

March 9, 2012

ACTION IS BRISK ON CONSTRUCTION RELATED BILLS AS KANSAS' MAJOR ISSUES MOVE SLOWLY

The half-way point in the Kansas legislative session has now passed with action on major items like the state budget, tax reform, reapportionment, school finance, KPERS and renewal of STAR bonds moving at a much slower rate than expected. That portends a very busy, and likely protracted, second half of the session with possible fireworks along the way. Movement on several construction related bills of interest has been fairly brisk, however, and an overview of those measures follows.

IMMIGRATION BILLS

The Builders' Association and Kansas City Chapter, AGC provided testimony in opposition to [HB 2492](#) and [HB 2577](#) in hearings before the House Federal and State Affairs Committee on February 15 and 16. Both measures would have required contractors and other businesses to affirm their enrollment and good faith participation in the e-verify program with respect to all new employees on public contracts of \$5,000 or more and contained severe penalty provisions for failure to do so. Both bills provided for contract suspension or termination and debarment from further public contracts as well as liquidated damage provisions ranging from 10 percent to 25 percent of the total value of the contract. The associations took a neutral position on [HB 2575](#) which provides that the state shall enroll and actively participate in e-verify for verification of employment status of all state employees whose employment commences after January 1, 2013.

[House Bill 2578](#) deals with the unlawful concealing, harboring or shielding of an alien and verification of citizenship status, and [HB 2576](#) deals with local enforcement of federal immigration laws. Two companion bills, [HB 2712](#) and [SB 399](#), supported by the agricultural community and other industry groups, would establish the Kansas Business, Workers and Community Partnership Act and authorize the secretary of labor to develop and administer a program to support noncriminal undocumented aliens who, in lieu of detention or deportation by the federal government, seek authorization from the federal government to work for certain eligible businesses in the state. The subject of immigration will likely be taken up once again by the House committee in the coming week.

COMPETITIVE BID PROTECTION ACT

The Builders' Association and KC Chapter, AGC testified in opposition to [HB 2515](#), as originally drafted, in a January 26 hearing before the House Commerce and Economic Development Committee. In its original form, the bill would have effectively disqualified contractors from doing public works construction in the state who are signatory to collective bargaining agreements that contain subcontracting restrictions. Language has been drafted and amended into the bill on the House floor to address that issue and the bill has now been referred to the Senate Ways and Means Committee. The Builders' Association and KC Chapter, AGC support and will continue to advocate for free and open competition on public works projects without regard to contractors' labor policy.

REMOVING SUNSET ON REGENTS' ALTERNATIVE DELIVERY AUTHORITY

The Builders' Association and KC Chapter, AGC have advised legislators of our support for [House Bill 2429](#) which would eliminate the June 30, 2012 sunset date for the state educational institution project delivery construction procurement act. Originally approved in 2009, this act, among other things, authorized the state board of regents to establish an alternative project delivery program under which construction management at-risk procurement processes may be utilized for state educational institution construction projects that are exclusively funded by non-state moneys. While most such construction projects and services are procured on a design-bid-build basis, there are occasions when construction management services better meet the needs of state educational institutions. To address such instances, the act required the state board to establish a state educational institution procurement committee to review and approve or deny requests for the utilization of alternative project delivery. When considering whether alternative delivery is appropriate for a given project, the procurement committee considers such things as whether its use would result in substantial savings of time or money, whether there is a need to overlap the design and construction phases on the project and whether use of an accelerated schedule is needed to make repairs in an emergency situation. If the procurement committee finds that the project does not qualify for alternative project delivery methods, then the construction services for such project shall be obtained pursuant to competitive bids and all contracts for construction services shall be awarded to the lowest responsible bidder.

The use of alternative delivery is not intended as a substitute for awarding public contracts by competitive bidding to the lowest responsible bidder. Rather, it is meant to provide a good alternative in appropriate circumstances and only after a determination has been made that it is in the public interest to use an alternative method of delivery. State agencies, counties and school districts currently have this ongoing authority in Kansas. HB 2429 was approved by the House (123-0) on February 22 and is now in the Senate Education Budget Committee.

MAKING MISCLASSIFICATION OF EMPLOYEES A FELONY

[Senate Bill 285](#) was heard by the Senate Judiciary Committee on February 9. The bill provided that, upon a second or subsequent violation, any person found to have knowingly and intentionally misclassified an employee as an independent contractor shall be guilty of a severity level 10 felony (instead of the current class C nonperson misdemeanor penalty). The Builders' Association and KC, AGC advised committee members that misclassification cases often turn on sophisticated legal judgments as to whether the alleged employer exercises sufficient control over the activities of an individual for that person to be deemed an "employee" as opposed to an "independent contractor." Subjecting employers, who make good faith but incorrect judgments about where that line should be drawn, to felony charges would be an extraordinary and unwarranted extension to criminal law. Having not been introduced by or referred to one of the few Senate committees that are exempt from deadlines, this measure has died in committee for failure to meet the February 24 deadline for consideration of bills in their house of origin.

70 PERCENT KANSAN WORKFORCE ON STAR BOND PROJECTS

Senate Bill 318 was heard by the Senate Commerce Committee on February 9. The Builders' Association and KC Chapter, AGC provided testimony in opposition to this proposal which would require any contractors entering into a state contract of \$100,000 or more, or performing work on a STAR bond project, to have their workforce, and their subcontractors' workforces, made up of at least 70% Kansans. Such a preference for Kansas workers would not only hurt those contractors located near state lines who may not have a workforce made up of 70% Kansas residents, it would also hurt Kansas contractors and subcontractors who would like to compete for similar work in neighboring states. Preference laws in one state are generally countered with the adoption of "reciprocal" preference laws in neighboring states. Reciprocal preferences generally impose the same restrictions in favor of their residents and such reciprocal laws would make it virtually impossible for Kansas contractors to compete for state funded work in neighboring states. We have a long history of opposing preference laws wherever and whenever they are proposed because open competition across state lines and across the boundary lines of political subdivisions within a state is essential to the building construction industry and other industries as well. Finally, we opposed SB 318 because it would restrict competition on such state contracts. This bill and a companion bill in the House, **HB 2463**, both died in committee for failure to meet the February 24 "turnaround" deadline mentioned above.

TRESPASS AND LIABILITY

The Builders' Association and KC Chapter, AGC has advised the Judiciary committees in both houses of the legislature of our support for **House Bill 2106**. Heard on February 8 in House Judiciary and on March 6 in the Senate committee, this measure would enact the Trespasser Responsibility Act. The bill provides that a possessor of land does not owe a duty of care to a trespasser and is not liable for injury to a trespasser, except under certain circumstances set out in the bill. In Kansas, as in most other states, land possessors generally owe no duty of care to trespassers and are not liable for their injuries, with limited exceptions. These rules have existed for decades and are based on the principle that land possessors are entitled to the free enjoyment of their land. The American Law Institute's (ALI) latest Third Restatement of Torts seeks to upend the traditional approach, however, by recommending that courts should impose a broad new duty on land possessors to exercise reasonable care for all entrants on their land, including unwanted trespassers. The only exception to the proposed new duty rule would be for injuries to so-called "flagrant trespassers", a term not defined in state tort law. The ALI's new Restatement of Torts has been characterized as a powerful new tool for trial lawyers and the new duty rule for land possessors has been described as one of the "top 10" provisions in the new Restatement that will benefit trial lawyers. HB 2106 is designed to arrest the expansion of duty rules for land possessors in Kansas before it happens. Our concern, of course, is the potential for expanded liability for contractors.

EMPLOYMENT SECURITY

Senate Bill 352 remains alive having been "blessed" by referral to the deadline-exempt Senate Ways and Means Committee. Among other things, this bill provides that an employee would be ineligible to receive Unemployment Insurance (UI) benefits if there was a violation of an employer's written alcohol or drug policy that was known to the employee and if adherence to the policy was a requirement of employment. Under current law, there is employee misconduct if: alcohol or drugs are used on the job; the employee was impaired; or, there was a positive alcohol or drug test. In certain

circumstances, an individual's absences from work or lateness also would be classified as employee misconduct. An individual would not receive benefits if that person commits misconduct after informing the employer of the person's intention to quit. If an individual commits fraud relating to UI benefits, the length of time that person would be prohibited from receiving benefits would increase from one year to two years. The bill also would repeal the current prohibition placed on the Secretary of Labor from employing persons who are politically active. The ban on the political activity of UI employees also would be repealed, as well as the corresponding misdemeanor imposed upon that activity.

Another employment security bill, [House Bill 2638](#), was passed (85-39) as amended in the House on February 23 and has been recommended "do pass" by the Senate Commerce Committee. When calculating weekly UI benefits, the bill would delete the requirement that holiday pay be included. If an employee received a single lump-sum separation or severance payment, then weekly UI benefits would be postponed for a time commensurate with the number of weeks of compensation the lump sum would represent. For new employers who start businesses in rate year 2014, the bill would reduce the UI contribution rate from 4.0 percent to 2.7 percent of wages paid. The rate for employers in the construction industry who are ineligible for an experience rate would continue to pay the statutory rate of 6.0 percent. As a condition for employers to receive reduced rates in rate year 2014 and subsequent years, employers would be required to file all reports and pay all contributions by January 31 of each year. However, the condition would not apply to employers if the average high cost multiple of the Employment Security Trust Fund's balance, as of July 31 of each year, falls below 1.0. Under the current high cost multiplier of 1.2, the UI Trust Fund is estimated to have sufficient funds to pay benefits for 1.2 years.

OTHER BILLS OF INTEREST

Experience Requirements for Specialty Contractors – [House Bill 2666](#) was passed by the House (114-10) on February 23 and referred to the Senate Local Government Committee on February 29. This bill was introduced at the request of an informal group of code enforcement officials, business owners, elected government officials, technical educators and wholesale suppliers and designed to address issues of common concern. As amended, the bill would require cities or counties that required the licensing of plumbers, electricians and HVAC contractors to verify applicants' respective documented proof of minimum experience necessary in order to receive a journeyman or master certificate. Typically, two years of field experience is required before a person may receive a journeyman license and an additional two years is required before qualifying for master certification.

Extending STAR Bond Authority for Certain Projects – [House Bill 2561](#) was heard by the House Commerce and Economic Development Committee on February 10 but remains in committee at this time. Having been originally referred to the deadline-exempt Taxation Committee, the bill has been blessed and remains a live bill. Under current law, the STAR Bonds Financing Act is set to expire on July 1, 2012. HB 2561 would extend the sunset provision until July 1, 2017 for the Manhattan Discovery Center project and the Schlitterbahn project in Wyandotte County.

Liability for Alleged Defects in Used Equipment – [House Bill 2629](#) was passed by the House (114-10) on February 23 and heard by the Senate Judiciary Committee on

March 6. This measure would amend the Kansas Product Liability Act to provide that a retail seller of used products would not be subject to liability in a claim arising from an alleged defect in a product if the seller establishes the product was resold after use by a consumer or other product user and was sold in substantially the same condition as when it was acquired for resale. An exception would exist for a claim arising out of intentional misrepresentation, an alleged breach of an express or implied warranty, or intentional concealment or nondisclosure of a condition known to the seller.

Deductions from Wages – House Bill 2581 would prohibit an employer from deducting any amount from an employee’s wages either directly or indirectly for the purpose of making a contribution to any political committee. The bill also specifies that a wage deduction is authorized when it is in writing, freely given by the employee, and obtained without intimidation, or fear of discharge or other disciplinary action for failure to permit the deduction. This bill has died in the House Commerce and Economic Development Committee having failed to be passed in its house of origin prior to the turnaround deadline.

Accident Prevention and Workplace Inspections – Senate Bill 355 remains alive having been blessed by referral to the deadline-exempt Senate Ways and Means Committee. Among other things, this bill would require insurance companies or group funded self-insured plans that provide workers compensation coverage to provide accident prevention programs to their covered employers at no cost to the employer. Current law requires accident prevention services to be provided to employers at their request. The availability of accident prevention services also would be noted on group funded self-insured certificates. Insurance companies or group-funded self-insured plans would report information about their accident prevention services to the Director of Industrial Safety and Health instead of the Director of Workers Compensation as currently provided by statute. The bill also would repeal the Secretary’s power to enter private business establishments for the purposes of gathering facts, statistics, and workplace safety inspections and would clarify that employers covered by federal Occupational Safety and Health Act (OSHA) are exempt from state inspections.

Small, Minority and Woman-owned Businesses – House Bill 2450 would, among other things, create the Kansas Small, Minority, and Women-Owned Business Development Program within the Department of Commerce. This program would: develop a comprehensive plan to provide opportunities for participation by such qualified businesses in public works; identify any barriers to equal participation by such qualified businesses in all state agency and postsecondary educational institution contracts; establish annual overall goals for participation by such qualified businesses for each state agency and postsecondary educational institution to be administered on a contract-by-contract basis or on a class-of-contracts basis; and develop and maintain a central small, minority, and women-owned business certification list for all state agencies and postsecondary educational institutions. This bill was heard in the House Commerce Committee on February 20 but has died in committee for failure to meet the turnaround deadline.

Roofing Contractor Registration Act – House Bill 2554 would enact the Kansas Roofing Registration Act. The bill would require that the Attorney General develop rules, regulations, applications, and approval and suspension procedures for certification of professional roofers. Renewal of the certification would be required every two years at a cost no greater than \$500. Any person who fails to obtain a valid registration certificate

or acts as a roofing contractor while his or her registration is suspended or revoked would be liable for a civil penalty of not more than \$10,000 per violation. After a suspension, the first certification renewal fee would double in cost and be charged along with a reinstatement fee. The bill also includes provisions for handling complaints, appeals, investigations, examinations and other procedures. This bill was heard in the House Commerce Committee on February 9 but has died in committee for failure to meet the turnaround deadline.