

CONSTRUCTION CONTRACT RETAINAGE

The following discussion on construction contract retainage policy and practice is offered in response to questions that were raised at the CPC Conference at UNC-Asheville in March.

Retainage **IS** payment withheld on work that has been successfully completed and accepted by the designer and owner.

Retainage **IS NOT** payment withheld for defective, incomplete or disputed work that has not been accepted by the designer and owner.

Requirements for retainage on University projects are spelled out in Article 31 of both the State Construction Office General Conditions (Form OC-15) and University of North Carolina General Conditions (Third Edition – June 2004).

Article 31.a.3 specifies that five percent (5%) retainage shall be held on payments to the contractor for the value of work done and materials delivered to the site, provided however, that after fifty percent (50%) of the contractor's work **has been satisfactorily completed on schedule, with approval of the owner (and State Construction Office on projects over \$2million dollars) and written consent of the surety**, further requirements for retainage will be waived **ONLY** so long as work continues to be completed satisfactorily and on schedule. This language clearly gives the owner the right to maintain and/or reinstate a 5% retainage after the contract is 50% complete if the contractor fails to perform satisfactorily. Adequate documentation of a contractor's failure to perform should be carefully and accurately prepared and maintained.

Senate Bill 1245 enacted as Session Law 2007-365 amended the laws related to retainage payments on public construction contracts in North Carolina. Under this law, the two major differences for University projects (whether State Construction projects over \$2 million dollars or projects under \$2 million dollars) are:

- 1) No retainage shall be allowed on contracts in which the total project costs are less than one hundred thousand dollars (\$100,000), and
- 2) Retainage on "early finishing trades" (structural steel, piling, caisson, demolition and other trades that may be identified in the original bid documents) may be reduced to five-tenths percent (0.5%) contingent upon the owner's receipt of an approval or certification from the designer that the work performed by the subcontractor is acceptable and in accordance with the contract documents.

The language in Session Law 2007-365 with regard to reinstatement of a 5% retainage after the contract is 50% complete is stronger than the language included in the General Conditions. This language provides that the owner, with written consent of the surety, shall not retain any further retainage from periodic payments due the contractor if the contractor continues to perform satisfactorily **and any nonconforming work identified by the designers or owner has been corrected by the contractor and accepted by the designers or owner**. If the owner determines the contractor's performance is unsatisfactory, the owner may reinstate retainage for each subsequent periodic payment application up to a maximum of five percent (5%).

Session Law 2007-365 also authorizes the owner to withhold additional retainage after a contract is fifty percent (50%) complete in order to retain two and one-half percent (2.5%) total retainage through completion of the contract. This will allow retainage on payments for change orders that are approved after fifty percent (50%) of the contract is completed.

Session Law 2007-365 provides that a prime contractor may hold retainage on payments to subcontractors under the same terms and conditions that retainage is held by the owner on payments to the prime contractor.

Nothing outlined in Session Law 2007-365 shall prevent an owner from withholding payment to the contractor in addition to the amounts authorized for retainage for unsatisfactory job progress, defective construction not remedied, disputed work, or third-party claims filed against the owner or reasonable evidence that a third-party claim will be filed.

Both the State and University General Conditions and Session Law 2007-365 allow the owner to retain funds toward the end of a contract to secure completion of the project or corrections of any work. The amount retained shall not exceed two and one-half times the estimated value of the work to be completed or corrected. Reduction of retainage must be with consent of the contractor's surety.