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MEMORANDUM OF OPPOSITION

BILL: S.980 (Libous) / A.725 (Braunstein)

SUBJECT: Prohibits retention on payment for materials delivered and accepted for a public or private construction project.

DATE: May 9, 2013

The Associated General Contractors of New York State, LLC (AGC NYS) the largest statewide trade association representing the construction industry strongly opposes A.980/A.725. This bill amends the state finance and general municipal law, in relation to requiring full payment for delivered materials pertaining to public works projects, and amends the general business law, in relation to prohibiting the retention of any payment due and owing a material supplier for a construction project.

Retainage is included in a contractual agreement between the owner of the construction project and the contractor that bears the cost and responsibility to skillfully and safely execute the entire project and then between the contractor and subcontractor/supplier. Retainage is a time-tested industry practice throughout the nation which acts as form of insurance on construction projects to ensure that the materials delivered are installed and certified to meet the specified requirements for quality and performance. Retainage is usually held until substantial completion of the construction project and is then released along with the final payment to the contractor. The owner typically retains 5 percent on public work and 10 percent on private work.

This legislation is bad for business because it would exempt all materials, regardless of type, cost, and warranty provisions, from retainage on all public and private construction projects. By exempting materials from retainage, public/private owners and general contractors would assume greater risk and be held liable for latent material defects. Without retainage, the ability to make corrections would be delayed, thus delaying the completion of the project.

This legislation is bad for public owners (schools, hospitals, etc.) because it would increase the costs of construction projects through delays. Keeping the current retainage provisions ensures that disputes over incorrect or defective materials would be quickly rectified and projects would be on-time and on-budget. Most contract provisions include liquidated damages for failure to complete the construction project on time.

For both public and private owners, as well as, for contractors and subcontractors, this legislation would interrupt the ability to freely contract based on well-established industry standards. Besides adding to the risks on a construction project, this would have a chilling effect on commerce.

In sum, this legislation is bad for public/private owners, general contractors, workers, contractors, and taxpayers by driving up the cost of every construction project in New York State. Accordingly, the AGC NYS **strongly opposes A.980/A.725.**