

2010 Legislature Changes Prompt Payment and Alternative Delivery Statutes

by Wyatt Hoch

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During the waning days of their 2010 session, Kansas legislators passed important amendments to our private and public prompt payment statutes. The changes are aimed at increasing project cash flow to contractors, and apply to all Kansas design and construction contracts executed after July 1, 2010. The four most-important changes are:

5% limit on retainage. The industry-standard 10% retainage has been cut in half to 5% at all levels, with only 2 exceptions. First, at the time of contracting the owner, architect, or “general contractor” (for its subcontractors) may determine a higher rate of retainage (up to 10%) is required to ensure performance of the contract. Second, retainage may be increased (again up to 10%) during performance if both the owner *and* architect find the general contractor or subcontractor (1) is not meeting the contract terms; (2) is behind schedule; or (3) is performing shoddy work.

“Alternate security” in lieu of retainage. The prime contractor and its subcontractors may *eliminate all retainage* on their work by posting, before commencing work, an irrevocable letter of credit, certificate of deposit, cash bond, or “other type of asset” of a value greater than or equal to the retainage. The upstream party has the right to choose the type of security and, presumably, the conditions on which that security can be accessed.

Authorization for early release of retainage on private projects. The statutes now mandate the release of retainage to subcontractors when the owner, prime contractor, and architect or engineer determine the subcontractor has satisfactorily-completed its work and that retainage can be released without risk or additional cost to the prime or owner. The sub’s retainage must be requested and paid as part of the next payment cycle.

150% limit on value of incomplete work. The private-projects statute now mirrors the public statute’s mandate for the release of retainage within 30 days after substantial completion. But both statutes now limit at 150% of value the retainage for incomplete subcontractor work if the incomplete work is not due to the fault of the subcontractor. They inexplicably do not say what happens to retainage when the sub *is* at fault for not completing its work prior to substantial completion.

The legislature also amended the alternative project delivery building construction procurement statutes (K.S.A. § 19-2166b for counties and § 72-6760d for school districts). The changes clarify that the selection committee’s interviews with prospective firms should occur in executive session. All other discussions and actions in the selection process must be held in an open meeting. The new statute enables hospital districts to use either design-build or CM at-risk delivery for their construction projects.

Big Changes Coming to Lien Laws? The legislature is considering sweeping revisions proposed by the AGC to the commercial subcontractor lien and statutory bond statutes—effective next July. Watch for more information on the proposed changes in a future issue alert.

For Further Information

Foulston Siefkin regularly counsels clients on issues relating to construction law. If you are interested in additional information regarding this Issue Alert, or if you have questions about how this new legislation may impact you, call Wyatt Hoch at (316) 291-9769 or email him at whoch@foulston.com. Mr. Hoch’s training in architecture and experience in construction place him in a unique position to counsel architects, engineers, and contractors. His practice includes design and construction contract drafting and consulting, claim negotiation, and dispute resolution in both arbitration and court settings on a nationwide basis. Mr. Hoch enjoys Martindale-Hubbell Law Directory’s highest “AV” rating for lawyers and is listed in the Best Lawyers in America. Mr. Hoch serves as the lead attorney for the firm’s construction law practice. For additional information on the Firm, please visit our website at www.foulston.com. Information contained in this bulletin has been prepared for general information purposes only and is not legal advice.