

HOUSE BILL No. 2238

By Committee on Commerce and Labor

2-3

Rep. Grange
Balloon Amendment 1
January 13, 2010

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9 AN ACT concerning construction contracts; relating to retention in pub-
10 lic and private construction contracts; amending K.S.A. 16-1802, 16-
11 1804, 16-1902 and 16-1904 and repealing the existing sections.

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

14 Section 1. K.S.A. 16-1802 is hereby amended to read as follows: 16-
15 1802. As used in this act:

16 (a) "Alternate security" means a retainage bond, bank letter of credit,
17 certificate of deposit, cash bond or other ~~mutually acceptable items~~ of
18 value equal to or exceeding the amount of retained funds.

type of asset or security

19 (a) (b) "Construction" means furnishing labor, equipment, material
20 or supplies used or consumed for the design, construction, alteration,
21 renovation, repair or maintenance of a building, structure, road, bridge,
22 water line, sewer line, oil line, gas line, appurtenance or other improve-
23 ment to real property, including any moving, demolition or excavation.

24 (b) (c) "Contract" means a contract or agreement concerning con-
25 struction made and entered into by and between an owner and a con-
26 tractor, a contractor and a subcontractor or a subcontractor and another
27 subcontractor.

28 (c) (d) "Contractor" means a person performing construction and
29 having a contract with an owner of the real property or with a trustee,
30 agent or spouse of an owner.

31 (d) (e) "Owner" means a person who holds an ownership interest in
32 real property.

33 (e) (f) "Person" means an individual, corporation, estate, trust, part-
34 nership, limited liability company, association, joint venture or any other
35 legal entity.

36 (f) (g) "Retainage" or "retention" means money earned by a contrac-
37 tor or subcontractor but withheld to ensure proper performance by the
38 contractor or subcontractor ~~for the remainder of such contractor's or sub-~~
39 ~~contractor's work on the project.~~

40 (g) (h) "Subcontractor" means any person performing construction
41 covered by a contract between an owner and a contractor but not having
42 a contract with the owner.

43 (i) "Substantial completion" means, ~~for the purpose of release of re-~~

1 ~~ention, the stage of a construction project where the project, or a desig-~~
 2 ~~nated portion thereof, is sufficiently complete in accordance with the con-~~
 3 ~~tract, so that portion thereof can be used for its intended purpose.~~

4 Sec. 2. K.S.A. 16-1804 is hereby amended to read as follows: 16-
 5 1804. (a) ~~An owner, contractor or subcontractor shall not withhold more~~
 6 ~~than 5% of the amount of a contract as retainage.~~

7 ~~(b) An owner, contractor or subcontractor may withhold retained~~
 8 ~~amounts incrementally from each monthly payment as 10% of the first~~
 9 ~~50% of the contract or as 5% of the total contract.~~

10 ~~(c) An owner, contractor or subcontractor shall release retained~~
 11 ~~amounts within 45 days after substantial completion of the contract as a~~
 12 ~~part of the regular payment cycle.~~

13 ~~(d) An owner, contractor or subcontractor shall not withhold more~~
 14 ~~than 150% of the value of incomplete work provided that the incomplete~~
 15 ~~work is due to no fault of the subcontractor. Any amounts retained for~~
 16 ~~incomplete work shall be paid within 45 days after completion of the work~~
 17 ~~as a part of the regular payment cycle.~~

18 ~~(e) A contractor or subcontractor may provide an alternate security~~
 19 ~~in lieu of retainage at any stage of the contract. If the alternate security~~
 20 ~~is provided prior to commencing the work no retainage shall be withheld.~~
 21 ~~If the alternate security is provided after the first payment cycle, any~~
 22 ~~retained funds shall be paid with the next regular payment.~~

23 ~~(f) An owner, contractor or subcontractor shall not retain any funds~~
 24 ~~from any party to the contract who has provided a 100% payment per-~~
 25 ~~formance bond for that party's work on the project.~~

26 ~~(g) An owner, contractor or subcontractor may withhold no more~~
 27 ~~than 10% retainage from the amount of any undisputed payment due.~~

28 ~~(h) If an owner, contractor or subcontractor fails to pay retainage,~~
 29 ~~if any, pursuant to the terms of a contract for private construction or as~~
 30 ~~required by this act, the owner, contractor or subcontractor shall pay~~
 31 ~~interest to the contractor or subcontractor to whom payment was due,~~
 32 ~~beginning on the first business day after the payment was due, at a rate~~
 33 ~~of 18% per annum.~~

34 Sec. 3. K.S.A. 16-1902 is hereby amended to read as follows: 16-
 35 1902. As used in this act:

36 (a) "Alternate security" means a retainage bond, bank letter of credit,
 37 certificate of deposit, cash bond or other ~~mutually acceptable items~~ of
 38 value equal to or exceeding the amount of retained funds.

39 ~~(b) "Construction" means furnishing labor, equipment, material~~
 40 ~~or supplies used or consumed for the design, construction, alteration,~~
 41 ~~renovation, repair or maintenance of a building, water or waste water~~
 42 ~~treatment facility, oil line, gas line, appurtenance or other improvement~~
 43 ~~to real property, including any moving, demolition or excavation of a~~

Retainage shall not exceed 5% of the value of the contract or subcontract unless the owner, architect or general contractor determine that a higher rate of retainage is required to ensure performance of the contract. Retainage, however, shall not exceed 10% of the value of the contract or subcontract.

(b) If the general contractor or subcontractor has failed to meet the terms of the contract, is not performing according to schedule or there is a problem with workmanship or other issues, the owner and architect may increase retainage up to 10%.

(c) An owner shall release the retainage on any undisputed payment due on a construction project within 30 days after substantial completion of the project; however, if any subcontractor is still performing work on the project under its subcontract, an owner may withhold that portion of the retainage attributable to such subcontract until 30 days after such work is completed.

(e) Prior to commencement of work, a general contractor or subcontractor may provide an alternate security in lieu of retainage.

(f) If a general contractor or subcontractor requests the use of an alternate security, as defined in subsection (a) of section 1, and amendments thereto, in lieu of retainage one must be accepted. However, the owner or general contractor who would otherwise withhold the retainage shall have the right to determine which type of alternate security, as defined in subsection (a) of section 1, and amendments thereto, shall be accepted.

(i) Nothing in this section shall prevent early release of retainage if it is determined by the owner, the contractor and the project architect or engineer, that a subcontractor has completed performance satisfactorily and that the subcontractor can be released prior to substantial completion of the entire project without risk or additional cost to the owner or contractor. Once so determined, the contractor shall request such early release of retainage from the owner as necessary to enable the contractor to pay the subcontractor in full. The owner shall, as part of the next contractual payment cycle, release the subcontractor's retainage to the contractor, who shall, as part of the next contractual payment cycle, release such retainage as is due to the subcontractor.

(j) An owner, contractor or subcontractor may withhold retained amounts from each monthly payment as 10% of the first 50% of the contract or as 5% of the total contract.

type of asset or security

1 building. “Construction” shall not mean the design, construction, altera-
 2 tion, renovation, repair or maintenance of a road, highway or bridge.

3 ~~(b)~~ (c) “Contract” means a contract or agreement concerning con-
 4 struction made and entered into by and between an owner and a con-
 5 tractor, a contractor and a subcontractor or a subcontractor and another
 6 subcontractor.

7 ~~(c)~~ (d) “Contractor” means a person performing construction and
 8 having a contract with an owner of the real property or with a trustee or
 9 agent of an owner.

10 ~~(d)~~ (e) “Owner” means a public entity that holds an ownership inter-
 11 est in real property.

12 ~~(e)~~ (f) “Public entity” means the state of Kansas, political subdivisions,
 13 cities, counties, state universities or colleges, school districts, all special
 14 districts, joint agreement entities, public authorities, public trusts, non-
 15 profit corporations and other organizations which are operated with pub-
 16 lic money for the public good.

17 ~~(f)~~ (g) “Retainage” or “retention” means money earned by a contrac-
 18 tor or subcontractor but withheld to ensure timely performance by the
 19 contractor or subcontractor ~~for the remainder of such contractor’s or sub-~~
 20 ~~contractor’s work on the project.~~

21 ~~(g)~~ (h) “Subcontractor” means any person performing construction
 22 covered by a contract between an owner and a contractor but not having
 23 a contract with the owner.

24 ~~(h)~~ (i) “Substantial completion” means ~~for the purpose of release of~~
 25 ~~retention~~, the stage of a construction project where the project, or a des-
 26 ignated portion thereof, is sufficiently complete in accordance with the
 27 contract, so that the owner can occupy or utilize the constructed project
 28 for its intended use ~~portion thereof can be used for its intended purpose.~~

29 ~~(i)~~ (j) “Undisputed payment” means payments which all parties to the
 30 contract agree are owed to the contractor.

31 Sec. 4. K.S.A. 16-1904 is hereby amended to read as follows: 16-
 32 1904. ~~(a) An owner, contractor or subcontractor shall not withhold more~~
 33 ~~than 5% of the amount of a contract as retainage.~~

34 ~~(b) An owner, contractor or subcontractor may withhold retained~~
 35 ~~amounts incrementally from each monthly payment as 10% of the first~~
 36 ~~50% of the contract or as 5% of the total contract.~~

37 ~~(c) An owner, contractor or subcontractor shall not withhold more~~
 38 ~~than 150% of the value of incomplete work provided that the incomplete~~
 39 ~~work is due to no fault of the subcontractor. Any amounts retained for~~
 40 ~~incomplete work shall be paid within 45 days after completion of the work~~
 41 ~~as a part of the regular payment cycle.~~

42 ~~(d) A contractor or subcontractor may provide an alternate security~~
 43 ~~in lieu of retainage at any stage of the contract. If the alternate security~~

the owner can occupy or utilize the constructed project for its intended use

(a) Retainage shall not exceed 5% of the value of the contract or subcontract unless the owner, architect or general contractor determine that a higher rate of retainage is required to ensure performance of the contract. Retainage, however, shall not exceed 10% of the value of the contract or subcontract.

(b) If the general contractor or subcontractor has failed to meet the terms of the contract, is not performing according to schedule, shows poor workmanship or other issues, the owner and architect may increase retainage up to 10%.

1 ~~is provided prior to commencing the work no retainage shall be withheld.~~
 2 ~~If the alternate security is provided after the first payment cycle, any~~
 3 ~~retained funds shall be paid with the next regular payment.~~

4 ~~(e) An owner, contractor or subcontractor shall not retain any funds~~
 5 ~~from any party to the contract who has provided a 100% payment per-~~
 6 ~~formance bond for that party's work on the project.~~

7 ~~(a) (f) An owner, contractor or subcontractor may withhold no more~~
 8 ~~than 10% retainage from the amount of any undisputed payment due.~~

9 ~~(b) (g) An owner, contractor or subcontractor must release the re-~~
 10 ~~tainage on any undisputed payment due on a construction project within~~
 11 ~~30 45 days after substantial completion of the project as part of the regular~~
 12 ~~payment cycle; however, if any subcontractor is still performing work on~~
 13 ~~the project under its subcontract, an owner may withhold that portion of~~
 14 ~~the retainage attributable to such subcontract until 30 45 days after such~~
 15 ~~work is completed.~~

16 ~~(e) (h) If an owner, contractor or subcontractor fails to pay retainage,~~
 17 ~~if any, pursuant to the terms of a contract for public construction or as~~
 18 ~~required by this act, the owner, contractor or subcontractor shall pay~~
 19 ~~interest to the contractor or subcontractor to whom payment was due,~~
 20 ~~beginning on the first business day after the payment was due, at a rate~~
 21 ~~of 18% per annum.~~

22 ~~(i) Nothing in this section shall prevent early release of retainage~~
 23 ~~if it is determined by the owner, the contractor and the project architect~~
 24 ~~or engineer, that a subcontractor has completed performance satisfacto-~~
 25 ~~rily and that the subcontractor can be released prior to substantial com-~~
 26 ~~pletion of the entire project without risk or additional cost to the owner~~
 27 ~~or contractor. Once so determined, the contractor shall request such ad-~~
 28 ~~justment in retainage, if any, from the owner as necessary to enable the~~
 29 ~~contractor to pay the subcontractor in full, and the owner shall, as part~~
 30 ~~of the next contractual payment cycle, release the subcontractor's retain-~~
 31 ~~age to the contractor, who shall, as part of the next contractual payment~~
 32 ~~cycle, release such retainage as is due to the subcontractor.~~

33 Sec. 5. K.S.A. 16-1802, 16-1804, 16-1902 and 16-1904 are hereby
 34 repealed.

35 Sec. 6. This act shall take effect and be in force from and after its
 36 publication in the statute book.

(d) Prior to commencement of work, a general contractor or subcontractor may provide an alternate security in lieu of retainage.

(e) If a general contractor or subcontractor requests the use of an alternate security, as defined in subsection (a) of section 1, and amendments thereto, in lieu of retainage one must be accepted. However, the owner or general contractor who would otherwise withhold the retainage shall have the right to determine which type of alternate security, as defined in subsection (a) of section 1, and amendments thereto, shall be accepted.

(f) An owner, contractor or subcontractor may withhold retained amounts from each monthly payment as 10% of the first 50% of the contract or as 5% of the total contract.