

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE

The meeting was called to order by Chairman Steve Brunk at 9:00 a.m. on February 11, 2009, in Room 784 of the Docking State Office Building.

All members were present except:

Representative Louis Ruiz-excused
Representative Broderick Henderson- excused
Representative Bill Wolf- absent

Committee staff present:

Renae Jefferies, Office of the Revisor of Statutes
Daniel Yoza, Office of the Revisor of Statutes
Jerry Donaldson, Kansas Legislative Research Department
Dennis Hodgins, Kansas Legislative Research Department
Stephen Bainum, Committee Assistant

Conferees appearing before the committee:

Bill Miller, American Subcontractors Association
Ken Keller, American Subcontractors Association
Kurt Brack, American Subcontractors Association
Eric Stafford, Associated General Contractors
Diane Gjerstad, Wichita Public Schools
Joe Waters, Johnson County
Robert Vancrum, Blue Valley Schools
Dan Morgan, Associated General Contractors

Others attending:

See attached list.

The meeting was called to order by Chairman Steve Brunk at 9:00 a.m. He opened the hearing on **HB 2238**.

HB 2238 - Amending the fairness in private construction contract act and the fairness in public construction contract act regarding retainage.

Renae Jefferies, Assistant Revisor, explained the changes being made to the bill (Attachment 1).

Bill Miller, American Subcontractors Association, appeared as a proponent of **HB 2238** (Attachment 2). He said that retainage was money that a contractor or subcontractor had earned but was being withheld to ensure completion of the job. 74% of the states have decreased retainage to 5% or less with one at 0% and seven at 2.5%. This bill would bring Kansas more into line with other states retainage rates.

Representative Quigley asked who is retaining the funds. Bill answered that it was the owner of the project.

Representative Schwab gave the example of a contractor who wanted to retain 7%. This bill would say that he could not do that. He could only withhold 5%. So basically the state is telling me how much retainage I can withhold in my contract? Bill said that was correct. You can retain 5% or less but not more than 5%. Bill said that the state was protecting people who might tend to be abused.

Representative Schwab asked why not put it in the contract that the bill must be paid in 45 days. Bill replied that the subcontractor was not in a position to bargain that since he is paid by the general contractor, not the owner.

Representative Tietze asked about the 10.4% of the subcontractors that got none or only part of their retainage funds. Why don't they get their funds? Bill said the reason might be that the money no longer exists because it was used for cost overruns, change orders or under financing.

Representative Kerschen asked if the retainage costs were being added to the contract price. Bill said that might occur in good times but during downturns they would not because they would lose the business.

CONTINUATION SHEET

Minutes of the House Commerce And Labor Committee at 9:00 a.m. on February 11, 2009, in Room 784 of the Docking State Office Building.

Ken Keller, American Subcontractors Association, appeared as a proponent of **HB 2238** (Attachment 3). He said that the legislation would bring Kansas into the 21st century in regard to retainage laws. Kansas retainage law is antiquated and needs to be changed. This bill will accomplish that.

Kurt Brack, American Subcontractors Association, appeared as a proponent of **HB 2238** (Attachment 4). He said that getting paid their retainage was one of the top concerns for subcontractors. He urged support of **HB 2238**.

Representative Kerschen asked if anyone paid retainage before it was due. Kurt said that it was rare for that to happen and usually on a very small project.

Representative Schwab asked if the best way to solve the non-payment of retainage was to file a lien even if the owner and general contractor are upset. Kurt said that the bank would have a mortgage filed on the project which was a substantial amount and your lien filing would come after the mortgage. So many times the lien is not worth the paper it is written on. Most of the time the subcontractor is not in position to bargain on these things.

Representative Grant asked how bad retainage nonpayment was in Kansas. Kurt said that the problem is rampant right now. This bill would change that.

Representative Gatewood asked if retainage withholding was more of a problem in bad times. Kurt said yes and the Kansas retainage rate of 10% was larger than their profit margin on the job. So if it is not paid they are losing money on the job.

Eric Stafford, Associated General Contractors, appeared as an opponent of **HB 2238** (Attachment 5). He said that Associated General Contractors had a great concern with the Legislature intruding in private contracts.

Representative Bethell asked when do you know that a job is complete. Eric said that it can vary depending on circumstances. Is there a reasonable amount of time with which we could say that the job is complete? Most of the time there is a clause in the contract that calls for substantial completion.

Representative Schwab said that if you don't pay the retainage you would probably end up in court. If we pass this bill and you don't pay the retainage, won't you still end up in court? So that doesn't change anything.

Representative Grange asked who pays the general contractor the money that he is withholding from the subcontractor? Eric said the owner pays the general contractor and the general contractor pays the subs. John said that this law will put the owner on notice that he must pay the general contractor who in turn pays the subcontractor.

Diane Gjerstad, Wichita Public Schools, appeared as an opponent of **HB 2238** (Attachment 6). She said that the legislature should not impose additional contractual constraints on public construction projects. School construction projects are time sensitive and it becomes very disruptive and expensive when jobs are not completed on time.

Representative Kerschen asked what level of retainage the school board used. Diane replied that it was 10%. She said that many times there were long punch lists that indicated that there was still a lot of work to be done after the certificate of occupancy was issued. We believe that 10% is reasonable to get the subcontractor to come back and finish the job.

Representative Brunk ask when that is done everybody gets paid? Diane said yes and that we actually paid as the work is completed so we are not withholding the entire amount.

Joe Waters, Johnson County, presented testimony in opposition to **HB 2238** (Attachment 7). He indicated that they had project types that are unique and require significantly different retainage structures in order to be successful. Johnson County believes that matters of prompt payment and penalties are already addressed thoroughly by statute and should not be included in **HB 2238**.

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Robert Vancrum, Blue Valley Schools, presented his testimony in opposition to **HB 2238** (Attachment 8).

He said that 5% retainage was not sufficient in cases where there was more than the usual punch list or if tear out and replacement was required. Then they would have to hire replacements and have a cost overrun.

Dan Morgan, Associated General Contractors, presented testimony in opposition to **HB 2238** (Attachment 9). He urged the committee not to report the bill out favorably for passage.

Representative Grange asked if there was nothing in this proposal that you would consider valid or that we should consider. He said that there was opposition to varying degrees to each part of the bill.

The Chairman closed the hearing on **HB 2238** and indicated that we would consider it again tomorrow morning.

The next meeting is scheduled for February 12, 2009.

The meeting was adjourned at 10:30 a.m.