

## Insights

# RETENTIONS: THE LATEST DEVELOPMENTS

Dec 01, 2022

On 10 November, NEC and the Construction Leadership Council (CLC) published guidance on how to reduce the use of retentions in *NEC contracts*. It recognises what they refer to as the range of views across the sector about the practice of retentions and the government's 2018 consultation.

As the Guidance notes, NEC provides an optional clause, Option X16, to deal with retentions. It is not a core clause and this is because NEC *considers* that if an NEC contract is administered properly with the parties being guided by mutual trust, co-operation and collaboration, there should be no need for a retention:

*"...there has never been a provision in NEC contract core clauses for retentions... because NEC promotes a high level of collaboration in project delivery, with a 'right first time' mantra applying from the outset.*

*The existence of non-compliant work at the end of an NEC project would imply the contract has not been managed properly, and any refusal to fix it would not accord with the collaborative ethos of the contracts..."*

However, given the current climate with the supply chain under increasing pressure, perhaps it is not so surprising that NEC felt the need to join up with the CLC and remind users once again that a retention is not the only answer to ensuring defects are rectified.

This blog takes a closer look at the paper.

## KEY TAKEAWAYS

### **There is no need for retentions on a well-managed project**

This is the crux of the paper. Reference is made to the damage poorly managed retentions can cause the supply chain (leading to insolvency and disruption and all that this entails) and note is made of the various industry and government initiatives underway to eradicate their use.

Particular mention is made of the CLC ambition to move to zero retentions by 2025, achieving this through use of procurement and delivery models that incentivise the provision of high quality work.

## **The NEC form is already structured to avoid the need for retentions**

The paper explains that the NEC Engineering and Construction Contract (ECC) is structured in such a way that retentions are not necessary.

In brief, the NEC approach to the remediation of defects varies depending on the payment option chosen but broadly the position is that the contractor has an obligation to correct defects whether or not it is notified of them.

Before completion, defects should be corrected within the programme and after completion, defects must be corrected within the defects correction period at the end of which a “Defect Certificate” is provided. Unremedied defects should be noted in this certificate and “addressed in final payment” under the contract.

NEC’s position is that selecting a contractor with an excellent reputation for quality (and ideally with whom the client already has a commercial relationship) in addition to monitoring the contractor’s financial health, effective quality management, carefully defining completion requirements and reviewing work thoroughly before completion should mean that no retention is necessary “even if the Scope is silent on Completion...”.

## **If some form of security is required to ensure defect rectification, then there are some alternatives to retention**

NEC recognises that despite the robust terms of the NEC ECC to secure defect rectification, sometimes parties will want additional assurance that defects will be remedied, but that rarely is there need to resort to retentions.

This is because NEC has built in some alternatives that provide the necessary security without the potential to cripple the supply chain, for example:

- Y(UK)1: Project bank Account.
- Option X13: Performance Bond.
- Option X4: Ultimate Holding Company Guarantee.

## **Although NEC recognises that sometimes only a retention will do**

NEC concludes by recognising that in some circumstances the use of a retention may be appropriate, for example in the following scenarios:

- Where the client does not believe it is possible to achieve an acceptable standard for the works at completion. (In other words, if the client doesn’t believe it will be able to operate a quality management system effectively during the works).

- If the client does not believe that the contractor will be willing to correct defects.
- If the client is concerned about the contractor's financial health.

If a retention is required, then Option X16 can be used. As with other contracts, a percentage based retention is withheld, and the retained amount is halved following completion and until the Defects Certificate is issued. In addition, there is an option for the contractor to provide a retention bond, in a form that is agreed when the contract is executed.

## FINAL THOUGHTS

Retentions are a well established practice and can be an effective way to reduce the risk of defects and incentivise better quality when they are appropriately and fairly administered.

The problem is that they are also open to mismanagement and, particularly in this market, can be used to reduce or delay payments, which can have serious consequences for both the supply chain and project.

NEC and CLC's guidance provides a balanced view of the position, highlighting some of the issues with the practice of retentions but also recognising the circumstances where they may be appropriate, which is when Option X16 can be used.

---

This article first appeared on the Practical Law Construction blog dated 30 November 2022.

## RELATED CAPABILITIES

- Commercial Construction & Engineering

## MEET THE TEAM



### **Kimberly Roberts**

London

[kimberly.roberts@bclplaw.com](mailto:kimberly.roberts@bclplaw.com)

[+44 \(0\) 20 3400 4627](tel:+442034004627)

---

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon ([kathrine.dixon@bclplaw.com](mailto:kathrine.dixon@bclplaw.com)) as the responsible attorney.