



Support HB 14-1165
Concerning the Limit on the Retainage Allowed under a Private Construction Contract
Rep. Fischer/Sen. Tochtrop

BACKGROUND: In the construction industry, one of the greatest problems experienced by business owners is getting paid for work performed. The problem has been particularly acute for subcontractors, who shoulder most of the costs for labor and materials on construction projects, and are forced to keep financing the work while large sums of money are being held until completion for months and sometimes years.

In 2011, the Colorado Legislature recognized that withholding large sums of money puts businesses and jobs at risk and took a major step to correct the situation by limiting the amount of “retainage” that can be withheld in public construction projects. “Retainage” represents funds withheld from each progress payment to ensure full and satisfactory completion of the work. It is a concept unique to construction. The 2011 legislation capped retainage at 5% of the amount due under a construction project contracted by a public entity. It has been a great benefit to all parties to the contract and has had no ill effects.

The first major test of this law came after the floods in 2013 when the Colorado Department of Transportation was tasked with reopening 27 damaged highways in a very short time frame. What has been described as an “amazing feat” took thousands of contractors and subcontractors pushing hard to ensure the public had access to these roads before winter set in. These same professionals continue to be tasked with building and rebuilding Colorado, but with twice the amount of money being withheld. HB 14-1165 simply replicates the retainage limitations in public contracts so they apply to any contracts within the private sector and creates penalties for violating the law.

THE PROBLEM: Retainage often represents a huge sum – often 10% or more of the value of the contract. It forces contractors and subcontractors to, in essence, act as “the bank” by forcing them to front the costs of their own work. This often causes cash flow problems that make it difficult to stay in business because retainage not only represents all of a contractor’s profit, but also a significant portion of the actual costs to perform the work.

THE CASE FOR REFORM: The legislature has already acted to ensure fairness in contracting in the public sector. It is unreasonable to expect that work conducted under a public contract would be any different under a private contract, especially when it is conducted by the same professionals. A 5% cap has proven to be a fair amount of withholding to assure timely and satisfactory work without imposing an undue burden on the public, owners, contractors and subcontractors.

SPECIFICS OF HB 14-1165:

- ❖ A person who contracts for improvements to real property must:
 - Pay not less than 95% of the amount due according to the agreed-upon payment schedule, limiting to 5% the amount which may be temporarily withheld (retained) to ensure the quality of the work
 - Pay subcontractors the amount retained after the work is accepted
- ❖ A person who withholds greater than 5% is liable for interest and attorney fees should an action be brought within one year;
- ❖ Contractual provisions that do not comply with the requirements in this law are not enforceable.

WHAT THE BILL DOES NOT DO:

- HB 14-1165 does NOT mandate specific payment schedules;
- It does NOT create new departmental regulatory oversight, leaving enforcement to the courts on a complaint basis;
- It does NOT apply to primary construction contracts that are less than \$150,000;
- It does NOT apply to the construction of single family or multi-family dwellings of 4 units or less.

SUMMARY: This bill is a natural complement to the limitation of retainage allowed under a public construction contract and is consistent with it. The bill is fair and reasonable to all parties to a contract and is narrowly drafted to target the most significant problem, avoiding many of the broad, controversial options that have been proposed in previous years. It will bring much needed relief to an industry hit hard by recession, and is overdue. We urge the Legislature's favorable consideration and support.