The Law Offices of David Bransdorfer • 8102 Fulton Street East • Ada, Michigan 49301
Phone: (616) 682-5155 • Email: info@bransdorfer.net

Notice Regarding Citation of these Laws

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The Kansas "Little Miller Act"

Kansas Statutes, Chapter 16, Contracts and Promises, Article 19, Kansas Fairness in Public Construction Contract Act, sections 16-1901 through 16-1908

Chapter 60, Civil Procedure, Article 11, Liens for Labor and Material, sections 60-1110 & 60-1112

Chapter 68, Roads and Bridges, Part I, Roads, Article 5, County and Township Roads, sections 68-410, 68-521 and 68-527a

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Chapter 16.--CONTRACTS AND PROMISES
Article 19.--KANSAS FAIRNESS IN PUBLIC CONSTRUCTION CONTRACT ACT

16-1901. Title; rights and duties not waivable or varied under terms of contract.

(a) K.S.A. 16-1901 through 16-1908, and amendments thereto, shall be known and may be cited as the Kansas fairness in public construction contract act.

(b) The rights and duties prescribed by this act shall not be waivable or varied under the terms of a contract. The terms of any contract waiving the rights and duties prescribed by this act shall be unenforceable.

16-1902. Definitions. As used in this act:

(a) "Construction" means furnishing labor, equipment, material or supplies used or consumed for the design, construction, alteration, renovation, repair or maintenance of a building, water or waste water treatment facility, oil line, gas line, appurtenance or other improvement to real property, including any moving, demolition or excavation of a building. "Construction" shall not mean the design, construction, alteration, renovation, repair or maintenance of a road, highway or bridge.

(b) "Contract" means a contract or agreement concerning construction made and entered into by and between an owner and a contractor, a contractor and a subcontractor or a subcontractor and another subcontractor.

(c) "Contractor" means a person performing construction and having a contract with an owner of the real property or with a trustee or agent of an owner.

(d) "Owner" means a public entity that holds an ownership interest in real property.

(e) "Public entity" means the state of Kansas, political subdivisions, cities, counties, state universities or colleges, school districts, all special districts, joint agreement entities, public authorities, public trusts, nonprofit corporations and other organizations which are operated with public money for the public good.

(f) "Retainage" means money earned by a contractor or subcontractor but withheld to ensure timely performance by the contractor or subcontractor.

(g) "Subcontractor" means any person performing construction covered by a contract

between an owner and a contractor but not having a contract with the owner.

(h) "Substantial completion" means the stage of a construction project where the project, or a designated portion thereof, is sufficiently complete in accordance with the contract, so that the owner can occupy or utilize the constructed project for its intended use.

(i) "Undisputed payment" means payments which all parties to the contract agree are owed to the contractor.

16-1903. Public construction contracts; payment provisions; provisions against public policy, void, unenforceable; failure to pay.

(a) Subject to the provisions of subsections (b), (c), (d), (e), (f), (g), (h) and K.S.A. 16-1904 and 16-1905, and amendments thereto, all owners, contractors and subcontractors, who enter into a contract for public construction after the effective date of this act, shall make all payments pursuant to the terms of the contract.

(b) The following provisions in a contract for public construction shall be against public policy and shall be void and unenforceable:

(1) A provision that purports to waive, release or extinguish the right to resolve disputes through litigation in court or substantive or procedural rights in connection with such litigation except that a contract may require nonbinding alternative dispute resolution as a prerequisite to litigation;

(2) a provision that purports to waive, release or extinguish rights to file a claim against a payment or performance bond, except that a contract may require a contractor or subcontractor to provide a waiver or release of such rights as a condition for payment, but only to the extent of the amount of payment received; and

(3) a provision that purports to waive, release or extinguish rights of subrogation for losses or claims covered or paid by liability or workers compensation insurance except that a contract may require waiver of subrogation for losses or claims paid by a consolidated or wrap-up insurance program, owners and contractors protective liability insurance, or project management protective liability insurance or a builder's risk policy.

(c) All contracts for public construction shall provide that payment of amounts due a contractor from an owner, except retainage, shall be made within 30 days after the owner receives a timely, properly completed, undisputed request for payment according to terms of the contract, unless extenuating circumstances exist which would preclude approval of payment within 30 days. If such extenuating circumstances exist, then payment shall be made within 45 days after the owner receives such payment request.

(d) The architect or engineer of record or agent of the owner shall review, approve and forward undisputed requests for payment to the owner within seven business days of receipt from the contractor.

(e) If the owner fails to pay a contractor within the time period set forth in subsection (c), the owner shall pay interest computed at the rate of 18% per annum on the undisputed amount to the contractor beginning on the day following the end of the time period set forth in subsection (d).

(f) A contractor shall pay its subcontractors any amounts due within seven business days of receipt of payment from the owner, including payment of retainage, if retainage is released by the owner, if the subcontractor has provided a timely, properly completed and undisputed request for payment to the contractor.

(g) If the contractor fails to pay a subcontractor within seven business days, the contractor shall pay interest to the subcontractor beginning on the eighth business day after receipt of payment by the contractor, computed at the rate of 18% per annum on the undisputed amount.

(h) The provisions of subsection (g) shall also apply to all payments from subcontractors to their subcontractors.

16-1904. Retainage; release and withholding thereof; failure to pay.

(a) An owner, contractor or subcontractor may withhold no more than 10% retainage from the amount of any undisputed payment due.

(b) An owner must release the retainage on any undisputed payment due on a construction project within 30 days after substantial completion of the project; however, if any subcontractor is still performing work on the project under its subcontract, an owner may withhold that portion of the retainage attributable to such subcontract until 30 days after such work is completed.

(c) If an owner, contractor or subcontractor fails to pay retainage, if any, pursuant to the terms of a contract for public construction or as required by this act, the owner, contractor or subcontractor shall pay interest to the contractor or subcontractor to whom payment was due, beginning on the first business day after the payment was due, at a rate of 18% per annum.

(d) Nothing in this section shall prevent early release of retainage if it is determined by the owner, the contractor and the project architect or engineer, that a subcontractor has completed performance satisfactorily and that the subcontractor can be released prior to substantial completion of the entire project without risk or additional cost to the owner or contractor. Once so determined, the contractor shall request such adjustment in retainage, if any, from the owner as necessary to enable the contractor to pay the subcontractor in full, and the owner shall, as part of the next contractual payment cycle, release the subcontractor's retainage to the contractor, who shall, as part of the next contractual payment cycle, release such retainage as is due to the subcontractor.

16-1905. Suspension of performance, when.

If any undisputed payment is not made within seven business days after the payment date established in a contract for public construction or in this act, the contractor and any subcontractors, regardless of tier, upon seven additional business days' written notice to the owner and, in the case of a subcontractor, written notice to the contractor, shall, without prejudice to any other available remedy, be entitled to suspend further performance until payment, including applicable interest, is made. The contract time for each contract affected by the suspension shall be extended appropriately and the contract sum for each affected contract shall be increased by the suspending party's reasonable costs of demobilization, delay and remobilization.

16-1906. Action or arbitration to enforce act; costs; venue. In any action to enforce K.S.A. 16-1903, 16-1904 or 16-1905, and amendments thereto, including arbitration, between a contractor and subcontractors or subcontractors and subcontractors, the court or arbitrator shall award costs and reasonable attorney fees to the prevailing party. Venue of such an action shall be in the county where the real property is located and under Kansas law. The hearing in such an arbitration shall be held in the county where the real property is located.

16-1907. Provisions waiving right to collect damages for delays, void, unenforceable. Any provision in a contract that purports to waive the rights of a party to the contract to collect damages for delays caused by another party to the contract shall be void, unenforceable and against public policy. This provision is not intended to create a contract between parties where a contract did not otherwise exist.

16-1908. Scope. The provisions of the Kansas fairness in public construction contract act

shall not apply to construction projects which are required to comply with section 109 of the Kansas department of transportation special provisions to the standard specifications, 1990 edition (90P-205-R6) or any subsequent editions.

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Chapter 60.--PROCEDURE, CIVIL
Article 11.--LIENS FOR LABOR AND MATERIAL

60-1110. Bond to secure payment of claims. The contractor or owner may execute a bond to the state of Kansas for the use of all persons in whose favor liens might accrue by virtue of this act, conditioned for the payment of all claims which might be the basis of liens in a sum not less than the contract price, or to any person claiming a lien which is disputed by the owner or contractor, conditioned for the payment of such claim in the amount thereof. Any such bond shall have good and sufficient sureties, be approved by a judge of the district court and filed with the clerk of the district court. When bond is approved and filed, no lien for the labor, equipment, material or supplies under contract, or claim described or referred to in the bond shall attach under this act, and if when such bond is filed liens have already been filed, such liens are discharged. Suit may be brought on such bond by any person interested but no such suit shall name as defendant any person who is neither a principal or surety on such bond, nor contractually liable for the payment of the claim.

60-1111. Public works bond.

(a) *Bond by contractor.* Except as provided in this section, whenever any public official, under the laws of the state, enters into contract in any sum exceeding $100,000 with any person or persons for the purpose of making any public improvements, or constructing any public building or making repairs on the same, such officer shall take, from the party contracted with, a bond to the state of Kansas with good and sufficient sureties in a sum not less than the sum total in the contract, conditioned that such contractor or the subcontractor of such contractor shall pay all indebtedness incurred for labor furnished, materials, equipment or supplies, used or consumed in connection with or in or about the construction of such public building or in making such public improvements.

A contract which requires a contractor or subcontractor to obtain a payment bond or any other bond shall not require that such bond be obtained from a specific surety, agent, broker or producer. A public official entering into a contract which requires a contractor or subcontractor to obtain a payment bond or any other bond shall not require that such bond be obtained from a specific surety, agent, broker or producer.

(b) *Filing and limitations.* The bond required under subsection (a) shall be filed with the clerk of the district court of the county in which such public improvement is to be made. When such bond is filed, no lien shall attach under this article. Any liens which have been filed prior to the filing of such bond shall be discharged. Any person to whom there is due any sum for labor or material furnished, as stated in subsection (a), or such person's assigns, may bring an action on such bond for the recovery of such indebtedness but no action shall be brought on such bond after six months from the completion of such public improvements or public buildings.

(c) In any case of a contract for construction, repairs or improvements for the state or a state agency under K.S.A. 75-3739 or 75-3741, and amendments thereto, a certificate of deposit payable to the state may be accepted in accordance with and subject to K.S.A. 60-1112, and amendments thereto. When such certificate of deposit is so accepted, no lien shall attach under

this article. Any liens which have been filed prior to the acceptance of such certificate of deposit shall be discharged. Any person to whom there is due any sum for labor furnished, materials, equipment or supplies used or consumed in connection with or for such contract for construction, repairs or improvements shall make a claim therefor with the director of purchases under K.S.A. 60-1112, and amendments thereto.

60-1112. Certificate of deposit authorized for state capital improvement projects.

(a) The director of purchases may accept a certificate of deposit payable to the state instead of any required surety bond from a bidder or contractor in the case of any contract for construction, repairs or improvements under K.S.A. 75-3739, 75-3741 or 60-1111 and amendments thereto. Each such certificate of deposit shall be in an amount which is at least equal to the contract price, shall be subject to forfeiture to the state and shall be in a form and under such other conditions as may be applicable and prescribed by the director of purchases for surety bonds and in accordance with this section.

(b) Each such certificate of deposit shall be retained by the state for at least six months after the final acceptance of the construction, repairs or improvements for which the contract was entered into. At the end of such period, the certificate of deposit may be endorsed back to the vendor or bidder if there are no claims by the state under the contract for which the certificate of deposit was accepted under this section or by any person making a claim against the certificate of deposit under subsection (c). All interest accruing under any such certificate of deposit shall belong to the bidder or contractor unless the certificate of deposit is forfeited to the state or as otherwise provided under subsection (c).

(c) (1) In any case of a breach of performance under a contract for construction, repairs or improvements for which a certificate of deposit was accepted under this section, the director of purchases shall determine the amount of money needed to remedy such breach and may set off the amount from the moneys on deposit under the certificate of deposit, after notice to the contractor of such breach and the amount determined by the director therefor.

(2) In any case of a claim against a certificate of deposit accepted under this section for labor furnished, materials, equipment or supplies used or consumed in connection with or for the contract for construction, repairs or improvements, the director of purchases may pay such claim from the moneys on deposit under the certificate of deposit if the contractor does not dispute such claim or the amount thereof. If the contractor disputes any such claim or the amount thereof, the director of purchases may interplead such claim or claims in the district court for a county where the construction, repairs or improvements are located. The director of purchases may file an original action to resolve such claim or claims, if necessary, and pay any moneys remaining from the certificate of deposit into the district court therefor.

Chapter 68.--ROADS AND BRIDGES
PART I.--ROADS
Article 4.--STATE HIGHWAYS

68-410. Contracts to be let to lowest responsible bidder; nonresidents; bonds in lieu of mechanic's liens; filing claim before actions on bond. All contracts for the construction, improvement, reconstruction, and maintenance of the highway system, the cost of which exceeds one thousand dollars ($1,000), except contracts between the secretary of transportation and the various counties, shall be awarded at a public letting to the lowest responsible bidder: *Provided, however,* That no contract for a single project or structure shall be divided into two or more contracts and awarded without public letting and to other than the lowest responsible bidder. The secretary shall adopt necessary rules and regulations covering the making and receiving of bids

and letting of contracts: *Provided,* That no contract shall be awarded to a nonresident individual, partnership or corporation unless the same has established a permanent office in the state of Kansas so that service can be had and taxes collected from said nonresident: *And provided further,* That the provisions of K.S.A. 16-113 shall not apply to contracts made by the secretary. The person or persons to whom a contract may be awarded shall give good and sufficient surety bond by a company authorized to do business in this state to be approved by the secretary, and filed with the secretary in such sum as the secretary shall fix, not less than the amount of such contract price, conditioned that such contractor will faithfully perform such contract in every respect and conditioned further that such contractor or contractors or subcontractor or subcontractors of said contractor or contractors shall pay all indebtedness incurred for supplies, materials or labor furnished, used or consumed in connection with or in or about the construction of the project for which the contract has been let, including gasoline, lubricating oils, fuel oils, greases, coal and similar items used or consumed and used directly in carrying out the provisions of the contract: *Provided,* That when such bond has been so approved by and filed with the secretary of transportation, no mechanic's lien shall attach by reason of the failure of the contractor or contractors or subcontractor or subcontractors of said contractor or contractors to pay for or make settlement for the items covered by this act: *Provided further,* That any person to whom there is due any sum for labor or material or for any item covered by this act or his or her assigns, may bring an action on said bond for the recovery of said indebtedness and said suit may be brought in any county in the state where any part of said contract has been performed: *Provided further,* That no such action shall be brought on said bond unless within six (6) months after the completion date of said contract, according to the records of the secretary of transportation, there be filed with the secretary an itemized statement of the amount of such indebtedness, which itemized statement must be sworn to and acknowledged before a notary public or other officer authorized to administer oaths: *Provided,* That no action shall be brought on said bond after one (1) year from the completion date of said contract: *Provided further,* The provisions of K.S.A. 60-1111 shall not apply to contracts made by the secretary of transportation.

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68-521. Letting of contracts; plans and specifications; publication notice; bids, surety; award; bond of contractor; duty of county attorney; inspection by engineer; roads damaged or destroyed by disaster.

(a) The board of county commissioners before awarding any contract for the construction, surfacing, repairing or maintaining of any road as provided in K.S.A. 68-520, and amendments thereto, when the county engineer's estimated cost of such improvement is more than $10,000, shall have the approved plans and specifications which have been adopted by order of the board for such work filed in the county clerk's office or in some other county office designated by the board at least 20 days prior to the time of the letting.

The county clerk or some other county officer designated by the board shall give not less than 20 days' notice of the letting by publication in at least two consecutive weekly issues of the official county paper, the first publication of such notice to be not less than 20 days prior to such letting. The notice shall specify with reasonable minuteness the character of the improvement contemplated, where it is located, the kind of material to be used, the hour, date and place of letting of such contract, when the work is to be completed, and invite sealed proposals for the same. Such other notice may be given as the board may deem proper. All bids shall be made on the proposal blanks furnished by the county, signed by the bidder, sealed and delivered, or sent by mail, by the bidder, or the agent or attorney thereof, to the county clerk or to some other

county officer designated by the board. The letting of all contracts shall be conducted in such manner as to give free, open competition, and all qualified bidders, shall be given an equal opportunity to bid upon the plans and specifications on file. Each bidder shall be required to accompany the submitted bid with a bid surety in an amount equal to 5% of the bid amount in the form prescribed by the board as a guarantee that, if the contract is awarded to the bidder, the bidder will enter into the contract with the board. If a bidder fails to enter into the contract when awarded to the bidder, the bid surety shall become the property of the county as its liquidated damages and shall be paid to the county treasurer for credit to the general fund of the county, and the board may award the contract to the next lowest responsible bidder. The bids shall be opened publicly by the board or a designee thereof at the place, date and hour named in the advertising notice, and all bids shall be considered, and accepted or rejected.

In case the work is let at such public letting or thereafter, the contract shall be awarded to the lowest responsible bidder, or the board, if it deems the proposals too high, may reject all bids, and readvertise the work as before. No such contract shall be let at an amount exceeding 110% of the county engineer's estimated cost of the work. No such contract shall be considered as awarded unless the contractor shall within 21 days after the letting enter into contract and shall give the bond required by K.S.A. 60-1111, and amendments thereto, and a performance bond to the county in a penal sum equal to the amount of the contract price, conditioned upon the faithful performance of the contract, payable to the county upon failure to comply with the terms of the contract. The contractor shall file with the county clerk the bonds, which shall be approved by the chairperson of the board and the county attorney by their signatures indorsed thereon.

(b) The provisions of subsection (a) shall not apply to contracts for the expenditure of county moneys for the reconstruction or repair of a road if:

(1) The road has been damaged or destroyed as a result of a disaster;

(2) the governor has declared the county, or that part of the county in which the road is located, a disaster area;

(3) the board of county commissioners finds that a hardship would result if the road is not immediately reconstructed or repaired;

(4) the board of county commissioners has obtained an estimate of the cost of the reconstruction or repair of the road from the county engineer. If there is no county engineer, the board shall obtain such estimate from the Kansas department of transportation; and

(5) the contract for the reconstruction or repair of the road is awarded within 60 days of the governor's declaration required by paragraph (2).

(c) The county attorney or county counselor shall meet with and advise the board of county commissioners in all matters pertaining to letting and making of all contracts under this act. The board may make partial payments, on the written estimate of its county engineer, upon any contract work as the same progresses, but not more than 95% of the estimate of the materials furnished and work done, or of the contract price, shall be paid in advance of the full and satisfactory completion of the contract. Final payment shall not be made on any such contract until the county engineer has inspected the work and certified in writing that it has been properly done and completed in accordance with the contract, plans and specifications, and the county engineer's certificate to that effect has been filed in the office of the county clerk or some other county officer designated by the board.

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68-527a. Settlement of disputes over maintenance, improvement or inspection of roads on county or township lines; district courts; appeal. Whenever a dispute arises over the maintenance, improvement and/or inspection of roads located on county lines or township

lines on designated county line roads as provided for in K.S.A. 68-507 and 68-527, the district court of the county in which the road is located shall have jurisdiction to hear and settle the dispute. If the decision involves a designated county line road, the district court of any county which adjoins such county line road shall have jurisdiction of and it shall be its duty to hear and settle the dispute. If an action is filed in more than one district court, the last action filed shall be dismissed on motion. Appeals to the supreme court may be taken from the decision of the district court.

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