

# MISSOURI AND KANSAS PROMPT PAY AND RETAINAGE LEGISLATION

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# MISSOURI PROMPT PAY AND RETAINAGE LEGISLATION

- Missouri Timeline
  - 1990 - Missouri Prompt Pay Act - *Public Jobs*  
R.S.Mo. Section 34.057
  - 1995 - Missouri Prompt Pay Act - *Private Jobs*  
R.S.Mo. Section 431.180
  - 2002 - Missouri Retainage Act - *Private Jobs*  
R.S.Mo. Section 436.300

# 1990 MISSOURI *PUBLIC* CONSTRUCTION PROMPT PAY ACT - R.S.MO. 34.057

- KEY POINTS

- 1. Applies To *Public Works* Contracts
- 2. Owner Pays Within 30 Days
- 3. Retainage Shall Not Exceed 5%
  - Unless Owner and Architect/Engineer Determine Higher Rate (Not To Exceed 10%) Is Required To Ensure Performance
- 4. Owner May Reduce Or Eliminate Retainage Early If Contractor's Work Is Proceeding Satisfactorily
  - Less 200% of Value Of Minor Incomplete Work

# 1990 MISSOURI *PUBLIC* CONSTRUCTION PROMPT PAY ACT R.S.MO. 34.057

## • KEY POINTS

- 5. Owner To Pay Retainage 30 Days After Substantial Completion And Acceptance
  - Less 200% Value Of Minor Work Incomplete
- 6. Owner Has To Pay 18% Interest To Contractor On Late Payments
  - Payment Must Be “Due” Contractor
- 7. Contractor To Pay Subcontractors and Suppliers Within 15 Days Of Receipt Of Payment from Owner
  - When Owner Does Not Pay Application In Full, Pro Rata Pay To Subcontractors/Suppliers Or Withhold From Breaching Subcontractors/Suppliers And Pay Other Subcontractors/Suppliers In Full

# 1990 MISSOURI *PUBLIC* CONSTRUCTION PROMPT PAY ACT R.S.MO. 34.057

- **KEY POINTS**

- 8. Contractor Has To Pay 18% Interest On Late Payments To Subcontractors
  - Payment Must be “Due” To Subcontractors/Suppliers
  - Also Applies To Lower-Tier Subcontractors And Suppliers
- 9. Owner May Withhold Pay To Contractor - Only In “Good Faith”
  - LDs - Unsatisfactory Progress - Defective Work- Disputed Work - Contract Noncompliance - Reasonable Evidence Of Third Party Claims - Failure Timely To Pay For Labor/Materials - Damages - Violation Of The Law - Reasonable Evidence That Cannot Complete For Unpaid Contract Balance
  - In Such Case, No 18% Interest Owed

# 1990 MISSOURI *PUBLIC* CONSTRUCTION PROMPT PAY ACT R.S.MO. 34.057

- KEY POINTS

- 10. Contractor May Withhold Pay From Subcontractors/Suppliers Or Not Include Their Work In Contractor's Pay Application - Only In "Good Faith"
  - See 9. Above
  - In Such Case, No 18% Interest Owed
- 11. If Payments "Not Withheld In Good Faith For Reasonable Cause" Court May Also Assess Reasonable Attorney Fees Against Owner Or Contractor That Withheld Funds

# 1990 MISSOURI *PUBLIC* CONSTRUCTION PROMPT PAY ACT R.S.MO. 34.057

- KEY POINTS

- 12. Court May Award Attorney Fees If Plaintiff Or Defendant Asserted Claims Or Defenses Under Missouri Prompt Pay Act “Frustratingly Or In Bad Faith”
- 13. R.S.Mo 34.058 – Invalidates “no damage for delay clause” in public works contracts (excludes MoDOT)
- Five Years Later .....

# 1995 MISSOURI *PRIVATE* CONSTRUCTION PROMPT PAY ACT R.S.MO. 431.180

- KEY POINTS

- 1. Applies To *Private* Design and Construction Contracts
- 2. Parties Must “Make All Scheduled Payments Pursuant To The Terms Of The Contract”
- 3. Court may Assess 18% Interest And Reasonable Attorney Fees If Party Fails To Pay As Scheduled
- 4. An Arbitrator Is Also Entitled To Make Such An Interest And Attorney Fees Award
- 5. R.S.Mo § 431.183 – pay when paid clause no defense to mechanic’s lien claim

Seven Years Later....

# 2002 MISSOURI *PRIVATE* CONSTRUCTION RETAINAGE LEGISLATION - R.S.MO. 436.300

- KEY POINTS

- 1. Applies Only To *Private* Construction Contracts
- 2. Effective For All Private Construction Contracts Entered Into After August 28, 2002
- 3. Applies To All Owner, Contractors and Subcontractors And Suppliers At All Lower Tiers
- 4. Establishes New Provisions and Restrictions On The Withholding Of Retainage
  - Owner must release retainage within 30 days after substantial completion less 150% of cost to complete punchlist items

# 2002 MISSOURI *PRIVATE* CONSTRUCTION RETAINAGE LEGISLATION - R.S.MO. 436.300

- KEY POINTS

- 5. Retainage Shall Not Exceed 10%
  - Owner Can Withhold More If Contractor's Performance Is Unsatisfactory
- 6. Retainage Held "In Trust" For Benefit Of Subcontractors And Suppliers Who Are Not In Default
- 7. Establishes Contractor's Right To Escrow "Acceptable Security" In Lieu Of Owner Withholding Retainage
  - Only If Contractor Not In Default
  - Upon Contractor's Written Request

# 2002 MISSOURI *PRIVATE* CONSTRUCTION RETAINAGE LEGISLATION - R.S.MO. 436.300

- KEY POINTS

- 8. Escrow Tender May Be Made Before Or After Retainage Withheld
  - If Before, Owner Releases Retainage To Extent Of Security
  - If After, Owner Releases Retainage Within 5 Days Of Tender
- 9. Contractor Is Entitled To Receive Interest Or Income Earned On Security Deposited In Lieu Of Owner Withholding Retainage
- 10. Subs Have Like Right To Tender Security Into Escrow In Exchange For Contractor's Release Of Retainage

# 2002 MISSOURI *PRIVATE* CONSTRUCTION RETAINAGE LEGISLATION - R.S.MO. 436.300

- KEY POINTS

- 11. “Acceptable Security” Which May Be Escrowed In Lieu Of Owner Withholding Retainage

Includes:

- CDs Issued By National Banking Association Or Banking Corporation In Missouri
- Retainage Bond Issued By Surety Authorized To Issue Surety Bonds In Missouri
- Irrevocable And Unconditional Letter Of Credit Issued By National Banking Association Or Banking Corporation in Missouri

# 2002 MISSOURI *PRIVATE* CONSTRUCTION RETAINAGE LEGISLATION- R.S.MO. 436.300

- KEY POINTS

- 12. 18% interest And Attorney Fees May Be Awarded By Court If Retainage Is Improperly Withheld
- 13. An Arbitrator Is Also Entitled To Make Such An Interest and Attorney Fees Award
- How Have other States Handled This In The *Public* Arena? Is The Missouri Legislature Likely To Extend This Legislation Into The *Public* Sector?

## OTHER JURISDICTIONS WHICH HAVE ENACTED *PUBLIC* WORKS ESCROW RETENTION LEGISLATION

- 33 STATES IN THE USA HAVE PASSED STATUTES PERMITTING CONTRACTORS TO ESCROW “ACCEPTABLE SECURITIES” IN LIEU OF THE *PUBLIC* OWNER WITHHOLDING RETAINAGE
  - Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, Wyoming.

# KANSAS ESCROW RETENTION LEGISLATION

- K.S.A. SECTION 75-6909 (1999)
  - 1. Applies Only To “*Public* Improvement Projects”
  - 2. Contracts Must Be At Least \$1,000,000 For This Act To Apply
  - 3. Contractor May Make Escrow Request
  - 4. Contractor To Establish Escrow Account At Permitted Banking Institution

# KANSAS ESCROW RETENTION LEGISLATION

- K.S.A. SECTION 75-6909 (1999)
  - 5. Owner Shall Enter Into “Appropriate” Escrow Agreement With Contractor And Bank
  - 6. Owner And Contractor Shall Sign Escrow Agreement
  - 7. Contractor To Pay Escrow Fees
  - 8. Escrow Agreement Shall State That Escrowed Funds Are Returned To Owner On Contractor Default

# KANSAS ESCROW RETENTION LEGISLATION

- **K.S.A. SECTION 75-6909 (1999)**
  - 9. “Acceptable Security” Includes T-Bills, T-Bonds, T-Notes, CDs
  
  - **NOTE: ACT DOES NOT EXTEND TO SUBCONTRACTORS AND SUPPLIERS ON KANSAS PUBLIC PROJECTS.**

# KANSAS FAIRNESS IN PRIVATE CONSTRUCTION CONTRACT ACT

(KSA 16-1801, et seq.)

(Signed into law by Governor Sebelius  
on April 18, 2005)

# What does the Act cover?

- “Construction” means furnishing labor, equipment, material or supplies used or consumed for the design, construction, alteration, renovation, repair or maintenance of a building, structure, road, bridge, water line, sewer line, oil line, gas line, appurtenance or other improvement to real property, including any moving, demolition or excavation
- Contract for private construction entered after the effective date of the Act
- Non-residential – the Act does not apply to single-family housing or multi-family housing of 4 units or less.

# INVALIDATES

- (1) WAIVER OF RIGHT TO RESOLVE DISPUTES THROUGH LITIGATION IN COURT OR SUBSTANTIVE OR PROCEDURAL RIGHTS BUT CONTRACT MAY REQUIRE ARBITRATION OR ADR
- (2) WAIVER OF MECHANIC'S LIEN CLAIMS EXCEPT TO THE EXTENT OF THE AMOUNT OF PAYMENT RECEIVED
- (3) WAIVER OF SUBROGATION EXCEPT FOR LOSSES PAID BY WRAP-UP, OCIP OR PROJECT MANAGEMENT PROTECTIVE LIABILITY INSURANCE PROGRAMS

# MECHANIC'S LIENS AND PAY IF OR

Any provision in a contract for private construction providing that a payment from a contractor or subcontractor to a subcontractor is contingent or conditioned upon receipt of a payment from any other private party, including a private owner, is no defense to a claim to enforce a mechanic's lien or bond to secure payment

# PAYMENT TERMS

- Owner to pay “undisputed” amounts within 30 days.
- 18% late interest
- Contractor statutory “stop work” remedy – 7-day notice (14 days)
- Contractor to pay within 7 business days of receipt of payment
- 18% late interest
- Flow down – subcontractors and lower tiers
- Subcontractor statutory “stop work” remedy – 7-day notice (14 days)

# RETAINAGE

- 10% Retainage Cap
- 18% late interest

# ATTORNEY'S FEES

- Awarded to prevailing party
- Suits – County where property is located
- Arbitration may award attorney's fees

# **KANSAS FAIRNESS IN PUBLIC CONTRACT (KSA 16-1901)**

(Signed into law by Governor Sebelius  
on April 20, 2007)

# What does the Act cover?

- Construction contract with public owner
- Owner – public entity that holds ownership interest
- Public entity – state, political subdivisions, cities, counties, state universities or colleges, school districts, special districts, joint agreement entities, public authorities, public trusts, nonprofit corporations and other organizations operating with public money for public good
- Act does not apply to KDOT projects

# INVALIDATES

- Waiver of right to sue (exception: agreement for arbitration valid)
- Waiver of payment/performance bond rights
- Waiver of subrogation (exceptions: wrap-ups, project management protective liability or builder's risk policies)
- No damage for delay

# Payment Terms (By Owner)

- Payment due within 30 days (or 45 days due to extenuating circumstances)
- Architect/Engineer to review Payment Applications within 7 days
- 18% late interest

# Payment Terms (By Contractor)

- Contractor to pay subcontractors/suppliers within 7 days of receipt of payment from Owner
- 18% late interest

# RETAINAGE

- 5% or not to exceed ...
- 10% if Owner and Architect/Engineer determine higher rate required to ensure performance
- Release retainage within 30 days of substantial completion
- Owner may continue to hold portion of retainage attributable to subcontractors still working
- Owner may withhold 150% of cost to complete
- 18% interest accrues on unpaid retainage
- Early release of retainage prior to substantial completion for subcontractor if Owner, Contractor and Architect/Engineer determine no risk to Owner

# Stop Work Rights

- Contractor and Subcontractors – notice to stop work after 7 business days additional notice after payment is due

# Attorneys' Fees

- Court or arbitrator shall award attorneys' fees to prevailing party
- Venue – project location

