

February 27, 2007

Senator Karin Brownlee, Co-Chair Senate Commerce Committee
Senator Nick Jordan, Co-Chair Senate Commerce Committee

(sent via e-mail)

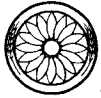
Re: SB 333

Dear Senators,

After the hearing on February 19th, Senator Brownlee asked that those in opposition to SB 333 meet with the parties in support of the bill. Mac Andrew, Director of Infrastructure for Johnson County, and I attended a lengthy meeting on February 20th hosted by Eric Stafford. As a result of that meeting Eric Stafford has shared revisions made to the bill that address several concerns, but a number of issues still remain.

Fundamentally, Johnson County believes adequate protections exist for the public and the contractor in both statutory and case law. We believe that contract terms and conditions between a contractor and the local elected officials responsible for a specific project should be negotiated between those parties. While we continue to request that the Committee not recommend SB 333 for passage, there are a few key issues that we believe should be addressed if it does move forward.

- New sections 3 (d) and 3 (e) – Allows for the “architect or engineer of record” to “review, approve and forward” undisputed payment requests, however, there are two key provisions missing. First, not all projects have an Architect or Engineer of record, and second, no provision is allowed for the owner to review and approve payments. The public owner has a high standard of care in reviewing payment requests before making payments of taxpayer’s dollars. We have an obligation to closely review payment requests and the public has a right to expect that we are not simply rubber-stamping the review of others. In addition, many public projects are Design/Build in which the Architect or Engineer of record actually works for the contractor, not the owner. Clearly the owner must also have authority to dispute or approve a payment request.
- New section 3 (e) – It is unclear if partial payment of an inaccurate payment request is mandated under threat of late payment charges. We believe that minor corrections to inaccurate payment requests should be done by the Architect or Engineer and the owner, where reasonable, in order to continue to process a payment request. However, we believe strongly that the burden of accurate invoicing is the responsibility of the contractor and that a payment request with multiple errors or an error that affects a significant portion of the payment request should be rejected and sent back to the contractor for correction. Requiring partial payments relieves the contractor of the burden of providing accurate invoices, inappropriately shifting the responsibility to the Architect or Engineer and the owner. We believe deleting the word “undisputed” on line 41 would clarify the intent and correct any misinterpretation.
- New section 3 (e) – Establishes a rate of 18% per annum, we believe this is exorbitant and inappropriate with taxpayer dollars. We recommend it be established here, and throughout SB 333, as “the statutory judgment rate” which is consistent with other such clauses in State statute.



- New section 4 (a) – The revised language is an improvement and consistent with our standard practice, however, there are extenuating circumstances and some project types for which a higher retainage amount is very important to the timely, successful completion of a project. For those instances, the owner needs to have the ability to contract for higher retainage amounts. It is important to note that this is for unusual circumstances and it is made very clear in Requests for Proposals, Bid Documents and subsequent contracts between the owner and contractor so that all parties are aware and everyone is treated fairly.
- New section 5 – This section addresses alternately the contractual relationships between the owner/contractor and the contractor/subcontractor, which leaves some confusion as to whether a relationship is being created between the owner and the subcontractor. We believe a sentence should be added to the end of the section to clarify as follows: “Nothing in this section shall affect the contract time or cost between the owner and the contractor unless the contractor is the suspending party”.

Johnson County has a strong and positive relationship with the construction industry in our community and it is in the best interest of the taxpayers that this industry be successful. We utilize fair and balanced contracts that are thoughtfully prepared and assure the greatest chance of success on a given project. While the construction industry has inherent risks, we strive to balance those risks equitably and describe them in our contracts on a project by project basis.

Again, Johnson County believes that current statutory and contract law provide an adequate structure for fair and equitable construction contracts and successful construction projects for the public. We request that you not recommend SB 333 for favorable passage, however, if that is not the case and the bill moves forward, we ask that the above corrections/clarifications be incorporated into the bill.

If you have any questions or if I may be of any assistance in this matter please advise.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Joseph Waters'.

J. Joseph Waters
Director

CC (via e-mail): Eric Stafford
 Stuart Little
 Hannes Zacharias
 Mac Andrew
 John Metzler