

AIA LEGAL BRIEF – APRIL 2008

2008 Pending Construction Legislation – Kansas and Missouri

By: Bill Quatman, FAIA, Esq.
Shughart Thomson & Kilroy, P.C.

The Kansas and Missouri legislative sessions are in full swing and there are many bills pending that impact the architectural profession or the construction industry. Hot topics this year seem to be Alternative Project Delivery (mostly design-build), Sustainable Design for public projects, Toll Roads (how would you like to pay \$5.00 to drive I-70 from Kansas City to St. Louis?), Mechanic's Liens, Residential Contractor Warranties and Home Inspections, and Construction Contract Clauses. For the first time in a long time, there is very little pending dealing with professional licensure. The biggest news is, perhaps, the repeal of Fee Caps for architectural services in Kansas. See HB 2744, below.

Your representatives from AIA/Missouri and AIA/Kansas have taken positions for or against some of these bills, as have the contractor and engineering associations. If you have a strong opinion yea or nay on any pending bill, you can contact your own State Senator or State Representative to express your view, or contact your state AIA Component. A personal letter or, better yet, a personal visit to the State Capitol, is your way to actively participate in the legislative process. Bills that start with an "HB" are "House Bills" and those with an "SB" are Senate Bills.

For copies of any specific piece of legislation, or to track its progress, log onto the Missouri legislative web site at www.moga.mo.gov; or the Kansas legislature at www.kslegislature.org/legsrv-legisportal/index.do. The status of each bill as of the first of April 2008 is noted.

Missouri

Alternative Delivery.

SB 1. Modifies the bonding requirements for the 800-Bridges Design-Build Contract, which nobody could bond; applies to any design-build highway project contract that is designated as a "design-build-finance-maintain" project, and for which the contract with the design-builder exceeds 25 years. Bid or proposal bonds shall be in an amount not less than \$5,000,000. Performance bonds shall be in an aggregate amount of \$200,000,000 or 25% of the construction work cost, whichever is less. Payment bonds may be reduced to amount of the performance bonds. Contains an emergency clause.

8/24/2007 – Second reading in committee.

SB 752. Job order contracting for construction of public buildings. A firm, fixed price, competitively bid, indefinite delivery contract for small to medium, multi-traded maintenance or repair projects and minor new construction projects.

1/22/2008 Hearing Scheduled But Not Heard in Committee.

SB 793. Allows toll roads if a constitutional measure is passed by the Missouri voters. Toll facility projects to be constructed upon I-70 between St. Louis and Kansas

City. The commission is authorized to construct these toll facility projects with the *design-build* project delivery system (section 226.1205). The toll for traveling the entire length of Interstate 70 is capped at \$5.00 (indexed for inflation).

1/23/2008 – Committee Hearing Conducted.

HCS HB 1707. This substitute authorizes school districts to enter into design-build contracts for construction projects costing more than \$15,000. (AIA and CECMo oppose; Builders Assn. supports).

03/27/2008 - Perfected by Consent.

Accessible Design (Housing).

HB 2459. Creates laws relating to the design of affordable housing units. Requires accessible design features.

03/27/2008 - Read Second Time.

Construction Contracts.

SB 1077. Modifies Section 434.100, RSMo's anti-indemnity provisions. The general prohibition against indemnity agreements is expanded to specifically prohibit agreements to hold harmless the negligence of the other person's officers, employees, or agents. The current law only specifically prohibits agreements that hold harmless another person from that person's own negligence. The act modifies the additional insured exception by providing that the anti-indemnity prohibition does not apply to a party's promise to purchase project-specific insurance policies, other types of protective liability insurance policies, or builder's risk insurance. The act expands the definition of "construction work" and defines the terms "indemnify" or "hold harmless" as including any requirement to name the indemnified party as an additional insured in the indemnitor's insurance coverage for the purpose of providing an indemnification for any liability not otherwise allowed.

Voted "do pass" in Senate Committee 3/4/2008.

HB 2332. Voids any clause in a construction contract that requires a party to continue work or to continue to supply materials, labor, or services when the other party fails to make payments for work performed or materials supplied. Any provision of a contract stating that a party cannot suspend performance of contractual obligations when another party does not make prompt payments is also unenforceable and void against public policy. Parties cannot contract to permit, allow, or authorize a party to withhold or redirect payments otherwise due another party to the contract or to take possession of equipment, materials, appliances, property, or tools of another construction contract. Applies to construction contracts entered into after August 28, 2008.

03/04/2008 - Read Second Time.

Green/Sustainable Design.

SB 1100. After August 28, 2008, any state or local government building over 10,000 s.f. that is constructed or substantially renovated shall obtain certification under the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) Green Building Rating System, with some exemptions. Any exempted building shall comply with the LEED certification requirements as much as possible, but not to exceed the life cycle cost savings. The Department of Natural Resources shall promulgate rules to implement the provisions of the act and shall develop procedures to verify compliance with the act. This act is similar to SB 702 (2007).

3/6/2008 – Committee Hearing Conducted

SB 772. Creates a tax credit for expenses incurred in recycling construction waste, equal to 75% of the expenses incurred for recycling the construction waste. The tax credit is non-refundable and non-transferable but may be carried forward up to three subsequent tax years. The Department of Natural Resources shall administer the tax credit program and shall maintain a list of all taxpayers eligible for the tax credit. The total amount of tax credits issued in any year shall not exceed \$1,000,000 and the tax credit program shall sunset after 6 years. This act also directs the Department of Natural Resources to establish and administer a state-funded grant program for construction and demolition waste reduction.

No action since 1/10/2008. Stuck in Committee. (Second year).

SB 1263. Buildings and facilities that are constructed, purchased, leased, enlarged, or renovated with any portion of state funding or funding by a political subdivision shall meet the requirements of the 2006 International Energy Conservation Code (IECC), or the latest subsequent version of the IECC. The act requires that by January 1, 2009, the Department of Natural Resources shall modify the minimum energy efficiency standard for state buildings so that it is at least as stringent as the 2006 IECC rather than the current standard of American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE) Standard 90. Adds energy codes to the types of technical codes for which certain counties, fire protection districts, and municipalities currently have the authority to adopt by reference. Beginning in the 2009-2010 school year, every high school in the state shall ensure its students receive instruction in certain environmental-related topics around Earth Day each year. More provisions.

3/6/2008 - Hearing Conducted in House Committee.

SB 1117. Any appliance purchased with any portion of state funding shall be an Energy Star appliance under the Energy Star program by the U.S. Department of Energy and the Environmental Protection Agency. By January 1, 2009, the Department shall modify the minimum energy efficiency standard so that it is at least as stringent as the International Energy Conservation Code, 2006 version (2006 IECC) rather than the current standard of American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE) Standard 90. The act modifies the date to July 1, 2009, by which all design for state buildings involving new construction or substantial renovation and any building considered for purchase or lease by a state agency shall comply with the minimum energy efficiency standard. Beginning July 1, 2016, at least 10% of the electricity used by state buildings must come from renewable energy sources and beginning July 1, 2026, at least 20% of the electricity used by state buildings must come from renewable energy sources. The act gives counties of the third classification the same authority to adopt a building code as current law provides to counties of the first and second classifications. Creates the "Show Me Green Sales Tax Holiday." For 2009 and every year thereafter, during the seven day period beginning on April 19th and ending April 25th, all sales of Energy Star certified appliances will be exempt from state and local sales tax. The Department of Elementary and Secondary Education shall provide grants to public school districts after July 1, 2009 to assist schools obtain LEED certification for new building construction or substantial renovation projects.

Heard in Committee on 3/6/2008.

Homeowner Warranty and Remedies.

SB 913. Creates statutory warranties for home buyers and homeowners and also prevents home solicitors from engaging in certain deceptive practices. Three new-home warranties are created by this act. 1) covers new homes against faulty workmanship and defective materials due to noncompliance with building standards for a three-year period. 2) covers new homes against faulty installation of plumbing, electrical, heating and cooling systems for a five-year period. 3) covers the home against major construction defects (foundation) for a 10-year period. These warranties are extended to subsequent purchasers of the home. The act also creates three warranties for home improvement work. Contractors must guarantee that the home improvement will be free from major construction defects for a ten-year period. The court shall also award the homeowner court costs and reasonable attorney fees. If the breach of the warranties was willful or deceitful, the court may also assess punitive damages.

Read in Committee on 1/16/2008. No movement since then.

Highway Construction.

SB 1257. Under this act, a person commits involuntary manslaughter if he or she operates a motor vehicle in violation of the "endangerment of a highway worker" statute, and when doing so, acts with criminal negligence to cause the death of a highway worker in a construction zone or work zone. Such crime shall be a class B felony. This act expands the crime of assault of a law enforcement officer, emergency personnel, or probation and parole officer to include highway workers in a construction zone or work zone.

Second reading in Committee on 3/3/2008.

SJR 31. A constitutional amendment to authorize the Highway & Transportation Commission to conduct feasibility studies, fund, design, acquire, construct, maintain, and operate toll facilities.

1/23/2008 – Committee Hearing Conducted.

HB 1338. Prohibits any state entity from closing a state highway with a weighted average traffic volume exceeding 7,000 for a continuous period exceeding 60 days.

Read Second time on 01/10/2008. Appears dead.

Drug/Alcohol Testing.

SB 1222. Requires contractors to have a drug and alcohol testing program in place in order to work on school property. Employers may contract with a third-party to administer the program. With the submission of a bid, a contractor must provide a statement stipulating that the contractor and all subcontractors slated to work on the project have a testing policy in place. Employees shall not work on a project unless they test negative within twelve months of the start date of the project. After the project commences, the employer may require an employee to submit to reasonable suspicion testing if the employer has reason to believe that the employee is using drugs in violation of the employer's policies. Employees who test positive more than once shall be completely barred from working on the project. Employers who knowingly permit employees to work in violation of the testing policy shall be fined up to \$200, imprisoned up to 6 months or both. Each day a violation persists constitutes a separate offense.

Fourth year for this bill. Second reading in Committee on 2/28/2008.

HB 2397. Requires any entity that provides construction services on the property of a public or private school or university or any state- owned building to have an

approved drug and alcohol testing program. An employee who tests positive more than once is completely barred from working on the project. An employer who knowingly allows an employee to work in violation of the testing policy may be fined up to \$200, imprisoned for up to six months, or both. Each day that a violation continues is a separate offense. An employer with an equivalent alcohol and drug testing program that has been in existence since January 1, 2005, and meets certain specified criteria is not subject to the requirements of the bill.

03/12/2008 - Read Second Time.

Residential Contractor Disclosure.

HB 1919. Beginning August 28, 2008, this bill requires contractors of residential home repair or remodeling prior to executing a contract to provide the owner with a disclosure form which contains information regarding the contractor, whether the contractor is licensed or registered, if there is a court judgment against the contractor within the last five years, and the contractor's work history. The Attorney General will develop the form and make it available on the Attorney General's Internet web site.

03/12/2008 - Public Hearing Scheduled, Bill not Heard.

Architect/Engineer Liens.

SB 1074. Currently, architects, engineers, landscape architects, land surveyors, and corporations registered to do the work of these professions who perform work on buildings or land have a lien on the building or land to the extent of one acre. This act increases the lien to encompass 3-acres.

3/31/2008 - S Consent Calendar.

Contractor & Subcontractor Audits.

HB 2236. Office of Administration to conduct random audits of contractors or subcontractors performing publicly funded construction projects in Missouri; to confirm the legal status of the contractor's or subcontractor's workers and to ensure compliance with the prevailing wage laws. If an audit reveals that a contractor or subcontractor is employing illegal aliens or is out of compliance with the prevailing wage laws, the Office of Administration will impose a fine of up to \$1,000 for each day the contractor or subcontractor is in violation.

02/25/2008 - Read Second Time, no hearing scheduled.

Architectural Plan Review Fees.

HB 2066. This bill requires the Department of Health and Senior Services to establish a schedule of fees, not exceeding \$3,000, to be paid by an applicant for an architectural plan review of construction documents for new construction and alterations of certain licensed health care facilities. The department will have the authority to waive or reduce the fees using uniform guidelines. Subject to appropriations, the fees collected will be used to conduct the reviews.

02/25/2008 - Public Hearing Completed.

Site Safety.

HB 2399. This bill requires any person contracting to work on the construction of public works for any public body to provide an approved 10-hour federal Occupational Safety and Health Administration Construction Safety Program for their on-site employees prior to beginning work on the project and requires the contract to include this requirement. Any employee found on the worksite without documentation of the successful completion of the required program will be subject to immediate removal.

The contractor will forfeit as a penalty to the public body \$2,500 plus \$100 for each employee hired for each calendar day, or portion thereof, that the person is employed without the required training. Becomes effective **August 28, 2009**.

03/12/2008 - Read Second Time. No hearing scheduled.

HB 2387. Requires contractors of certain public works projects to provide their employees with an approved 10-hour federal Occupational Safety and Health Administration Construction Safety Program.

03/11/2008 - Read Second Time, no hearing scheduled.

Kansas

A/E Selection Law.

HB 2744. An Act concerning provision of architectural, engineering and land surveying services for certain projects for state agencies. This bill repeals the former caps on fees for architectural services for State contracts.

Passed the House on 3/27/2008 (Yeas 123 Nays 0); Passed the Senate through an "Emergency Final Action" on 4/4/08 (Yeas 39 Nays 0).

Green/Sustainable Design.

SB 452. An Act concerning energy; relating to energy efficiency initiatives for certain state agencies and public schools.

02/28/2008 Withdrawn from Ways and Means Committee; Referred to Natural Resources Committee

Mechanic's Liens.

SB 603. An Act concerning liens; relating to supplier's liens; amending K.S.A. 60-1111 and repealing the existing section.

Hearing held on 2/20/2008

Anti-Indemnity/Construction Contracts.

House Substitute for SB 379. House Sub. for SB 379 would amend the law on an indemnification provision in construction contracts, motor carrier transportation contracts, dealer agreements, or franchise agreements.

03/28/2008 S Nonconcurrent; CC requested; apptd Vratil, Bruce, Goodwin

HB 2007. An Act concerning contracts; relating to indemnification provisions and additional insured parties; amending K.S.A. 2006 Supp. 16-121 and repealing the existing section.

01/31/2007 H Hearing: Tues., 2/6/2007, 3:30 pm, Rm 313-S

HB 2228. An Act concerning construction contracts; relating to indemnification provisions and additional insured parties; amending K.S.A. 2006 Supp. 16-121 and repealing the existing section.

Hearing 2/6/2007

Insurance and Bonds.

HB 2900. An Act concerning insurance; enacting the controlled insurance programs act.

Hearing 2/25/2008

HB 2794. An Act concerning civil procedure; relating to public works sureties; amending K.S.A. 60-1111 and 60-1112 and repealing the existing sections.

Hearing 2/21/08

Home Inspections.

HB 2315. An Act concerning real property; relating to home inspections; requiring home inspector registration and certificates.

03/31/2008 Withdrawn from Ways and Means; Referred to Commerce

Alternative Project Delivery.

SB 485. An Act concerning counties; enacting the county alternative project delivery building construction procurement act.

03/31/2008 passed as am.

SB 642. An Act concerning the procurement of design and construction services for unified school district improvements contracts; enacting the Kansas unified school district alternative project delivery building construction procurement act.

Hearing 3/05/2008

Labor Laws/Illegal Aliens.

SB 260. An Act concerning public contracts for services; prohibitions on knowingly employing or contracting with illegal aliens; provisions in public contracts for services; penalties for violations.

Hearing 2/13/2007

For more information, contact Bill Quatman, FAIA, Esq. or Ryan Manies, AIA, Esq. at the law firm of Shughart Thomson & Kilroy, P.C., email: bquatman@stklaw.com or rmanies@stklaw.com. Regional offices in Kansas City, Overland Park, Springfield and St. Joseph, Missouri. (816) 421-3355.