

## **KANSAS REGULAR SESSION ENDS; RETAINAGE BILL PASSED**

*The Kansas Legislature's 2010 regular session ended shortly after midnight on March 31 with neither house having passed a budget proposal for FY 2011, which starts on July 1. That will be the primary focus of the upcoming veto session which is scheduled to convene on April 28. New general revenue estimates are expected on April 16 and leadership has elected to delay action on a budget until they know how large the budget shortfall is going to be. Projections are between \$400 and \$500 million. Governor Mark Parkinson has called for a one cent increase in the state sales tax and an increase in tobacco taxes while Senate leaders have called for approximately \$300 million in new taxes and \$100 million in cuts and House leaders hope to balance the budget through spending cuts and no sales tax increase. In the end, it is likely that we will see a state budget that incorporates both spending cuts and some increase in the state sales tax rate. Should a sales tax increase be passed, staff has already provided the revisor of statutes with language that would exempt binding construction contracts entered into prior to the effective date of the increase.*

### **RETAINAGE CHANGES APPROVED**

The conference committee report on [Substitute for Senate Bill 377](#) was adopted by the House (66-53) and the Senate (40-0) on March 30. This measure amends the retainage provisions of both the Fairness in Private Construction Contract Act of 2005 and the Fairness in Public Construction Contract Act of 2007. As amended in conference committee the bill provides that:

- Retainage shall not exceed 5% of the value of the contract or subcontract unless the owner or contractor determines that a higher rate of retainage is required to ensure performance of the contract. Retainage, however, shall not exceed 10% of the value of the contract or subcontract;
- An owner shall release all remaining retainage on any undisputed payment due to a contractor on a construction project within 30 days after substantial completion of the project; however, if any contractor or subcontractor is still performing work on the project, an owner may withhold that portion of the retainage attributable to such work until 30 days after such work is completed;
- An owner may withhold not more than 150% of the value of incomplete work, provided that the incomplete work is due to the fault of a contractor; a contractor may withhold not more than 150% of the value of incomplete work, provided that the incomplete work is due to the fault of a subcontractor; and, a subcontractor may withhold not more than 150% of the value of incomplete work that is the responsibility of another subcontractor, provided that the incomplete work is due to the fault of such other subcontractor. Any amounts retained for incomplete work shall be paid within 45 days after completion of the work as a part of the regular payment cycle;
- An "alternate security" is defined as an irrevocable bank letter of credit, certificate of deposit, cash bond or other type of asset or security of value equal to or exceeding the amount of retained funds (but specifically not a performance bond or a payment bond);
- Prior to commencement of work, a contractor or subcontractor may request an alternate security in lieu of retainage; and
- If a contractor or subcontractor requests the use of an alternative security in lieu of retainage the owner or contractor who would otherwise withhold the retainage shall have the right to determine which type of alternative security shall be accepted.

This retainage measure was originally introduced in the form of Substitute for HB 2238, a "carryover" bill from the 2009 session. That bill stalled in the Senate Judiciary Committee when a decision was made to send the proposal to the Kansas Judicial Council for study and recommendation. In response, the House Commerce and Labor Committee gutted the contents of the original SB 377 (which had dealt with home inspectors) and inserted the HB 2238 language which was then amended

in conference committee and adopted by both houses just prior to the close of the regular session. The bill now awaits the governor's signature.

## **STATE CONSTRUCTION REGISTRY**

Originally introduced as [Senate Bill 469](#), this proposal was heard by the Senate Judiciary Committee which voted to refer it to the Kansas Judicial Council as part of a comprehensive review of Kansas lien laws. The contents of this bill were subsequently amended into Substitute for SB 377, above, on the House floor before being stricken from that measure by a conference committee which wanted more time to review the proposal. SB 469 would require the Secretary of State to implement and maintain an online State Construction Registry for the purposes of filing and maintaining notifications by original contractors, subcontractors, and remote claimants ("remote claimants" have no contract directly with the original contractor and include sub-subcontractors and material suppliers to subcontractors). Original contractors would be allowed to file a "notice of commencement" with the State Construction Registry prior to, but no later than 15 calendar days after the commencement of physical construction work at the project site. The notice would include the name and address of both the owner of the project and any original contractor; the legal description of the real property or the street address, city, state, county, and zip code of the real property on which the construction or improvement is to be made; a brief description of the construction or improvement to be performed on the property; the date the owner first executed a contract with an original contractor for the construction or improvement; the name and address of the person preparing the notice of commencement; and a prescribed statement to remote claimants, subcontractors or suppliers that gives notice that labor or work is about to begin on the real property and that any remote claimant or subcontractor may preserve their lien rights by filing a "notice of furnishing" with the registry.

If any original contractor has filed a notice of commencement concerning a project for which a subcontractor or remote claimant has furnished labor, equipment, materials or supplies, such subcontractor or remote claimant may preserve their lien rights and ability to file a claim under a payment bond by filing a notice of furnishing within 21 days of furnishing labor, equipment, materials or supplies to the project. If the subcontractor or remote claimant does not file within that time period, the subcontractor or remote claimant may file at a later date but the subcontractor or remote claimant's lien rights would only be effective from the date of the filing of the notice of furnishing. Finally, if no notice of commencement has been filed on the project by an original contractor then no notice of furnishing is required of a subcontractor or remote claimant in order to preserve their lien rights or ability to file a claim under a payment bond.

## **DEBATE ON REPEAL OF SALES TAX EXEMPTIONS POSTPONED**

On March 16, the House voted to postpone discussion on [House Bill 2549](#) until the veto session, but not before stripping the bill of most of the repealer language contained in the bill. As HB 2549 came out of the House Taxation Committee it would have added about \$170 million to the state general fund by eliminating sales tax exemptions on residential utilities and religious organizations, among many other things. The largest portion of that amount (nearly \$140 million) would have come from eliminating the current sales tax exemption on residential utilities. It remains to be seen how the elimination of certain sales tax exemptions might fit into the final budget package.

## **ALTERNATIVE DELIVERY FOR HOSPITALS**

[Substitute for Senate Bill 513](#) was approved by the House of Representatives (122-0) on March 19 and signed by the governor on March 31. As originally introduced, SB 513 amended a 2008 law that permits boards of county commissioners to use either the "construction management at risk" or "design-build" method of delivery on county building construction projects in order to also permit the use of these alternative delivery methods on county and district hospital projects in appropriate circumstances. The bill also provided that prequalified firms shall be interviewed in executive session,

allowing the competing firms to present their proposed team members, qualifications, project plan and to answer questions, so that each firm's proprietary and financial information is protected and so that no competing firm obtains unfair advantage. All other discussion and any actions taken in the selection process shall be conducted in an open meeting. A second bill, SB 514, also required selection committees to interview each of the competing firms in executive session. SB 514 was merged with the provisions of SB 513 by the Senate Federal and State Affairs Committee on February 11 and the substitute bill was approved by the full Senate (39-0) on February 25. Staff provided testimony in support of both of these bills.

## **BIDDING PREFERENCE BILLS**

The Association opposed companion bills in the House and Senate which would have required bids from contractors domiciled outside the state of Kansas to be at least 5% lower than the lowest bid received from a contractor domiciled within the state in order for the non-Kansas bidder to be awarded a construction contract. [House Bill 2690](#) died in the House General Government Budget Committee for failure to meet the deadline for consideration of bills in the house of origin. [Senate Bill 526](#) remains in the deadline-exempt Senate Ways and Means Committee.

## **ECONOMIC DEVELOPMENT BILL APPROVED**

[Senate Substitute for Substitute for House Bill 2538](#), an important new economic development measure, has been passed and is on its way to the governor. This bill expands the 2009 Promoting Employment Across Kansas (PEAK) program in a variety of ways. That program authorizes a diversion of employee withholding taxes under certain circumstances to qualified companies or third parties performing services on behalf of such companies. New substantive definitions are added and some existing terms redefined. "Expanding business" would be defined generally to include existing business operations in Kansas that are proposing projects that would provide unique economic development opportunities and may be at significant risk of being located outside the state. The current definition of "metropolitan county" would add Leavenworth County to the current statutory list of Douglas, Johnson, Sedgwick, Shawnee and Wyandotte counties. The existing definition of "new employee" also would be expanded to include persons located to Kansas from another country, as well as from another state. Under the 2009 law, companies must relocate all of their facilities and employment to Kansas in order to qualify to retain a portion of the company's payroll withholding taxes. The bill relaxes that requirement so that a company would be eligible if it relocated or expanded a portion of its business operations into the state. An existing Kansas business that relocated or expanded within the state also would be made eligible; however, that business would not be able to claim a tax benefit until after January 1, 2012. A current requirement that employees must be compensated at a rate equivalent to at least 100 percent of the county average wage is changed so that the qualifying compensation is at least 100 percent of the county "median" wage. Qualified companies will be eligible to retain 95 percent of the employees' withholding taxes if the median wage paid to the new employees is equal to or greater than 100 percent of the median wage paid in the county. Companies qualifying for PEAK under the 2009 law are prohibited from also participating in a separate withholding tax diversion program, the IMPACT Program. This bill relaxes that restriction so that companies could qualify for both programs, but not relative to the same employees.

## **TAX CREDITS GET "HAIRCUT"**

The conference committee report on [Senate Bill 430](#) was approved by the House (111-8) and Senate (40-0) on March 30 and now awaits the governor's signature. SB 430, as amended, makes several changes to 2009 legislation which was designed to provide a 10 percent "haircut" for various income tax credits. This bill makes a number of technical corrections involving the distinction between "refundable" and "nonrefundable" credits relative to the 10 percent reduction for tax years 2009 and 2010 and clarifies the tax treatment of certain credits. A refundable tax credit provides a refund to taxpayers of any amount of credit in excess of their liability. A nonrefundable credit does not allow

taxpayers to claim a refund to the extent of any excess credit beyond their liability. It also repeals a specific \$3.75 million cap for FY 2011 that had been imposed on historic preservation income tax credits. New language clarifies that the portion of angel investor tax credits that had been subject to the haircut provisions in tax years 2009 and 2010 could be carried forward to future tax years. The bill also makes needed statutory amendments needed for Kansas to remain in national compliance with the streamlined sales tax act. The original bill was requested for introduction by the Department of Revenue which advised that the 10 percent haircut legislation approved in the 2009 session was intended to list all nonrefundable credits in subsection (a) of KSA 2009 Supp. 79-32,264; and all refundable credits in subsection (b).

## RESOLUTIONS OF INTEREST

**Senate Concurrent Resolution 1625** encourages the federal government to accelerate the construction and operation of the National Bio and Agro-Defense Facility (NBAF) in Manhattan, Kansas and to provide research, testing, and evaluation to secure the nation's food supply and agricultural economy. The resolution also urges Congress to provide funding for the construction of the NBAF and to move quickly to sell the Plum Island Animal Research Center (off the northeast coast of Long Island in New York state), the location of the previous facility. The resolution was approved by the Senate (40-0) on February 10 and the House Transportation and Public Safety Budget Committee recommended that it be adopted as amended on March 29.

**Senate Concurrent Resolution 1626** is on General Orders in the Kansas Senate. This proposition would amend the Kansas Constitution by adding a new Article 16 designed to preserve the freedom of Kansans to provide for their health care. The resolution incorporates model language from the American Legislative Exchange Council's (ALEC) model legislation, "Freedom of Choice in Health Care Act" which, reportedly, has been filed or announced in 35 states. A similar resolution, **House Concurrent Resolution 5032**, has been introduced in the Kansas House of Representatives. If approved by two-thirds of the members of the Senate and two-thirds of the members of the House of Representatives, the proposed constitutional amendment would be submitted to voters at the November 2010 general election unless a special election is called at a sooner date by a concurrent resolution of the Legislature.