

June 8, 2012

## KANSAS END OF SESSION REPORT

*After a total of 99 days, including a record-setting 26-day veto session, the 2012 Kansas legislative session was adjourned on Sunday evening, May 20. The 2012 session was highlighted by the adoption of a massive income tax reduction package that is summarized immediately below. As usual, many bills affecting the commercial building construction industry were also considered and summaries of some of the more important proposals follow. Please note that all of the following legislation that was signed into law shall become effective on July 1, 2012.*

### MAJOR INCOME TAX CHANGES SIGNED INTO LAW IN KANSAS

Governor Sam Brownback approved a number of significant new tax law changes in Kansas when he signed [Senate Substitute for House Bill 2117](#) into law on May 22. Aimed at spurring economic development in the state, this new law will cut individual income tax rates for 2013 and totally eliminate income taxes on certain non-wage business income for the owners of 191,000 Kansas businesses. The business tax break targets the owners of LLC's, Subchapter-S Corporations, and sole proprietorships, allowing them to avoid taxes on earnings that they currently have to report as individual income tax filers. The new law also decreases income tax rates for all individual taxpayers by eliminating the current three-bracket rate structure for individual income taxes (i.e., 3.5, 6.25, and 6.45 percent) and replacing it with a two-bracket system with rates of 3.0 and 4.9 percent for 2013. The standard deductions claimed by single heads of household and for married couples filing jointly will also increase, from \$4,500 to \$9,000 and from \$6,000 to \$9,000 respectively. Those changes are offset by eliminating numerous tax deductions, credits and other breaks. The overall tax reduction is estimated to be around \$800 million annually beginning in 2014 and total some \$4.5 billion over six years. By comparison, the state's individual income taxes brought in \$2.7 billion in 2011.

The Substitute for HB 2117 contained many tax reform provisions of [Senate Bill 339](#), a proposal recommended by the governor at the start of the 2012 session. Some of the provisions of the governor's plan which were removed from this new law by the Senate Assessment and Taxation Committee were the proposed repeal of credits relating to historic preservation and to angel investor contributions, the proposed repeal of itemized deductions and the proposal to maintain the state sales tax rate at 6.3 percent on and after July 1, 2013 rather than reduce it to 5.7 as currently scheduled and as promised two years ago when the sales tax rate was increased to address a budget shortfall.

The substitute bill's evolution was somewhat strange and very controversial. Concerned about the cost of the bill, the Senate had killed it (20-20) on March 21. Just hours later, and at the personal request of the governor, the Senate voted to reconsider the measure and passed it (29-11) in hopes of keeping the overall tax reform debate alive and negotiating a less costly tax cut package in conference committee. On May 9, however, House members came to the conclusion that the conference committee negotiations were failing and, amid great controversy and acrimony, voted to concur with the larger tax cut package that the Senate had previously killed, resurrected and passed.

Governor Brownback then indicated that he would sign the bill, but also encouraged lawmakers to keep working toward a compromise that was less costly to the state. In the end, no compromise was reached and the governor signed the bill into law.

### **STAR BOND AUTHORITY EXTENDED TO 2017**

Given the volume of major issues facing the Kansas Legislature during the veto session, there was real concern that legislators might not get to legislation that would extend Sales Tax and Revenue (STAR) Bond authority beyond the current July 1, 2012 sunset date. Fortunately, that concern was addressed when the House of Representatives concurred with the Senate's prior action to "gut" the provisions of a capital improvements appropriations bill and substitute the extension of STAR Bond authority in [Senate Substitute for House Bill 2382](#) on the final day of the session and the governor signed the bill into law on May 31. The substitute bill extends this authority until July 1, 2017. STAR bonds allow developers to pay certain project costs with state and local sales taxes generated at tourism destinations and are credited with helping the state secure major projects such as the Kansas Speedway, Livestrong Sporting Park and a stadium for MLS team Sporting Kansas City. About \$81 million in STAR bonds will support a 60-acre, \$580 million project called Prairiefire at Lionsgate in Overland Park and a proposed mixed-use development at Shawnee Mission Parkway and Johnson Drive called Mission Gateway is seeking more than \$60 million in STAR bond support. The new law also provides that "A city that created a redevelopment district in an eligible area that was approved for STAR bonds prior to the effective date of this act for the city of Manhattan Discovery Center on December 28, 2006, and the Schlitterbahn project in Wyandotte county on December 23, 2005, may by ordinance elect to have the provisions of this act applicable to such redevelopment district."

### **ALL IMMIGRATION BILLS STALL**

As previously reported, 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 immediate contract suspension or termination and debarment from further public contracts for violations. In addition, HB 2492 imposed liquidated damages of up to 10 percent and HB 2577 imposed liquidated damages of up to 25 percent of the total value of the contract for violations. There were no protections in either bill for inadvertent errors committed by subordinate personnel and unknown to the principals of the business entity when made.

The associations did not weigh in on [House Bill 2578](#) which dealt with the unlawful concealing, harboring or shielding an alien and verification of citizenship status or on [HB 2576](#) which dealt with local enforcement of federal immigration laws. Nor did the associations address two companion bills, [HB 2712](#) and [SB 399](#), which were supported by the agricultural community and other industry groups and would have established the Kansas Business, Workers and Community Partnership Act and authorized 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 associations took a neutral position on the one immigration bill that made it out of committee this session, [HB 2575](#). That measure provided 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. HB 2575 remained on general orders in the House as the session ended. Finally, an amendment added to an appropriations bill on the House floor that would have required those performing contracts with state agencies of \$50,000 or more to verify their and their subcontractors' good faith participation in e-verify in 2013 was stripped out in conference committee.

## **COMPETITIVE BID PROTECTION ACT APPROVED**

Adoption of the Competitive Bid Protection Act took a very circuitous route through the legislative process but was ultimately approved in the form of [Senate Substitute for House Bill 2157](#) and signed into law on May 25. Originally introduced as [House Bill 2515](#), the intent of this legislation was to prevent governmental entities in Kansas from mandating the use of project labor agreements on their projects. As previously reported, the Builders' Association and KC Chapter, AGC testified in opposition to the original drafting of HB 2515 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 was drafted to address our concern and amended into the bill on the House floor. The Senate Ways and Means Committee later struck all of the competitive bid provisions of HB 2515 and made it an appropriations bill that was subsequently ruled materially altered by the House and referred to the House Appropriations Committee where it remained when the session ended. The amended version of [House Bill 2515](#) was, however, amended into the Senate Substitute for HB 2157 which itself had previously been an act relating to the apportionment of business income by certain taxpayers but which was also gutted and made a vehicle for the Competitive Bid Protection Act and other language creating a three percent bid preference for motor vehicles assembled in Kansas and purchased by the state. The Builders' Association and KC Chapter, AGC support free and open competition for all contractors on public works projects without regard to their labor policy.

## **SUNSET REMOVED ON REGENTS' ALTERNATIVE DELIVERY AUTHORITY**

The Builders' Association and KC Chapter, AGC advised legislators of our support for [House Bill 2429](#) which eliminated the June 30, 2012 sunset date for the state educational institution project delivery construction procurement act. The governor signed HB 2429 into law on March 30. Originally approved in 2009, this act authorized the state board of regents to establish an alternative project delivery program under which construction management at-risk procurement processes may be utilized, if appropriate, for state educational institution construction projects that are exclusively funded by non-state moneys. Most such construction projects are procured on a traditional design-bid-build basis but there are occasions when construction management services better meet the needs of state educational institutions. To address those situations, 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 delivery methods, then the construction services for such project are obtained pursuant to competitive bids and all contracts for construction services are awarded to the lowest responsible bidder. The sunset on authority to use alternative delivery on appropriate Regents' projects will be eliminated as a result of the adoption of HB 2429.

## **PREFERENCE FOR KANSAN WORKFORCE ON STAR BOND PROJECTS**

The Builders' Association and KC Chapter, AGC provided testimony in opposition to [Senate Bill 318](#) which would have required 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. That is because the adoption of a preference law in one state is generally countered by the adoption of "reciprocal" preference laws in neighboring states. Other states' reciprocal preference laws generally impose the same level of preference in favor of their resident contractors as any competing nonresident contractors' states might impose against out-of-state contractors competing for work in their states. Historically, we have opposed 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 have restricted competition on such state contracts. This bill and a companion bill in the House, [House Bill 2463](#), both died in committee for failure to meet the February 24 "turnaround" deadline for consideration in their house of origin.

## **STRICT LIABILITY AVOIDED IN SALES OF USED EQUIPMENT**

[House Substitute for Senate Bill 83](#) was passed unanimously by the House (121-0) and the Senate (40-0) on May 9 and signed into law on June 1. Originally introduced to address the temporary employment of retired judges, SB 83 was stripped of that language and many of the provisions of [House Bill 2629](#) were amended into the House substitute. This new law amends 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 one of three conditions: (1) the seller is tax-exempt under section 501(c)(3) of the Internal Revenue Code; (2) the product liability claim is for strict liability in tort; or (3) the seller resold the product after it was previously used, it was sold in substantially the same condition as it was in when acquired for resale, the manufacturer of the defective product is subject to service of process under Kansas law or the law of the domicile of the claimant, and any judgment against the manufacturer would be reasonably certain of being satisfied. Adoption of this new law eases some of the concern associated with recent attempts to hold sellers of used equipment strictly liable for damages caused by such used equipment.

## **WORKERS COMP AND EMPLOYMENT SECURITY**

Although no significant changes were made in the areas of workers compensation and employment security law this session, there was action on [House Substitute for Senate Bill 416](#), which dealt with both, until the final day when the Senate voted not to adopt the conference committee report on the bill. Among many other things, this bill would have required 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. It would have repealed the Secretary of Labor's power to enter private business establishments for the purposes of gathering facts, statistics, and workplace safety inspections and clarified that employers covered by federal Occupational Safety and Health Act (OSHA) are exempt from state inspections. On the employment security side, the bill would have deleted the requirement that holiday pay be included when calculating weekly unemployment insurance (UI) benefits and made it discretionary to include either vacation or holiday pay in the calculation, depending upon whether it was attributable to a week for which the individual claimed benefits. If an employee received a single lump sum separation or severance payment, then weekly UI benefits would be postponed for a period of 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 have reduced 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. In addition, the State Employment Security Advisory Council would have been abolished. The Council is appointed by the Labor Secretary to provide advice on the administration of the UI system. There is no limit to the size of the Council, and an equal number of persons representing employers and employees is required, plus representatives of the general public.

## **TRESPASS AND LIABILITY**

As previously reported, the Builders' Association and KC Chapter, AGC advised the Judiciary committees in both houses 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 have enacted the Trespasser Responsibility Act. The bill provided 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. As in most other states, land possessors in Kansas 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 Restatement Third 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 was 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. While the [Substitute for House Bill 2106](#) was approved on a 119-5 vote in the House the bill stalled in the Senate Judiciary Committee. The provisions of HB 2106 were later amended into [House Substitute for Senate Bill 160](#) by the House Judiciary Committee

but, unfortunately, were not included in the final conference committee report on that measure which was passed.

## **EXPERIENCE REQUIREMENTS FOR SPECIALTY CONTRACTORS**

**House Bill 2666** was passed by the House (114-10) on February 23, passed by the Senate (40-0) on March 15 and signed into law on March 28. 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 requires cities or counties that require 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.

## **OTHER BILLS OF INTEREST**

**Making Misclassification of an Employee a Felony – Senate Bill 285** 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 legislators 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 died in committee for failure to meet the February 24 deadline for consideration of bills in their house of origin.

**Deductions from Wages - House Bill 2581** would have prohibited 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 specified 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. HB 2581 died in the House Commerce and Economic Development Committee having failed to be passed in its house of origin prior to the turnaround deadline.

**Proposed Small, Minority and Woman Owned Business Development Act - House Bill 2450** would have, among other things, created the Kansas Small, Minority, and Women-Owned Business Development Program within the Department of Commerce. This program would have been required to: 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. HB 2450 was heard in the House Commerce Committee on February 20 but died in committee for failure to meet the deadline for consideration in the house of origin. A companion bill, [Senate Bill 268](#), was referred to the Senate Commerce Committee, but did not receive a hearing.

**Proposed Roofing Contractor Registration Act - [House Bill 2554](#)** provided that no person shall engage in the business of or act in the capacity of a roofing contractor with the state without having a valid registration certificate and would have required the Attorney General to develop rules, regulations, applications and approval and suspension procedures for certification of professional roofers. Any person failing to obtain a valid registration certificate or acting 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. This bill was heard in the House Commerce Committee on February 9, but died in committee for failure to meet the deadline for consideration in the house of origin.