver of sub-  
26      rogation for losses or claims paid by a consolidated or wrap-up insurance  
27      program, owners and contractors protective liability insurance, or project  
28      management protective liability insurance or a builder's risk policy.

29      (c) All contracts for public construction shall provide that payment of  
30      amounts due a contractor from an owner, except retainage, shall be made  
31      within 30 days after the owner receives a timely, properly completed,  
32      undisputed request for payment, unless extenuating circumstances exist  
33      which would preclude approval of payment within 30 days. If such exten-  
34      uating circumstances exist, then payment shall be made within 45 days  
35      after the owner receives such payment request.

36      (d) The architect or engineer of record shall review, approve and  
37      forward undisputed requests for payment to the owner within seven busi-  
38      ness days.

39      (e) If the owner fails to pay a contractor within the time period set  
40      forth in subsection (c), the owner shall pay interest computed at the rate  
41      of 18% per annum on the undisputed amount to the contractor beginning  
42      on the day following the end of the time period set forth in subsection  
43      (d).

according to terms of the contract

or agent of the owner

of receipt from the contractor.

Except as provided in Sec. 4 below, a

1 (f) A contractor shall pay its subcontractors any amounts due within  
2 seven business days of receipt of payment from the owner, including  
3 payment of retainage, if retainage is released by the owner, if the sub-  
4 contractor has provided a timely, properly completed and undisputed  
5 request for payment to the contractor.

6 (g) If the contractor fails to pay a subcontractor within seven business  
7 days, the contractor shall pay interest to the subcontractor beginning on  
8 the eighth business day after receipt of payment by the contractor, com-  
9 puted at the rate of 18% per annum on the undisputed amount.

10 (h) The provisions of subsection (g) shall also apply to all payments  
11 from subcontractors to their subcontractors.

12 New Sec. 4. (a) An owner, contractor or subcontractor may withhold  
13 no more than ~~[5]~~ 10% retainage from the amount of any undisputed payment  
14 due, ~~unless the owner and the architect or engineer determine that a~~  
15 ~~higher rate of retainage is required to ensure performance of the contract.~~  
16 ~~Retainage, however, shall not exceed 10% of the value of the contract.]~~

17 (d) An owner must release the retainage on any undisputed payment due on  
18 a construction project within 30 days after substantial completion of the  
19 project; however, if any subcontractor is still performing work on the  
20 project under its subcontract, an owner may withhold that portion of the  
21 retainage attributable to such subcontract until 30 days after such work  
22 is completed. ~~[No more than 150% of the value of work that is not com-  
23 pleted due to no fault of the subcontractor may be withheld pending  
24 completion.]~~

25 (b-e) If an owner, contractor or subcontractor fails to pay retainage, if  
26 any, pursuant to the terms of a contract for public construction or as  
27 required by this act, the owner, contractor or subcontractor shall pay  
28 interest to the contractor or subcontractor to whom payment was due,  
29 beginning on the first business day after the payment was due, at a rate  
30 of 18% per annum.

31 (e f) Nothing in this section shall prevent early release of retainage if  
32 it is determined by the owner, the contractor and the project architect or  
33 engineer, that a subcontractor has completed performance satisfactorily  
34 and that the subcontractor can be released prior to substantial completion  
35 of the entire project without risk to the owner. ~~The contractor shall re-  
36 quest such adjustment in retainage, if any, from the owner as necessary  
37 to enable the contractor to pay the subcontractor in full, and the owner  
38 shall, as part of the next contractual payment cycle, release the subcon-  
39 tractor's retainage to the contractor, who shall, as part of the next con-  
40 tractual payment cycle, release such retainage as is due to the  
41 subcontractor.~~

42 New Sec. 5. If any undisputed payment is not made within seven  
43 business days after the payment date established in a contract for public

Change "5%" to "10%"

Insert new: "(b) If at such time as the Contractor's Contract is fifty percent (50%) complete (based on Contract amount), the work has been timely performed in accordance with the Contract as determined by the Owner, the Owner shall hold no further Retainage. If, subsequent to such election, the Owner should determine that the work is not being performed timely or in accordance with the Contract, the Owner may withhold such additional Retainage as is deemed necessary to reasonably protect the Owner's interest, but not in excess of ten percent (10%) of the amount of any undisputed payment due.

(c) If at such time as a Subcontractor's contract is fifty percent (50%) complete (based on contract amount), the Subcontract work has been timely performed in accordance with the contract as determined by the Contractor, and the Owner has agreed to withhold no additional retainage on the Contractor as described in subsection (b), the Contractor shall hold no further Retainage on said Subcontract. If, subsequent to such election, the Contractor should determine that the Subcontract work is not being performed timely or in accordance with the Subcontract or the Owner elects to withhold additional Retainage under the Contract, the Contractor may withhold such additional Retainage as is deemed necessary to reasonably protect the Contractor's and/or Owner's interest, but not in excess of ten percent (10%) of the amount of any undisputed payment due the Subcontractor.

(d)"

or additional cost to the owner or contractor. Once so determined, the

1 construction or in this act, the contractor and any subcontractors, regard-  
 2 less of tier, upon seven additional business days' written notice to the  
 3 owner and, in the case of a subcontractor, written notice to the contractor,  
 4 shall, without prejudice to any other available remedy, be entitled to sus-  
 5 pend further performance until payment, including applicable interest, is  
 6 made. The contract time for each contract affected by the suspension  
 7 shall be extended appropriately and the contract sum for each affected  
 8 contract shall be increased by the suspending party's reasonable costs of  
 9 demobilization, delay and remobilization.

10 New Sec. 6. In any action to enforce sections 3, 4 or 5, and amend-  
 11 ments thereto, including arbitration<sup>[7]</sup> between a contractor and subcon- Delete “,”  
 12 tractors or subcontractors and subcontractors, the court or arbitrator shall  
 13 award costs and reasonable attorney fees to the prevailing party. Venue  
 14 of such an action shall be in the county where the real property is located  
 15 and under Kansas law. The hearing in such an arbitration shall be held  
 16 in the county where the real property is located.

17 New Sec. 7. Any provision in a contract that purports to waive the  
 18 rights of a party to the contract to collect damages for delays caused by  
 19 another party to the contract shall be void, unenforceable and against  
 20 public policy. This provision is not intended to create a contract between  
 21 parties where a contract did not otherwise exist.

22 New Sec. 8. The provisions of the Kansas fairness in public building  
 23 construction act shall not apply to construction projects which are re-  
 24 quired to comply with section 109 of the Kansas department of trans-  
 25 portation special provisions to the standard specifications, 1990 edition  
 26 (90P-205-R6) or any subsequent editions

27 Sec. 9. K.S.A. 75-6402 is hereby amended to read as follows: 75-  
 28 6402. As used in the Kansas prompt payment act, unless the context  
 29 clearly requires otherwise, the following words and phrases shall have the  
 30 meanings respectively ascribed thereto.

31 (a) "State agency" means the state and any state agency, department,  
 32 division or authority thereof.

33 (b) "Government agency" means any state agency, library, commu-  
 34 nity college or unified school district.

35 (c) "Vendor" means any person, corporation, association or other  
 36 business concern engaged in a trade or business, either on a profit or not-  
 37 for-profit basis, and providing any goods or services to a government  
 38 agency.

39 (d) "Goods" means any goods, supplies, materials, equipment or  
 40 other personal property, but does not mean any real property.

41 (e) "Services" means any contractual services including architectural,  
 42 engineering, medical, financial, consulting or other professional services,  
 43 any construction services and any other personal services, but does not

1 mean any services performed as an officer or employee of any government  
2 agency. *Services shall not include construction contracts subject to sections*  
3 *1 through 8, and amendments thereto.*

4 (f) "Bill" means a proper billing which requests payment and which  
5 contains or is accompanied by such substantiating documentation as may  
6 be required for payment for the goods or services.

7 (g) "Community college" means any community college organized  
8 and operating under the laws of this state.

9 (h) "Library" means a library which serves the general public and is  
10 supported in whole or in part with tax money.

11 Sec. 10. K.S.A. 75-6402 is hereby repealed.

12 Sec. 11. This act shall take effect and be in force from and after its  
13 publication in the statute book.