

# NEC Secondary Option X16 Retention

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**Disclaimer:** the legal information given on the following slides does not constitute legal advice and is presented as the interpretation and opinion of the presenter on such matters.

## About Us


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## What is retention?

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### Definition

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*'A sum of money that is due, but is withheld by the payer as security against contract default by the payee'.*

Although the intention is to safeguard against the non-correction of defects, and insolvency, contracts rarely actually state the reason.

Retention is one of several contract assurance measures, including;

- Bonds,
- Guarantees,
- Warranties,
- Indemnities,
- **Payment security,**
- Third party rights,
- Direct agreements,
- Insurances.

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## Common Practice



The amount of money retained is commonly between 3 to 5% of each interim payment.

The retention amount may be subject to certain contract requirements and stipulations.

Half of the retention amount is paid to the payee upon completion of the project.

The remaining retention money is paid to the payee upon the expiry of a specified further period of time, usually related to correction of defects.

The retention money is retained by the payer with no particular obligation as to what happens with the money.

As an alternative to 'cash' retentions a retention bond is sometimes used as a form of payment security.

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## Industry Concerns

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## Issues



Other forms of contract assurance have been introduced but the practice of including retention in a construction contract continues.

Payment of retention money to a 'lower tier' supplier linked to 'another contract', the practice of which was only changed in the amendments to s110 of the 'Construction Act'.

A party in the supply chain becoming insolvent (Carillion, Dawnus) with loss of 'unprotected' retention money.

Effect on cash flow throughout the supply chain.

Current procedures lack sophistication and are not based on a 'targeted' approach or application.

It is perceived as both a 'cause' and 'symptom' of the reasons why the construction industry is not progressing.

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## Publications



Numerous Government departments and industry bodies have reported on the issue of retentions, including;

- 'Constructing the Team' – Sir Michael Latham, final report July 1994, Recommendation 27.
- 'The Use of Retentions in the UK Construction Industry' – House of Commons Trade and Industry Committee, 04 Dec 2002.
- 'Construction Supply Chain Payment Charter' – Construction Leadership Council, 2014.
- 'Retentions in the Construction Industry' – Department for Business, Energy & Industrial Strategy, October 2017.
- 'Roadmap to Zero Retentions' – Build UK, September 2019.
- 'Use of Cash Retentions in the Construction Industry – Debate Pack' – House of Commons, 24 February 2020.

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## Parliamentary Bills



### Construction Industry (Protection of Cash Retentions) Bill HC 2017

This was introduced by Alan Brown of the Scottish National Party in the House of Commons in 2017 and was actually a 'motion', as the calling of a general election prevented progress to a formal Bill.

### Construction (Retention Deposit Schemes) Bill HC 148 2018

This was introduced by Peter Aldous of the Conservative Party in the House of Commons in 2018 and proposed changes to the 'Construction Act' (new sections 111A & 111B). 'Brexit' and the calling of a general election prevented further progress.

### Construction (Retention Abolition) Bill HL 59 2021

This was introduced by Lord Aberdare (Crossbench) in the House of Lords in 2021 and proposes changes to the 'Construction Act' (new section 113A). It is currently awaiting the 1<sup>st</sup> reading in the House of Commons.



## NEC Suite

## NEC Suite



Secondary option X16 can be found in the following NEC forms of contract:

- Engineering and Construction Contract (ECC),
- Engineering and Construction Subcontract (ECS).

In addition, the 'short' versions of both these forms, ECSC and ECSS, contain provisions for retention as follows;

- Enter the retention percentage in Contract Data,
- Administer the procedure under sub-clause 50.7.

**Note:** secondary option X16 is not used with main option F under the NEC4 ECC form.

## ECC form – X16.1 Part 1



*'After the Price for Work Done to Date has reached the retention free amount, an amount is retained in each amount due. ....'*

**Note:** PWDD doesn't include any amounts in relation to;

- Price adjustment for inflation - X1,
- Bonus for early completion – X6,
- Delay damages – X7,
- Achieving the target for an incentive payment – X12, X20, X22,
- Advance payment – X14,
- Key Date assessment – cl25.3,
- Repeating a test or inspection – cl41.5,
- Contractor or Client liabilities – cl82.1, cl82.2,
- Insuring on behalf of the other party – cl85.1, cl86.3,
- Interest payment(s) – cl51.3,
- Tax required by the law – cl51.5,

## ECC form – X16.1 Part 2



'... Until the earlier of

- Completion of the whole of the works and
- the date on which the Client takes over the whole of the works ... '

Completion is certified within 1 week of occurrence – cl30.2.

The Client takes over the works not later than 2 weeks after Completion – cl35.1.

The Client may use (and 'takes over') any part of the works before Completion – cl35.2.

Note that the issue of a termination certificate stops the continuation of payment assessment dates – cl50.1.

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## ECC form – X16.1 Part 3



'... the amount retained is the retention percentage applied to the excess of the Price for Work Done to Date above the retention free amount.'

The retention percentage is  %

The retention free amount is

### Example

Retention percentage is 3%

Retention free amount is £500,000.00

PWDD is £850,000.00

Retention = (£850,000.00 less £500,000.00) x 3%

Retention = **£10,500.00**

This is included as part of the 'amount due' under the 3<sup>rd</sup> bullet of cl50.3.

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## ECC form – X16.2



*'The amount retained is halved*

- *in the next assessment made at Completion of the whole of the works or*
- *in the next assessment after the Client has taken over the whole of the works if this is before Completion of the whole of the works ... '*

**Note:** with NEC4 there is no 'additional' assessment at Completion of the whole of the works as was the case under NEC3.

This is included as part of the 'amount due' under the 2<sup>nd</sup> bullet of cl50.3.

*'... The amount retained remains at this amount until the Defects Certificate is due to be issued. No amount is retained in the assessments made after the Defects Certificate is due to be issued.'*

The Defects Certificate is issued at the *defects date* where there are no notified Defects – cl44.3.

## ECC form – X16.3 Part 1



Sub-clause X16.3 was added with NEC4.

*'If stated in the Contract Data or agreed by the Client, the Contractor may give the Client a retention bond, ... '*

The Contractor **May/may not** give the Client a retention bond. (Delete as applicable)

*'... provided by a bank or insurer which the Project Manager has accepted ... '*

Note that there are no timescales associated with this.

*'... for the total amount to be retained ...'*

It doesn't specify how this is calculated but presumably would use the 'tendered total of the Prices' (Contract Data Part 2) as the basis.

*'... and in the form set out in the Scope ...'*

This would determine both the type of bond and the terms.



## ECC form – X16.3 Part 2



*'... A reason for not accepting the bank or insurer is that its commercial position is not strong enough to carry the bond. ...'*

This would presumably relate to the bond provider's credit rating score.

*'... Any amount retained after the Contractor gives the Client a retention bond is paid to the Contractor in the next assessment.'*

This means that retention is deducted from amounts due until a retention bond is provided.

This would be the case in either of the following situations;

- Providing a bond at the beginning of the project – Contract Data Part 1,
- Providing a bond part way through the project – by agreement.



## Things to Consider...

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Sectional Completion,  
 Client takes over part of the works,  
 VAT and retentions,  
 A 'retentions cap',  
 Check the calculation,  
 The required retention bond and type.  
 Can the retention bond 'type' be changed?  
 Does the Scope actually state the required credit rating score of the bond provider?  
 A 'retention free amount' and Secondary Option X3??

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