

Construction Contracts (Retention Money) Amendment Bill

Specialist Trade Contractors Federation Submission

Introduction

The Specialist Trade Contractors Federation (STCF) is an umbrella group of organisations representing the specialist trades that are the backbone of our building and construction industry. Our members include specialists in structural steel, electrical, plumbing, gasfitting, drainlaying, scaffolding, heating and ventilation, roofing, precast concrete, windows, ceilings, and wall linings.

General

STCF supports this Construction Contracts (Retention Money) Amendment Bill (The Bill) and believe it will improve the resilience and reputation of the construction industry by ensuring retentions retained by a payer (Party A) are held in trust for the Payee (Party B) and are not available for use as working capital by Party A.

Compulsory reporting required by Party A will improve the relationship between Party A and Party B and lead to more trusting relationships. Penalties for non-compliance will act as a deterrent for non-compliance.

Specific comments:

- The Bill mandates that retention money held on trust must be kept in a separate trust account in a registered bank in New Zealand or in the form of other complying instruments such as an insurance policy or guarantee.
 - We believe the bill will reduce the risk of developers and main contractors using retention money for working capital, and if Party A goes into liquidation, then retentions held from Party B will be protected and able to be distributed by the receiver or liquidator, less their fee.
- When party A makes (or owes) a payment to party B and withholds an amount as security, the amount withheld is retention money, which automatically becomes trust property in respect of which party A must comply with all legal obligations of a trustee.
 - This is an important section of the Bill and will need to be understood by anyone holding retentions. An education programme may be needed to educate payers and payees of their obligations and rights.
 - We believe that another subclause is needed under 18C requiring that retention money must be deposited into the trust account (or added under the complying instrument) no later than the day the associated payment is due to be paid by Party A to Party B in accordance with the Construction Contracts Act. While this requirement is implicit in the Bill, we believe it should be stated explicitly for clarity.
- The Bill requires party A to give information about the retention money to party B when the money is first retained and then at least every three months.

- This requirement is a vital piece of the Bill. Without this requirement it has been proven that some developers or contractors will not keep retention money separate when their liquidity is squeezed.
- We believe Clause 18FC(6) may be ambiguous and should be amended as follows: *Party A must make the accounting and other records and financial statements required in 18FC(3) and 18FC(4) available for inspection by party B at all reasonable times and without charge.*
- The Bill introduces offences and penalties for the company (\$200,000) and its directors (\$50,000) for not complying with the specified requirements.
 - This is an important aspect of the Bill, but it does not include a mechanism for enforcing compliance. A clear and timely means of enforcement is essential, or Party B will have no practicable means of enforcing its rights over Party A and the benefits of the Bill may not be realised. The regulator (MBIE) is the obvious agency to enforce the Bill.
 - We are also concerned that the level of the fines set in the Bill is small when considering the value of retentions held, which often amount to millions of dollars. STCF suggests these fines be increased to at least \$500,000 for the company and \$200,000 for each director.
- The Bill states that if party A becomes insolvent, the receiver or liquidator becomes trustee of the retention money for the purpose of collecting it and distributing it. They are entitled to be paid reasonable fees and cost for doing so.
 - This provision will save significant cost and lead to creditors receiving a greater proportion of the retentions owed. It also means the costs will be deducted from the retention fund rather than the general assets of the failed business, which is a fair allocation of cost.
- There will be some costs in administering the separate account(s) and reporting functions, however most of these functions are already needed to administer the retention monies. There will be minimal additional costs from the status quo.

Summary

STCF supports the Construction Contracts (Retention Money) Amendment Bill with the proviso that:

- a sub-clause is added to 18C requiring retention money be deposited in the retention trust account (or complying instrument updated) on or before the day the associated payment is due under the Construction Contracts Act.
- clause 18FC (6) is amended to remove possible ambiguity;
- a mechanism is introduced for reporting non-compliance and enforcement of penalties; and
- the penalties for non-compliance are raised to ensure they are an actual deterrent.

Contact STCF

For any questions regarding this submission, please email office.nzstcf@gmail.com

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