

Approved: March 25, 2005
Date

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE

The meeting was called to order by Chairman Don Dahl at 9:00 A.M. on March 21, 2005 in Room 241-N of the Capitol.

All members were present.

Committee staff present:

Jerry Ann Donaldson, Kansas Legislative Research Department
Norm Furse, Office of Revisor of Statutes
Renaë Jefferies, Office of Revisor of Statutes
June Evans, Committee Secretary

Conferees appearing before the committee:

Ken Keller, Western Extralite Company
Bill Miller, Building Erection Services Company
Dan Haake, Haake Foundations
Dave Massey, National Association of Credit Managers
Corey Peterson, Association of General Contractors of Kansas
Pat Tryon, Westar Energy

Others attending:

See attached list.

The Chairman opened the hearing on **Sub SB 33 - Fairness in private construction contract act.**

Staff gave a briefing stating this was new language to the law. Staff recommended some technical amendments. The Senate voted the bill out 36-3. There is not a fiscal note.

Ken Keller, Western Extralite Company, testified as a proponent to **Sub SB 33**. When this bill was passed out of the Senate it was agreed that an amendment was needed (Attachment 1). (The Chairman asked for testimony)

Bill Miller, representing Building Erection Services Company, and American Subcontractors Association, Inc., testified as a proponent to **Sub SB 33**. Mr. Miller reviewed the guidelines for a successful construction project. The contractor pays each subcontractor the amount received from the owner on its account promptly but not later than seven days after receipt. A subcontractor should require that a no damages for delay clause be stricken or else modified to permit a claim for compensation in addition to the extension of time, so long as the delay was not the fault of the subcontractor. Because mechanics' liens are generally derivative claims, all parties claiming by, through, or under the general contractor have implicitly waived their respective lien rights by reason of the general contractor's waiving its underlying right to a mechanics' lien under the applicable state law. Most American Institute of Architects (AIA) documents published since 1906 have contained in their titles the words "Standard Form." The term "standard" is not meant to imply that a uniform set of contractual requirements is mandatory for AIA members or others in the construction industry. Rather, the AIA standard documents are intended to be used as fair and balanced baselines from which the parties can negotiate their bargains. As such, the documents have won general acceptance within the construction industry and have been uniformly interpreted by the courts.

If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to any other available remedies, upon seven additional days' written notice to the Contractor, stop the work of this subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate adjustment, be increased by the amount of the Subcontractor's reasonable costs of demobilization, delay and remobilization (Attachment 2 - filed in Chairman's office).

Dan M. Haake, Haake Foundation, testified as a proponent to **Sub SB 33**, stated it was not unreasonable for payment terms of a contract to be clear and understood. If that was the case he would not be testifying for

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this bill as it would not be needed (Attachment 3).

Dave Massey, Chairman of the Board of Directors for the National Association of Credit Managers, Kansas City Division, Inc., testified as a proponent to **Sub SB 33**. This legislation would provide some protection to subcontractors and material suppliers in the construction industry while, if enacted, would have virtually no negative effects on owners and general contractors that presently practice fair payment practices.

The absence, or withholding, of fair and timely payment for properly completed work can create severe financial hardship on small Kansas businesses. These businesses are arguably the least able to afford the expense of unnecessary payment delays (Attachment 4).

Corey D. Peterson, Executive Vice President of the Associated General Contractors of Kansas, testified as a proponent with amendments plus the balloon amendment offered by Mr. Keller. The first amendment is to protect the ability to obtain a lien release upon payment. Five business days for contractor payment is stated in many contracts, including AGC standard contracts, but not all. These standard contracts were developed as model contracts, not as law. Adding an extra two days would enable more flexibility for unusual projects or situations where the billing cycle would not allow for a five day turnaround (Attachment 5).

Dan Morgan, a proponent to **Sub SB 33**, stated the bill addressed a number of controversial issues that either set one segment of the industry against another or set the construction industry's interests against the interests of owners and users of construction services and the Missouri law is a doable alternative. That law provides powerful enforcement punch to private construction contracts by awarding attorney fees to the prevailing party in a lawsuit or arbitration and imposing significant interest penalty provisions against any part to a construction contract that fails to live up to any of the terms of its agreement.

The subcommittee of the Senate Commerce committee was able to modify the original bill and arrive at a substitute that removes the controversial issues, adds the enforcement provisions that were recommended and provides a timetable for payments by owners, contractors and sub contractors that mirrors industry standards (Attachment 6).

Pat Tryon, project architect, Westar Energy, testified as an opponent to **Sub SB 33**. The bill has the noble intent of ensuring fairness among all parties engaged in a private construction contract. Our opposition begins on line 38 of page 2. The interest rate identified in three places is 20% higher than the current statutory rate of 15% per year for nonpayment on bonds, promissory notes and other written documents for payment of money. Westar Energy suggests amending the bill's language to not exceed the statutory rate established in K.S.A. 16-207.

The time limits for payments are adequate for the owners, but the short timeframe in Section 3 (3) (f) and (g) could increase disputes between general contractors and subcontractors. Increasing disputes will not create fairness.

Section 5 penalizes owners. An owner may make timely payment to the general contractor, but the general contractor fails to pay the subcontractor in accordance with the timeframe in this section.

The "loser pays" is a remedy initially devised for a party that does not have adequate means to pay for legal services. Shifting the prevailing party's attorney's fees to the loser is not the norm in the United States. The responsibility for each side to pay their own legal fees is a distinct part of the judicial system... in fact it is known as the "American Rule" (Attachment 7).

The Chairman asked Ms. Aron if she could return March 22 to give testimony as time had elapsed. Ms. Aron said she would be able to come back on Tuesday.

The meeting adjourned at 10:27 a.m. The next meeting will be March 22, 2005.

The following written testimony was submitted: Jim DeHoff, Executive Director, AFL-OCIO (Attachment 8); Chris Wilson, Executive Director, Kansas Building Industry Association (KBIA) (Attachment 9). Mcihael

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R. Murray, Director, Governmental and Public Affairs, Sprint (Attachment 10).