HB 763
State Procurement – Retention Proceeds
Health and Government Operations Committee
Position: Favorable

Maryland AGC, the Maryland Chapter of the Associated General Contractors of America, provides professional education, business development, and advocacy for commercial construction companies and vendors. While the overwhelming majority of our members are open shop, we welcome union contractors and are the bargaining agent with four of the basic trades. AGC of America is the nation's largest and oldest trade association for the construction industry. AGC of America represents more than 26,000 firms, all through a nationwide network of chapters. Maryland AGC supports HB 763 and respectfully urges the Committee to give the bill a favorable report.

HB 763 addresses a major issue for contractors, namely, extended delays in receiving payment of retainage ("retention proceeds" in statutory language) once a project is substantially complete, i.e., the State or a procurement unit (hereinafter, the State") has taken possession of the completed project. Retainage is a device whereby the State will withhold from a contractor a specified portion from each progress payment. The purpose is to protect the State and guarantee contractor performance. For state procurements in excess of $100,000, by statute the contractor is required to furnish a 100% performance and 100% payment bond[1]. Again, by statute, a prime contractor may not retain from its payments to subcontractors any greater percentage of retainage than the State withholds from the prime contractor.[2] Once the project is substantially complete, retainage should be paid out as part of completing the project. Under Maryland's Prompt Payment law, prime contractors must pay subcontractors their appropriate share of retainage within seven days of the prime contractor's having received the retainage payment.[3]

The problem is that the State will fail to pay retainage for extended periods of time. HB 763 establishes a time certain when retainage must be paid out – within 90 days after substantial completion as defined by the applicable contract. This gives the State ample time to close out the project and gives the contractor a time certain when it will receive full payment for the completed work. The State is fully protected by the provisions of §13-226(b)(2) which allow the State to withhold whatever amount in excess of retainage the State deems necessary to protect its interests. Without harming the State, HB 763 protects contractors and subcontractors alike.

Retainage is a major burden for contractors. On most construction projects, the contractor's profit margin is around 5%. Thus 5% retainage is the contractor's entire profit on a job. When the State fails to pay out retainage for extended periods of time after project completion, it denies the contractor the profit it has earned under contract. This affects the contractor's cash flow, its ability to undertake other work, and to acquire the bonding necessary to undertake public work, in particular. The same holds true for subcontractors, who will not receive their share of retainage until the State pays up. Small subcontractors are especially vulnerable. Payrolls must be met every week, and delay in paying out retainage puts small contractors in jeopardy. In effect, when the State fails to pay out retainage, it is using the cash flow of contractors and subcontractors to fund the State's activities at the contractors' expense. That is manifestly unfair and not the purpose of retainage.

For these reasons, we respectfully urge the Committee to give HB 763 a favorable report.

Champe C. McCulloch
McCulloch Government Relations, Inc.
Lobbyist for Maryland AGC

---

[1] State Finance and Procurement, §17-103(a)
[2] State Finance and Procurement, §13-225(c)
[3] Real Property, §9-302(3)