

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Karin Brownlee at 8:30 A.M. on March 2, 2006 in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Kathie Sparks, Kansas Legislative Research Department
Helen Pedigo, Revisor of Statutes
Colin Brainard

Conferees appearing before the committee:

Ken Keller-Western Extralite
Bill Miller-Building Erection Services
Terri Tensley-VHC Mechanical
Tonya Bair-Bair Excavating
Don Haake-Haake Foundations
Vince Migliazzo-Mark One Electric
Beth Houser-Credit Professionals
Tim McCarty-McCarty Mechanical
Corey Peterson-Associated General Contractors of Kansas
Eric Sartorius-City of Overland Park

Others attending:

Chairperson Brownlee opened the hearing on **SB 516-Fairness in public construction contract act** by introducing Helen Pedigo from the Revisors office to explain the bill. Ms. Pedigo stated **SB516** concerns public construction contracts and is somewhat similar to the bill Committee passed out last year on private construction. Differences between the two bills: this bill has public entities including the state of Kansas, cities, counties, school districts political subdivisions, and state universities or colleges.

Upon conclusion of Ms. Pedigo's review, there was discussion regarding the bill on public construction compared with the bill from last session on private construction.

Chairperson Brownlee introduced Ken Keller, Western Extralite, to give his testimony as a proponent of **SB 516**. Mr. Keller presented written testimony. (Attachment 1) Mr. Keller stated last session the Legislature passed **SB 33** which was very good and badly needed legislation for private construction contracts. Today, we have the opportunity to extend those same benefits to public contracts where the same problems exist. The egregious acts, the slow pay, only the owners have changed. In fact, the slow pay is even worse in public construction. Many of the public entities will take the monies they receive and put them in time deposits for a fixed period to enhance revenues. How can they be expected to pay if this money is tied up in a 90 day CD and is not available. The problem of course, is the general contractor and the subcontractors have payrolls to meet and suppliers to pay. Their only recourse is to borrow from the bank provided they have that ability. In closing he urged the Committee to support **SB 516**.

Chairperson Brownlee introduced Bill Miller representing the Greater Kansas City Chapter of the American Subcontractors Association. Mr. Miller presented written testimony. (Attachment 2). Mr. Miller stated **SB 516** is essentially the same as **SB 33**, which is the bill from last year, but with a different owner. Mr. Miller stated one of the problems with private construction is receiving retainage within a reasonable length of time after the work is completed. Mr. Miller feels that when the contract work is complete the retainage should be paid. He stated this bill would stop that problem. He referred the Committee to his testimony which contains facts on retainage and also a sheet with comparisons to Missouri law on Private and Public Prompt Payment Acts.

Chairperson Brownlee introduced Terri Tensly representing VHC Contracting, Inc. to testify as a proponent of **SB 516**. Ms. Tensly presented written testimony. (Attachment 3) She stated her company performs work for numerous public entities in Kansas as a subcontractor under a general contractor and on construction management projects where their contract is directly with the owner. Regardless of the form the contract takes on public projects, VHC feels the arbitrary terms by which the majority of public entities make

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payments on construction projects is unfair and burdensome. She stated VHC usually has to wait six months after their portion of the job is complete to receive payment which causes them to have to borrow on their line of credit to start the next job. She feels that when the work is complete, 30 days is a reasonable length of time for payment. She asked the Committee to support **SB 516**.

Chairperson Brownlee introduced Tonya Bair representing Bair Excavating to give her testimony as a proponent on **SB 516**. Ms. Bair presented written testimony. (Attachment 4) Ms. Bair stated that excavators are first on the jobsite and first to complete their work. When an invoice is sent for the prior month's work to the General Contractor, it takes an additional 60 to 90 days before payment is received. Many times she is forced to borrow money and pay interest until payment is received ninety days later. She stated their experience with receiving retainage is worse. She stated that **SB 516** will help smaller contractors continue to roll their money. She also stated she sometimes has to wait as long as a year and a half to receive retainage monies. She urged the Committee to support **SB 516**.

Chairperson Brownlee introduced Dan Haake representing Haake Foundations to give his testimony as a proponent on **SB 516**. Mr. Haake presented written testimony. (Attachment 5) Mr. Haake stated he was a small concrete contractor in Kansas City and the best thing that could come out of this bill is the cash flow will be better. He stated he shies away from doing public work because the payments are so late he can't afford it. In closing, he stated **SB 516** would be good policy for owners, contractors and suppliers.

Chairperson Brownlee introduced Vince Migliazzo representing Mark One Electric to give his testimony as a proponent of **SB 516**. Mr. Migliazzo presented written testimony. (Attachment 6) Mr. Migliazzo stated Mark One Electric is trying to run their business in a fair and reputable way. That means paying employees and suppliers in a timely manner and hope we have some profit at the end of the day. But that is getting harder, especially when we have to wait 60 to 90 days or even longer to get paid for work that we have completed. He stated the bill will help them collect money in a reasonable and fair amount of time and enable them to conduct their business on a level field with the owners and contractors they work with.

Chairperson Brownlee introduced Beth Houser representing Credit Professionals to give her testimony as a proponent to **SB 516**. Ms. Houser presented written testimony. (Attachment 7) Ms. Houser stated **SB 516** is about fair business practices within the construction industry. She has witnessed many problems created for contractors and suppliers when construction project payments are not made in a timely manner. **SB 516** will change this.

Chairperson Brownlee introduced Tim McCarty representing McCarty Mechanical located in Merriam, Kansas to give his testimony as a proponent of **SB 516**. Mr. McCarty presented written testimony. (Attachment 8) Mr. McCarty stated he is a heating and air conditioning contractor and would typically be a sub-contractor on a public project. He also stated the bill would allow him to be paid for work he has completed in a reasonable time frame. Just as **SB 33** addressed these issues for the private sector, **SB 516** addresses the same issues for the public sector. He urged the Committee to support the bill.

Proponent written only testimony was received from: John Kelble representing Industrial Sales and Service; (Attachment 9) Michael Falbe, P.E. representing Bob D. Campbell & Company; (Attachment 10) Douglas Carlson representing C&O Electric Sales Company; (Attachment 11) and Robert Daly representing Kaw Roofing and Sheet Metal. (Attachment 12)

Chairperson Brownlee called for questions from the Committee to the proponents. Being none, she introduced Corey Peterson representing the Associated General Contractors of Kansas to give his testimony as an opponent to **SB 516**. Mr. Peterson presented written testimony. (Attachment 13) Mr. Peterson stated AGC opposes **SB 516** as written. He offered a balloon to the bill which was attached with his testimony. Mr. Peterson stated the retention language in the balloon is a compromise that was the result of several meetings between the subcontractors and general contractors within AGC. The balloon will improve the cash flow for subcontractors, while keeping important protections in place for general contractors and owners. The language in SB 516 will subject owners and general contractors to undue risk and would likely end up forcing smaller, less experienced subcontractors out of the marketplace, since they may be perceived as too risky for a general contractor to use without the protections of retention. Mr. Peterson went on to review the entire balloon.

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Upon completion of Mr. Peterson's testimony there was discussion with the Committee. Chairperson Brownlee stated she thought that AGC's balloon would need more work for both sides.

Chairperson Brownlee introduced Sandy Jacquot representing the League of Kansas Municipalities to give her testimony as an opponent of **SB 516**. Ms. Jacquot presented written testimony. (Attachment 14) Ms. Jacquot stated she would like to focus on the 30 day payment. They understand and support the contractors getting paid in a timely fashion. The problem they have is the majority of cities in Kansas only meet once a month and that is when they pay bills. She suggests if for some reason they can't pay within the 30 days because a meeting got cancelled or something like that there could be language that would compel them to set a special meeting or make other arrangements to pay 15 days following that.

Chairperson Brownlee introduced Erik Sartorius representing the City of Overland Park to give his testimony as an opponent to **SB 516**. Mr. Sartorius presented written testimony. (Attachment 15) Mr. Sartorius stated

the City of Overland Park maintains a strong relationship with a multitude of contractors who perform work vital to the growth of the City. To do so, the City must be able to take local conditions into account when formulating contracts for the performance of work to be done. Artificial measures for timely payment, work completion and retainage compromise the City's ability to ensure that work is performed at a standard expected by taxpayers. He stated public construction contracting is regulated by federal acquisition regulations, state statutes, Kansas Department of Transportation policies and procedures and in some cases, county requirements. The City of Overland Park has a standard construction contract which among other provisions, addresses prompt payment, retainage and dispute resolution. The provisions of **SB 516**, especially with respect to prompt payment and retainage, can create a conflict between federal contracting regulations and state statute. Finally, public construction contracting is done in the interest of the public good. Governmental agencies operate from a long-term perspective-serving citizens today and well into the future. Cities seek to develop long-term constructive relationships with the contractor community, on the basis that a mutually beneficial partnership serves the best interest of the citizens, cities and contractors. In closing, he stated the City of Overland Park believes adequate protections exist in current law for all parties engaged in public construction.

Chairperson Brownlee introduced Edward DeSoignie representing Heavy Constructors Association of the Greater Kansas City Area to give his testimony as an opponent to **SB 516**. Mr. DeSoignie presented written testimony. (Attachment 16) Mr. DeSoignie stated that Contractors acting as generals use retainage to have a hold on their subcontractors in the event work by the subcontractor is deficient or inadequate. This is because it is not common practice for general contractors to require performance bonds from their subcontractors. If something on the project goes wrong with work done by the subcontractor, the retainage is used to have the subcontractor correct the problem. Public entities such as cities and counties also employ the practice in addition to requiring a performance bond for much the same reason. He is opposed to **SB 516**.

Chairperson Brownlee introduced Trudy Aron representing the American Institute of Architects to give her testimony as a proponent with amendments to **SB 516**. Ms. Aron presented written testimony. (Attachment 17) Ms. Aron stated the AIA Kansas has worked with AGC, their Specialty Contractors, and the State's Build Owners Group on the amendments she is offering. The biggest concern AIA Kansas has is page 3, lines 9-10. She stated the construction of buildings is a complicated process. Many of the components of the building cannot be connected, completed, finished, or started until the building is ready for substantial completion. Many aesthetic and finish components lag significantly more than 30 days following substantial completion. Without retainage, there is no incentive for the subcontractor to finish the work. She stated AIA Kansas does not oppose returning retainage within 30 days after substantial completion to those subcontractors who have completely satisfied their contracts. In closing, she stated that AIA Kansas urges the Committee to accept the amendments they are proposing on **SB 516**.

Opponent written only testimony was received from: Joe Levens representing Martin K. Ebby, (Attachment 18) Tim Browder presenting Farrell Construction; (Attachment 19) Kevin Kelley representing Kelly Construction; (Attachment 20) Phil Sewell representing Central Mechanical of Wichita; (Attachment 21) Matt Shatow representing the City of Lenexa; (Attachment 22) Eric Arner representing Water District No. 1 of Johnson County. (Attachment 23)

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Chairperson Brownlee closed the hearing on **SB 516** and made the statement if anyone else wanted to address the Committee to please deliver their written testimony to her office.

Meeting adjourned at 9:30 a.m. with the next meeting scheduled for March 3, 2006 at 8:30 a.m. in room 123S.