

Good afternoon, Chair and Committee Members.

My name is Raven Faber, and I am representing myself and my family. I am here today as a mother and a policy advocate in support of Senate Bill 50.

Whether you're a parent or someone who is child-free and regardless of political affiliation, I'm sure we can all agree on one fundamental thing: children should be safe and the institutions that parents rely on for their care should act responsibly and with transparency when harm is disclosed.

Two years ago, my own family experienced a very unfortunate situation in which clearer reporting expectations and established data retention policies would have made all the difference in seeking – and securing – accountability for harm done. Out of respect for my family's privacy and also because there is ongoing litigation, I won't be discussing the specifics of what happened but, I will tell you that when children are brave enough to speak the truth of harm done to them, adults must not hesitate. Institutions must not guess. And processes must not depend on personal discretion alone.

As an engineer who understands the value of best practices and clearly defined procedural frameworks, I can tell you that standards protect families and childcare centers alike. Standards create safety. Standards create consistency. Standards ensure quality.

Ambiguity, however, does none of those things. Ambiguity protects no one.

I understand that for most families, navigating government systems can be a difficult, time-consuming, and even frightening experience. All three of these things have certainly been true for me over the last two years and, unfortunately, my family and I have had to navigate our experience without the clearly defined procedural safeguards that Senate Bill 50 would provide.

Let me be clear: The purpose of this bill is not to expand arbitrary power, nor is it to grant unchecked authority. It establishes clear procedural safeguards. It ensures that when harm is disclosed, there is a consistent, defined process for response. It strengthens consistency and accountability. It reinforces trust by making expectations transparent. It is the deliberate work of transforming something extraordinarily painful into something protective, constructive, and enduring. And when children find the strength to disclose harm, responsible systems must be ready to respond.

I urge you to support Senate Bill 50.

Thank you for your time.

While the proposed bill aims to improve overall cash flow and liquidity by requiring general contractors to accept "like bonds" from their subcontractors, it may present unique challenges and unintended consequences for smaller subcontractors.

Specifically, the bill could affect smaller subcontractors in the following ways:

- **Difficulty Qualifying for Bonds:** Small trade contractors may struggle to meet the requirements to qualify for retainage bonds compared to larger, more established companies.
- **Disproportionate Premium Costs:** Smaller subcontractors might face disproportionately high bond premiums or have weaker surety capacity, which could lead to higher pricing for their services to offset these costs.
- **Premium Withholding Disputes:** The bill allows general contractors to withhold a subcontractor's portion of the bond premium if the general contractor provides a retainage bond to release that specific subcontractor's retainage. This cost-shifting mechanism could easily become a point of friction, negotiation, and potential dispute.
- **Unintentional Competitive Disadvantage:** If owners and general contractors begin to expect retainage bonds as the standard across all project tiers, very small subcontractors who cannot obtain a bond at a reasonable cost may be unintentionally disadvantaged or effectively excluded from certain projects.

To mitigate these issues, the review document suggests considering an optional carve-out that would allow parties to continue using traditional cash retainage for subcontracts below a certain dollar threshold, or for subcontractors who cannot reasonably obtain a bond.

## **HB26-1311: Review and Comparison to other States' Models**

This bill would materially improve cash flow for contractors and subs on Colorado CRE projects but leaves several gaps around owner protections, lien mechanics, and bond standards that you may want to tighten using other states' models.<sup>[1] [2] [3]</sup>

### **High-level CRE impact**

- For private commercial projects over 150,000 dollars, owners can no longer both withhold up to 5 percent retainage and refuse a qualifying retainage bond; if a bond is tendered, retainage must be released.<sup>[1]</sup>
- This will accelerate cash flow to GCs and subs, which reduces financing costs on large office, industrial, and retail projects and may modestly lower bid prices or reduce change-order pressure.<sup>[2] [1]</sup>
- Owners lose the leverage of cash retainage but receive a surety obligation instead; depending on how the bond is drafted, this may or may not fully replicate the practical protection of cash in the owner's hands.<sup>[2] [1]</sup>
- Flow-down is mandatory: if the owner accepts a bond from the GC, the GC must accept a "like bond" from subs, which should materially improve liquidity for trade contractors who are often capital-constrained.<sup>[3] [1]</sup>

### **Key mechanics of the draft**

- "Retainage bond" is defined broadly as a surety bond issued by an authorized insurer assuring satisfactory completion or conformity of goods and materials; it is not expressly limited to payment or performance obligations.<sup>[1]</sup>
- A contractor or subcontractor may tender a retainage bond in an amount not exceeding 5 percent of money earned; upon receiving a compliant bond, the owner, contractor, or subcontractor "shall accept" the bond and release the covered retainage.<sup>[1]</sup>
- The bond must be issued by a surety with an A.M. Best (or successor) financial strength rating not higher than "A-" as the minimum required rating, which is a relatively standard floor in commercial surety markets.<sup>[2] [1]</sup>
- The contractor may withhold a subcontractor's portion of the bond premium to the extent the contractor provides a retainage bond to obtain release of that subcontractor's retainage, which shifts some cost back down the chain.<sup>[1]</sup>
- Bonds and proceeds are subject to claim and lien "in the same manner and priority" as under article 22, effectively substituting the bond proceeds as the fund against which lien rights can attach.<sup>[1]</sup>

## Commercial real estate–specific effects

### Owners and lenders

- For CRE owners and construction lenders, the bill reduces built-in cash reserves held via retainage and substitutes surety credit, which may require underwriting of surety forms and increased reliance on performance/payment bonds.<sup>[2] [1]</sup>
- Some states’ surveys indicate that when retainage substitution is allowed, owners often respond by tightening other risk controls (more rigorous prequalification, higher bond requirements, greater use of escrow) rather than maintaining the status quo; you should expect similar behavior by institutional Colorado owners and lenders.<sup>[4] [3]</sup>
- Since the bond amount is capped at 5 percent of money earned, it may be materially smaller than a full performance bond (often 100 percent of contract price), limiting the owner’s protection if there are significant defects discovered late in the project.<sup>[5] [1]</sup>

### General contractors

- GCs on Colorado CRE projects gain a powerful tool to improve cash flow and reduce working-capital drag, especially on longer-duration office and industrial builds where 5 percent retainage on multimillion-dollar contracts is material.<sup>[6] [1]</sup>
- The mandatory acceptance of qualifying retainage bonds reduces owner bargaining power to insist on cash retainage in negotiated leases or development agreements, which is likely to be welcomed by larger GCs but may concern some owners.<sup>[3] [1]</sup>
- GCs can require “like bonds” from subs and pass through premium costs, which aligns incentives but may lead to higher pricing from subcontractors that have weaker surety capacity or face higher bond premiums.<sup>[2] [1]</sup>

### Subcontractors and lower-tier subs

- The flow-down “like bond” requirement is similar in concept to provisions in other states that require prime contractors to accept equivalent substitute security or retainage bonds from subs when the owner accepts a bond in lieu of retainage from the prime; this materially enhances liquidity for trades.<sup>[3] [1]</sup>
- In practice, small trade contractors may struggle to qualify for retainage bonds or may face disproportionate premium costs, so the ability of the GC to withhold the sub’s share of the bond premium could become a point of negotiation and potential dispute.<sup>[2] [1]</sup>

## Lessons from other states

Several states have long permitted substitute security or retainage bonds in place of cash retainage, mostly on public work but with principles that translate to private CRE projects.

- A 50-state survey notes that Missouri, Kansas, and Tennessee allow substitute security on private projects, often in the form of securities or retainage bonds, and that some states require retainage funds to be placed in escrow with interest paid to the contractor.<sup>[7]</sup>
- Another 50-state survey reports that in some jurisdictions, when an owner accepts a bond in lieu of retainage on public projects, the contractor must accept similar bonds from its subcontractors, mirroring your draft’s “like bond” concept; Washington law, for example, requires agencies to accept retainage bonds unless they can show good reason to refuse.<sup>[5] [3]</sup>
- Texas provides a useful cautionary example: when a statutory payment bond compliant with state property code requirements is in place on private projects, the owner is relieved of retainage “trapping” obligations and subcontractor lien rights shift to the bond, making bond form and notice requirements critical for protecting subs.<sup>[8] [9]</sup>
- Best-practice guidance for retainage bonds emphasizes clear conditioning of the bond, alignment with lien and notice statutes, and owner review to ensure the bond is in the correct amount, names the owner as obligee, and fully replaces the protection of retained funds.<sup>[8] [2]</sup>

For Colorado CRE stakeholders, these experiences suggest:

- If the bond language is not tightly defined, there is a risk that the bond could be narrower than existing mechanic’s lien protections tied to retained funds, which may leave owners and some subs worse off in the event of default.<sup>[9] [8]</sup>
- Clear cross-references to lien statutes and claim procedures reduce litigation and confusion about whether lien claimants proceed against the bond, the project, or both.<sup>[5] [3]</sup>

## **Suggested improvements to the bill text**

Below are targeted suggestions you could consider as talking points or proposed amendments, informed by other states' practice and CRE concerns.

### **1. Clarify bond conditioning and scope**

Issue: "Retainage bond" is defined broadly and could be interpreted as either a performance bond, a payment bond, or something in between, which creates uncertainty for owners and lien claimants.<sup>[1] [2]</sup>

Suggestions:

- Specify that a retainage bond must secure both (a) performance of the contractor's obligations up to at least the retained amount and (b) payment of amounts due to laborers, suppliers, and subcontractors to the same extent retainage would secure those obligations.
- Consider expressly stating that the owner (or upstream contractor) is the obligee, and that claimants with mechanic's lien rights may assert claims against the bond to the same extent as against retained funds under article 22.

### **2. Tighten lien and claim mechanics**

Issue: The bill says the bond and proceeds are subject to claim and lien in the same manner and priority as under article 22, but it does not address notice, limitation periods, or whether lien claimants' remedies are exclusive to the bond or cumulative.<sup>[3] [1]</sup>

Suggestions:

- Add clarifying language that:
  - A retainage bond stands in place of retained funds for purposes of lien rights and priorities.
  - Claimants may assert claims against the bond using existing article 22 notice and filing procedures, without losing lien rights on the property unless expressly intended.
- Consider a brief cross-reference or incorporation by reference of article 22 notice/claim procedures so practitioners do not have to guess how to perfect a claim against the bond.

### **3. Address owner discretion and “good cause” refusal**

Issue: The bill mandates that owners and contractors “must accept” any bond meeting the A.M. Best rating requirement, but other states often allow agencies or owners to refuse based on specific, articulable reasons (e.g., prior surety performance issues, inadequate form).<sup>[5] [1]</sup>

Suggestions:

- Add a “good cause” standard allowing an owner (or upstream contractor) to refuse a bond if:
  - The bond form does not materially comply with statutory requirements or contract terms.
  - The surety is under regulatory action or otherwise impaired.
  - The bond does not clearly identify the project, obligee, or amount.
- Require written notice of refusal stating the reasons, and provide a short cure period for the contractor or subcontractor to replace or correct the bond to avoid delaying payments.

### **4. Consider interaction with existing performance/payment bonds**

Issue: Many CRE projects already require 100 percent performance and payment bonds; layering a retainage bond on top of those may be redundant or confusing as to which surety is primary on what loss.<sup>[5] [2]</sup>

Suggestions:

- Clarify whether the retainage bond is required only when the owner has not required a full performance/payment bond, or whether it is always available as a substitute for retainage regardless of other bonding.
- Alternatively, authorize owners to specify in the contract that existing performance/payment bonds satisfy the “bond in lieu of retainage” option so long as they are in at least the contract amount and expressly cover retainage-related claims, consistent with Texas guidance that statutory bonds should be in the amount of the contract and approved by the owner.<sup>[8]</sup>

## 6. Refine “like bond” obligations

Issue: “Like bond” is defined as “substantially equivalent,” but there is no guidance on acceptable differences (amount, term, surety, or form), which can lead to disputes when subs tender bonds from different sureties or at slightly different terms.<sup>[3] [1]</sup>

Suggestions:

- Clarify that a “like bond” must:
  - Be in at least the same percentage of the subcontractor’s earned amounts as the GC’s bond is of its contract amount.
  - Use a form that is substantially similar in rights and remedies (including lien substitution) to the bond accepted from the GC.
  - Be issued by a surety meeting the same rating criteria.
- Allow parties to agree in the prime contract to a standard retainage bond form that will apply to all tiers to reduce friction and negotiation at the sub level.

## 7. Transparency on bond premiums and pricing

Issue: The bill allows contractors to withhold the subcontractor’s portion of the bond premium but does not address disclosure, which could lead to disputes over allocation.<sup>[1]</sup>

Suggestions:

- Require the contractor to disclose, upon request, the total premium paid for a retainage bond and the method used to allocate premium shares among subcontractors whose retainage is covered.
- Consider language stating that allocation must be reasonable and proportionate to the amount of retainage released for each subcontractor.

## 8. Consider a narrow carve-out or phase-in for small projects and small subs

Issue: Very small subs on CRE projects may not be bondable at reasonable cost, which could unintentionally disadvantage them if owners and GCs begin to expect retainage bonds on all tiers.<sup>[2]</sup>

Suggestions:

- Consider an optional carve-out allowing parties to continue using traditional cash retainage for subcontracts below a certain dollar threshold or for subs that cannot reasonably obtain a bond, while preserving the GC’s right to bond off its own retainage.
- Alternatively, provide an implementation date and encourage the Division of Insurance or another body to work with surety markets to ensure availability of appropriate retainage bond products.

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1. Attachment-D-Retainage-Surety-Bond-Construction-Contracts.pdf
2. <https://www.merchantsbonding.com/talk-surety-to-me/understanding-retainage-bonds>
3. <https://keglerbrown.gjassets.com/content/uploads/2018/09/Retainage-Law-in-the-50-States-2018.pdf>
4. <https://www.hklaw.com/files/Uploads/Documents/Alerts/Construction/01-20-12.pdf>
5. <https://mrsc.org/explore-topics/procurement/contract-administration/guarantees-bonds-retainage>
6. <https://www.procore.com/library/retainage>
7. <https://www.asageorgia.org/wp-content/uploads/2021/10/50-State-Retainage-Law-New-Language.pdf>
8. <https://www.porterhedges.com/texas-construction-law/the-often-overlooked-protection-provided-by-a>
9. <https://statutes.capitol.texas.gov/GetStatute.aspx?Code=PR&Value=53>
10. <https://www.consensusdocs.org/news/retainage-what-contractors-need-to-know-and-helpful-strategies/>
11. <https://law.justia.com/codes/florida/title-xviii/chapter-255/section-255-05/>
12. <https://texascityattorneys.org/wp-content/uploads/2022/06/T9.-Amy-Emerson-Paper.pdf>
13. <https://www.levelset.com/blog/florida-retainage-laws/>
14. <https://www.sunraynotice.com/blog/protecting-your-right-to-retainage-through-liens-and-bonds-texas>
15. <https://www.jimersonfirm.com/blog/2023/07/new-florida-statute-changes-retainage-and-prompt-pay-requirements-on-state-and-local-government-construction-projects/>
16. <https://olis.oregonlegislature.gov/liz/2013R1/Downloads/CommitteeMeetingDocument/21969>

# HB26-1311: The Risks of Mandatory Retainage Bond Substitution

Colorado's **HB26-1311** proposes allowing contractors to substitute 5% cash retainage with surety bonds to improve subcontractor cash flow. While the goal of prompt payment is supported, industry leaders argue that making this substitution mandatory strips owners of essential leverage and complicates project financing.

## THE PROBLEM: WHY MANDATORY BONDS CREATE RISK



### Loss of Practical Project Leverage

Cash ensures contractors return for punch lists; bonds are contingent, slow, and adversarial.



LIQUID CASH



IMMEDIATE LEVERAGE FOR PUNCH LIST WORK



SURETY BOND



TIME-CONSUMING CLAIM PROCESS



### Conflicts with Financing Covenants

Mandatory bonds may violate existing lender requirements and conservative project financing structures.



LENDER REQUIREMENTS

VIOLATION RISK



### Unintended Market Tightening

Lenders may respond with defensive controls like mandatory escrows or higher bond requirements.



## Comparison: Cash Retainage vs. Retainage Surety Bond

Cash Retainage	Retainage Surety Bond
Liquid cash reserve held by owner	Contingent credit obligation from a surety
Immediate leverage for punch list work	Time-consuming claim process against a third party
Higher working capital drag for subs	Potential for increased contractor prequalification and escrows

## THE SOLUTION: PROPOSED POLICY ADJUSTMENTS



### Shift to Voluntary Negotiation

Make bond substitution a negotiated contract option rather than an automatic statutory right.



NEGOTIATED OPTION



AUTOMATIC STATUTORY RIGHT



### Establish "Good Cause" Refusal

Allow owners to decline bonds if project risk is high or sureties are impaired.



HIGH PROJECT RISK

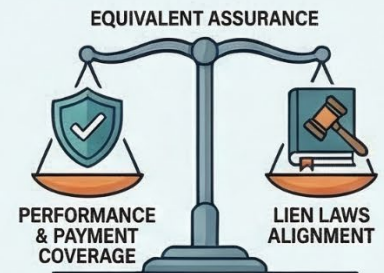


IMPAIRED SURETIES



### Ensure Equivalent Assurance

Require bonds to cover performance and payment while aligning with existing lien laws.



PERFORMANCE & PAYMENT COVERAGE

LIEN LAWS ALIGNMENT



March 18, 2026

Representatives Duran and Carter  
Senators Bright and Snyder  
Colorado General Assembly  
200 E. Colfax Avenue  
Denver, CO 80203

Re: Concerns with Retainage Surety Bond Substitution in Construction Contracts

Dear Representatives and Senators:

On behalf of NAIOP Colorado, the Commercial Real Estate Development Association, we appreciate the opportunity to provide comments on the proposed legislation concerning the use of a surety bond in lieu of retainage in private construction contracts.

Our members strongly support the goal of ensuring that subcontractors are paid promptly when their work is satisfactorily completed. Timely and predictable payment to subs is essential to a healthy construction market and to the success of commercial projects. At the same time, we have significant concerns with any framework that would compel owners and developers to accept a retainage bond as a mandatory substitute for cash retainage, regardless of project context, risk profile, or lender requirements.

From a developer and lender perspective, retainage is one of the few practical tools that can reliably ensure contractors and subcontractors return to the project to correct defects, complete punch list work, and honor warranty obligations. The leverage of withheld retainage is fundamentally different from a contingent claim against a surety, which can be time-consuming, adversarial, and uncertain. Replacing this tool with a bond on a mandatory basis, rather than as a negotiated option, materially shifts risk away from contractors and toward owners, developers, and their lenders.

For that reason, while we support improving prompt payment to subcontractors, we believe the bill should treat retainage bonding as an optional tool that parties may agree to use, not as a right that automatically compels owners, developers, and lenders to give up the security of cash retainage.

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We therefore respectfully request the following policy adjustments:

1. **Make retainage bonds voluntary, not mandatory**  
The bill should clearly provide that an owner or upstream contractor may agree by contract to accept a retainage bond in lieu of cash retainage, but is not required to do so as a matter of right. This preserves flexibility for projects where the owner and lender are comfortable with bond substitution, while allowing more conservative financing structures to maintain traditional retainage.
2. **Preserve owner and lender discretion to decline bond substitution**  
If the General Assembly wishes to retain some form of statutory right to tender a bond, that right should be conditioned on owner consent and a “good cause” standard, with owners and lenders able to decline bond substitution where, for example, project risk is high, lender covenants prohibit it, or the surety or bond form is not acceptable. Written reasons and a cure opportunity could be required, but the ultimate decision to give up cash retainage should remain with the parties bearing the long-term project risk.
3. **Ensure any retainage bond provides equivalent assurance to retainage**  
Where parties do choose to use retainage bonds, the statute should make clear that the bond:
  - Secures completion of the work and correction of defective work at least to the amount of the released retainage; and
  - Provides a practical, timely remedy for owners and developers that is not materially weaker, slower, or more uncertain than the leverage currently provided by withholding retainage.
4. **Protect subcontractor prompt payment without eliminating retainage leverage**  
We would support targeted measures to ensure that, once work is properly completed and accepted, subcontractors are not subject to unreasonable delays in receiving final payment. This can be achieved through strengthened prompt-pay standards, clearer timelines for retainage release, and well-defined conditions for withholding, without forcing owners to convert all retainage into surety risk.

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In short, NAIOP Colorado agrees that subcontractors who have completed their scope of work should be paid in full and without unnecessary delay. However, we do not support a mandatory bond-substitution regime that deprives developers and lenders of one of the few practical tools they have to ensure that contractors and subcontractors return to fix deficiencies and complete the project. We urge the General Assembly to preserve retainage bonding as an optional, negotiated mechanism rather than a compulsory replacement for retainage.

We would welcome the opportunity to work with you and your staff on amendment language that both advances subcontractor prompt payment and maintains the essential assurance that retainage currently provides to owners, developers, and lenders.

Sincerely,  
Kathie Barstnar,  
NAIOP Colorado Executive Director  
NAIOP Colorado, the Commercial Real Estate Development Association

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