

## SUMMARY OF 2010 KANSAS LEGISLATIVE SESSION

*Having adopted a controversial new sales tax increase and a major new transportation plan, the Kansas legislature adjourned its veto session on the afternoon of May 11. The big news of the session was the approval of a tax bill that will increase the state sales tax rate by one percent, from 5.3% to 6.3 % for the next three years. The sales tax rate will then drop to 5.7%, with the remaining .4% dedicated to transportation projects. The 8.2 billion dollar transportation package provides a minimum of \$8 million dollars to each of Kansas' 105 counties over the next ten years for roads, bridges and other transportation needs. Following are brief summaries of bills of particular interest to our industry:*

### EXISTING CONSTRUCTION CONTRACTS EXEMPT FROM TAX INCREASE

The Builders' Association and Kansas City Chapter, AGC staff worked with AGC of Kansas and others to protect contractors with existing contracts from unanticipated increased cost due to the sales tax increase and provided the following language which was amended into **Senate Substitute for House Bill 2360**: ***"If any contractor has entered into a written binding contract prior to May 1, 2010, for the original construction, reconstruction, restoration, remodeling, renovation, repair or replacement of a building, facility or residential structure, or for the construction, reconstruction, restoration, replacement or repair of a bridge or highway, the state sales tax applicable to such contracts shall be remitted at the rate in effect prior to the state sales tax increase scheduled to take effect on July 1, 2010, if the contractor gives notice and proof of such contract to the director of taxation on or before July 10, 2010, which notice and proof shall be in such form and of such sufficiency as the director shall prescribe."***

Staff will meet with Kansas Department of Revenue officials on June 7 to review "notice and proof" requirements and will advise you of them at our earliest opportunity.

On another positive note, The Builders' Association and KC/AGC joined a coalition of business groups to successfully lobby the legislature to remove language from the bill which would have eliminated the deduction for "qualified production activities" under Internal Revenue Code Section 199. Such activities include the building and renovation of commercial properties, as well as engineering and architectural services. Governor Mark Parkinson signed this bill on May 27 and it takes effect on July 1.

### RETAINAGE BILL SIGNED

Governor Parkinson signed **Substitute for Senate Bill 377** on May 19. The new law takes effect on July 1. 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 in the following ways:

- 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 measure is an amended version of [Substitute for House Bill 2238](#) which stalled when the Senate Judiciary Committee decided to send the proposal to the Kansas Judicial Council for study and recommendation. While the provisions of HB 2238 were later inserted in SB 377 and passed, this subject matter has been recommended for further study by the Judicial Council which establishes advisory committees to review specific areas and make recommendations for needed improvement. The Judicial Council then reviews the recommendations, makes appropriate changes, and forwards the recommendations to the Kansas Legislature for consideration and approval.

## **CONSTRUCTION REGISTRY BILL ALSO SENT TO JUDICIAL COUNCIL**

The Senate Judiciary Committee also voted to refer [Senate Bill 469](#) to the Judicial Council for study and recommendation to the 2011 Kansas Legislature. The primary elements of this proposal include the following:

- The Secretary of State would be required to maintain an online State Construction Registry for the purposes of filing and maintaining notifications by original contractors, subcontractors, and remote claimants (“remote claimants” include sub-subcontractors and material suppliers to subcontractors);
- Original contractors would be allowed to file a “notice of commencement” (NOC) 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 NOC 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;
- The NOC must include 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; and

- 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.

## **COMPREHENSIVE REVIEW OF KANSAS LIEN LAWS ALSO PLANNED**

It is important to note that the Senate Judiciary Committee has also asked the Kansas Judicial Council to perform a thorough review of Kansas lien laws and to recommend needed changes. This will be a much more comprehensive study than those mentioned above and recommendations to the Legislature are not expected until the 2012 legislative session at the earliest. Staff has been in touch with the Council and will monitor developments.

## **ALTERNATIVE DELIVERY FOR HOSPITALS**

**Substitute for Senate Bill 513** was signed by the governor on March 31 and takes effect on July 1. This new law amends 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. It also provides that prequalified firms shall be interviewed in executive session so that each firm's proprietary and financial information is protected and so that no competing firm obtains unfair advantage. SB 513 was amended by the Senate Federal and State Affairs Committee to provide that prequalified construction management firms competing for school district work shall also be interviewed in executive session and to clarify that all other discussion and any action taken in the selection process shall be held in an open meeting. Current law does not provide for the use of design-build procurement on school district projects. Staff provided testimony in support of both of these bills.

## **ECONOMIC DEVELOPMENT BILL SIGNED**

**House Bill 2554** was signed into law on May 17 and takes effect on July 1. This measure 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 are redefined. "Expanding business" is 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. Leavenworth County is added to the current statutory list of "metropolitan counties" which now includes Douglas, Johnson, Sedgwick, Shawnee and Wyandotte counties.

The existing definition of "new employee" is 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 relocates or expands a portion of its business operations into the state. An existing Kansas business that relocates or expands 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 has been changed so that the qualifying compensation is at least 100 percent of the county "median" wage.

Qualified companies would 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. The bill also makes technical corrections to the State's Economic Revitalization and Reinvestment Act to clarify that either wind or solar energy businesses are eligible for the issuance of bonding for certain qualified development or manufacturing projects.

The conference committee agreed to amend the bill with most of the contents that were contained in [Senate Substitute for Substitute for House Bill 2538](#) which was vetoed by the Governor on April 15.

## **CERTAIN TAX CREDITS TRIMMED**

[Senate Bill 430](#) was signed by the governor on April 19 and took effect on April 29. This bill, 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 statutory amendments necessary 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).

## **UNEMPLOYMENT COMPENSATION**

[House Bill 2676](#) was signed into law on March 22 and took effect on April 1. Passed by unanimous vote in both houses, this new law amends the Employment Security Law regarding contribution rates, penalties, and interest. The bill provides that for calendar years 2010 and 2011 the charge for contributing employers in rate groups 1 through 32 will be that of the 2010 original tax rate computation table. Contributing employers in rate groups 33 through 51 are capped at a 5.4 percent contribution rate. Employers have 90 days past the due date to file their contribution without being charged interest for the first three quarters of each of the two years.

The new law requires the Secretary of Labor to determine the interest payments for the following tax year on any planned or received borrowing from the federal government to maintain Unemployment Insurance Trust Fund solvency. The interest payment assessment rate would be imposed on all employers and would be a flat percentage of each employer's current tax rate. If the amounts collected are in excess of the interest due to the federal government, the moneys would be maintained in the Employment Security Interest Assessment Fund to be used to pay interest in future years. The Employment Security Interest Assessment Fund is established in statute for the sole purpose of paying any interest the state would owe to the federal government for maintaining the solvency of the Unemployment Security Trust Fund.

Maximum weekly benefits are established for any qualified individual at the amount determined by the Secretary of Labor on July 1, 2009 or the maximum weekly benefit determined by the Secretary on July 1, 2010, whichever is less for fiscal year 2011. For fiscal year 2012, the amount determined on July 1, 2010 or the amount determined on July 1, 2011, whichever is

less, would be the amount of maximum benefit allowed. The unemployment weekly payment for the waiting week is deferred until after December 31, 2011. The number of rate groups for negative account employers is increased from ten groups to nineteen groups. In addition, the maximum surcharge would be increased from 2.0 percent to 3.8 percent on top of the maximum rate of 5.4 percent.