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To: The Honorable Shane E. Pendergrass  
Chair, Health and Government Operations Committee

From: The Office of the Attorney General

Re: House Bill 763: State Procurement – Retainage Proceeds

The Office of the Attorney General submits the following written testimony in opposition to House Bill 763, requiring payment of undisputed retention proceeds within ninety days of substantial completion of certain contracts. Requiring payment of retainage before all work required to be done under the contract is complete may make it more difficult for contracting agencies to obtain full, complete, and timely completion of contracts.

Substantial completion of a contract is not the same thing as final completion of a contract. Forcing contracting agencies to release retained funds before the contract work is complete deprives them of the opportunity to hold these funds as security against any disputes that may arise during the time between substantial and final completion. Depending on the nature of the final work and amount of money at issue, some contractors may choose to abandon a contract prior to final completion or to drag their feet on reaching final completion, knowing that payment of retained funds will be made in ninety days even though the contract work remains unfinished. The remaining amounts owed under the contract may be insufficient to cover the damages incurred by a contracting agency if the contract is not fully and finally completed in a timely manner or if there are other problems with the final contract work.

Additionally, requiring payment of retained funds within ninety days of substantial completion may result in contracting agencies paying funds to contractors who are ultimately found to have committed fraud or other misconduct. Reports of fraudulent conduct on State contracts may not reach the procurement officer or the Office of the

Attorney General until after a contract is considered substantially complete. Once funds are paid to a contractor, it can be difficult to recover them if the contractor is later found to have engaged in misconduct.

For other types of contracts, Section 17-110 of the State Finance and Procurement Article requires that retainage be paid within 120 days of the date of satisfactory completion of the contract or the date of resolution of any disputes or claims. Use of a similar standard for the contracts covered by HB 763 would be a better way to address any concerns about timely payment while ensuring timely completion of all contract work and preserving the right of contracting agencies to withhold funds when disputes arise late in the performance of the contract.

We urge an unfavorable report from the committee on the bill.

cc: Members of the Health and Government Operations Committee