NEC & CLC Dealing with Retentions Guidance Webinar – Q&A

In my experience, when there is no retention, contractor performance has been substantially worse than where there is a retention pot. This is on contracts that have been managed effectively, with suitable quality management systems over the course of the works. Eliminating retentions appears to be a triumph of theory over the realities of the commercial incentives. The client will end up paying more to consultants to chase after contractors unwilling to perform - that will equal any reduced cost payable to the contractor for the retention pot during procurement.

A. Disappointing experience. I wonder why a contractor wishes to gain a reputation that it does not produce good quality work and does not comply with this contract obligations to rectify defects. Such contractors need to be publicly identified, and we need to find a way of moving away from this damaging approach to relationships in construction.

As the NEC recognises well, collaborative working is only possible with the correct commercial incentives. Use of clauses 46 is significantly weakened without a pot of money available - so it is also not a commercial incentive. Not sure where else commercial incentives to correct defects post completion might arise from?

A. See above.

Is any data available to show how much (and how often) retention is used, when assessing the cost to the Client of uncorrected defects?

A. NEC does not have such data, but major users of NEC may well have.

Is there any comparisons or data demonstrating the increase in tenderers prices (when retention is used)

A. See above.

There tends to be a reluctance with contractors to provide an on demand bond (that is no performance trigger/breach required to make a claim against the bond) as the working assumption is that an on demand bond will be called and therefore they need to liabilities for it in full within their pricing. A non on demand bond is a more sensible and cost-effective choice in my experience.

A. Agreed

As the Scope may be changed by a Project Manager giving an instruction under clause 14.3, this could mean that the 'type' of retention bond may be changed (from 'default' or 'conditional' to 'on-demand' type). Would it not be more sensible for NEC to locate such documents as an appendix to the Contract Data (Subcontract Data) instead?

A. This is a possible approach but remember that the change to scope will be a compensation event. Can the client sensibly justify the additional payment to obtain an on-demand bond – the cost may be substantial

I work client side and I have found recently, that when we have offered zero retention to the main contractor. The main contractor has still had retention clauses in their sub contact arrangements with their supply chain. How are NEC lobbying main contractors on this to drive the improvements required?

A. NEC does not have any leverage over contractors commercial arrangements, this must be settled by the client. It would be fairly simple to include a provision prohibiting retention in subcontracts.

What are the panel's thoughts on the question of the retention percentage and release terms (i.e., the time period for which cash is withheld) and how this can be 'tuned' to help make X16 more palatable?

A. Through the retention free period, NEC offers a pretty flexible way of collecting retention. The amount of retention held should reflect the anticipated level of quality and performance of the contractor. Some clients have drafted provisions seeking to release part of the retention before the defects date, but there are no plans at present to make such changes to the published NEC contracts.

Isn't a retention bond or performance bond a retention by another word?

A. Not quite; a retention bond generally imposes a fixed cost upfront, and may be more or less the cost to the contractor of financing retention.

If a project is delayed through no fault of the contractor and completion is not given, what would happen to retention held at that point? would there be a period in time then the retention should/would be released to the contractor?

A. Under the standard NEC contract, the retention is held in full until completion; there is no provision for releasing part of it before then.

Is there a case for excluding X16 under Target Cost contracts, on the basis that PWDD is prospective?

A. Not sure that the prospective nature of the assessment affects the choice, but under target contract contractor is reimbursed the divine cost of correcting defects, so there is little point in holding retention against such defects. The only benefit of retention would be to deal with defects found only after completion.

How can CLC and other industry bodies educate clients with regard to their contractual rights to rectification of defects whether or not retentions are held? As the use of retention is typically the default position under the majority of standard contract forms, and de facto even under NEC.

A. It would be good to get to position where retention is not held, and hopefully the guidance in this webinar will help to change client approach to the inclusion of retention.

Option X16 provides for a 'retention free amount' although there is no 'upper limit'. What about adding a 'retentions cap' to limit the total retentions amount deducted.

A. A retention can readily be added by describing it in contract data.

Clients have been known to go over and above the X16.2 (with a Z Clause), i.e., not halving retention at Completion.

A. Bidder should always be wary at changes to standard contracts.

Do you not feel that holding retentions simply squeeze cash flow down the supply chain increasing pressure and potentially impacting quality of work ?

A. Holding retention is definitely affects cash flow, and the impact should be assessed by the client in deciding whether to hold retention and how much. See above comments about quality of work and retention.