

Insights

RETENTION RELEASE?

Jul 24, 2019

SUMMARY

Build UK recently published a set of *minimum standards to be applied when using retentions in the construction industry*, as well as their roadmap to zero retentions by 2023. Retentions can have a huge impact on cashflow in the construction industry. This article considers whether it is time to replace them.

Build UK recently published a set of minimum standards to be applied when using retentions, as well as their roadmap to zero retentions by 2023. This follows on from Build UK's non-binding recommendations on contract terms, about which my colleague, Adriano Amorese, recently blogged.

For those of us involved in drafting and negotiating construction contracts, Build UK have also helpfully provided some template drafting for the JCT D&B contract, the JCT D&B sub-contract and the NEC4 ECC.

I applaud Build UK in their vision to have “fair and transparent payment practices” and, ultimately, to help cash flow throughout the construction supply chain where even a small retention could have a big impact on whether a contractor is able to remain trading. However, I’m yet to be convinced that getting rid of retentions is appropriate across the industry.

Positive policy points

The Build UK minimum standards include some positive policy points, which underpin their drafting amendments to the JCT and NEC standard forms. These policy points include:

- **Post completion retentions only**

Build UK's policy is that a retention should be deducted as a single sum towards the end of construction, rather than being sliced off interim payments throughout the construction period. I'm all for this as, during construction, the employer has the opportunity to assess interim

payment applications and, ultimately, the ability to pay less if it does not agree with an amount claimed. It is after completion that, in my view, a retention is more justified.

- **Reduction in retention percentages**

Retention percentages, in Build UK's view, should be reduced to 1.5% from the current standard 3% in the JCT D&B contract and as stated in the NEC4 user guide. This is intended to be reduced further to 1% in 2021. In my mind, this follows on from the previous policy point: if a retention is to be deducted only at completion, standard form contracts already envisage the retention percentage reducing at that milestone.

- **No more onerous**

Retention provisions in any sub-contract should be no more onerous than those in the main contract. I have worked on the basis, probably naively, that main contractors would not seek to put their sub-contractors in a more onerous position in terms of retentions, but an industrywide policy formalising this is no bad thing.

- **Value threshold for retentions**

Build UK's policy is that a retention should not be applied in contracts with a starting value of less than £50,000 (increasing to £100,000 from 2021). The Build UK view is that the risk on contracts at these values is "not high enough to justify retention", which seems sensible, although it is something that will need to be monitored in contracts where the value of the works increases.

- **Permanent works only**

Another Build UK policy point is that retentions should only be deducted from payments made in respect of permanent works. In their template drafting, Build UK introduce the concept of "Retention Excluded Works", which is defined as:

"...works that are exclusively temporary and/or preliminary in nature including, for example, scaffolding."

I am not convinced by this policy. For a recent contract on which I advised the employer, the works would have fallen into the definition of "Retention Excluded Works" due to their temporary nature. However, such "temporary" works needed to be in place for more than three years and were valued in excess of £10 million. The value and nature of these works would, in my opinion, justify a retention, despite being temporary in nature.

There is also the likely administrative burden of having to separate the Retention Excluded Works from those works for which a retention can be applied in a single contract. This policy is therefore certainly one that would need to be viewed on a contract-by-contract basis and is not something I would advise employer clients to implement as a blanket policy.

Step too far?

Build UK supports the abolition of retentions in the construction industry by no later than 2025. Their roadmap displays achieving zero cash retentions by 2023. In an industry that is notoriously slow moving, I think this is ambitious. Let's not forget that many are still wedded to deeds of collateral warranty, despite last century's Contracts (Rights of Third Parties) Act 1999.

More importantly, there is a lack of viable alternatives to cash retentions that provide the same degree of security. Retention bonds are intended to cure the cash flow ills perpetrated by cash retentions. These bonds, however, come at a cost (usually the contractor's) and the employer/main contractor then has to make a claim under the bond, which itself can be difficult.

Separately, the Construction (Retention Deposit Schemes) Bill has still not had its second reading. It was first heard in January 2018 and I suspect will disappear from the legislative agenda altogether, what with everything else going on in Westminster. The Bill requires any cash retention to be deposited in a retention deposit scheme so, while it does not address cash flow problems, would at least provide some protection against the person with the retention going under and taking the cash retention with them.

Of course, the real revolutionary step would be for the industry as a whole to produce defect-free work, or at the very least commit more readily and openly to rectifying defects without employers (or other contractors up the chain) needing a retention as an incentive or "stick" to drive performance.

Conclusion

Build UK's policy points include some positive ideas that, if implemented, would benefit all tiers of the industry. However, in the absence of alternatives to the cash retention, my view is that going entirely retention free is currently a step too far.

A version of the blog first appeared on the Practical Law Construction blog on 24 July 2019.

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