

SCOTTISH CASEC

YOU HAVE OUTSTANDING RETENTIONS?

HERE'S WHAT YOU CAN DO

RETENTIONS ABUSE

We are all familiar with the typical abuse associated with sub-contract retention provisions:

- Retentions release is made ***conditional*** on the issue of certain certificates under the main contract.
- The first half of retention is only released after the grant of a ***Practical Completion Certificate*** under the main contract.
- The second half is only released after the grant of a ***Certificate of Making Good Defects*** under the main contract.
- The sub-contract does not require the main contractor to give notice that these certificates have been issued or even that the client has released the outstanding retentions.
- Retentions are never released promptly; they have to be chased and release is usually delayed by tardy clearance of defects unrelated to the sub-contract works in question.

HERE'S WHAT YOU CAN DO

First Scenario

- Your sub-contract states that release of your retentions is conditional upon the employer releasing the main contractor's retentions.

THIS CLAUSE IS A PAY WHEN PAID CLAUSE AND IS INEFFECTIVE UNDER SECTION 113 OF THE CONSTRUCTION ACT.

- Now go to the SCHEME FOR CONSTRUCTION CONTRACTS.

“ONE-OFF” PAYMENTS SUCH AS RETENTIONS BECOME DUE ON THE EXPIRY OF 7 DAYS FOLLOWING COMPLETION OF THE WORK TO WHICH THEY RELATE [OR THE MAKING OF A CLAIM WHICHEVER IS LATER].

They, then, must be released no later than 17 days after the due date for release (unless the sub-contract has a final date for discharge of all payments).

- Still no release of retentions?

Refer the dispute to an adjudicator for a quick decision.

GO TO YOUR TRADE ASSOCIATION FOR FURTHER ADVICE.

Second scenario

- Your sub-contract states that release of your retentions is conditional upon the issue of a ***Certificate of Practical Completion*** or ***Certificate of Making Good Defects*** under the main contract. The main contractor is not required to notify you when these certificates are issued with the result you're left in the “dark” as to when they are actually issued.
- This arrangement is contrary to section 110(1)(a) which states that “every construction contract shall provide an adequate mechanism for determining [when] payments become due.”
- SINCE YOU DON'T KNOW **WHEN** YOUR RETENTION WILL BE RELEASED YOU SHOULD NOW GO TO THE SCHEME FOR CONSTRUCTION CONTRACTS AND FOLLOW THE REST OF THE ADVICE GIVEN UNDER THE FIRST SCENARIO.

SOME GOOD NEWS THIS YEAR

- During the course of this year (date to be confirmed) an amendment to the Construction Act will significantly improve matters [see the full text in the footnote at the end of the last page].
- **SUB-CONTRACT PROVISIONS MAKING RELEASE OF RETENTIONS CONDITIONAL UPON THE ISSUE OF CERTAIN CERTIFICATES OR PERFORMANCE UNDER THE MAIN CONTRACT WILL NOT CONSTITUTE AN ADEQUATE MECHANISM FOR PAYMENT.**
- If such provision exists you can ignore it and insist upon the retentions being released in accordance with the requirement of the Scheme [refer to advice under the first scenario].
- On the date that the above provision is implemented it will apply to contracts entered into on or after those dates.

TEXT OF AMENDMENT TO CONSTRUCTION ACT

“The requirement in subsection (1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on:

- a) The performance of obligations under another contract, or*
- b) a decision by any person as to whether obligations under another contract have been performed.”*

Construction Act [Section 110(1A)]