



Construction Contracts (Retention Money) Amendment Bill

The Electrical Contractors Association of NZ

(Trading as Master Electricians)

Submission

Introduction

Master Electricians is the professional trade organisation for electrical contracting businesses in New Zealand. The origins of the Master Electricians date back to 1925 and have today has grown to have over 1200 members, who employ in excess of 7,000 electrical workers, including a large proportion of the apprentices trained nationally.

Master Electricians wholly owns the Electrical Training Company who directly employ over 900 apprentices and train half of the 5000 electrical apprentices currently employed industry-wide.

General

Master Electricians supports this Construction Contracts (Retention Money) Amendment Bill (The Bill) the intent of these amendments will, we believe, improve the long term resilience of the sub-contracting companies and the overall reputation of the construction industry. In particular, 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 or leveraging by Party A.

Compulsory reporting required by Party A, as opposed to by request, will improve the relationship between Party A and Party B and lead to more trusting relationships. Penalties imposed 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 historic practice of developers and main contractors utilising retention money for working capital or leverage, leading to a misrepresentation of Party A's balance sheet. Should Party A go into liquidation, any retentions held from Party B will be protected and able to be distributed by the receiver or liquidator, less any 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 a very important section of the Bill, any party holding retentions will need to understand their requirements. An education programme may be needed to educate payers and payees of their obligations and rights.
- We believe that a further subclause is needed under section 18C; stating 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 implied 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 another vital piece of the Bill. Historically it has been proven that some developers or contractors will not keep retention money separate from trading accounts 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 Acts specified requirements.
 - This is an important aspect of the Bill, but it does not include a mechanism for enforcing compliance. A clear method of enforcement is essential, or, as has historically been the case, Party B will have no practicable means of enforcing its rights over Party A, resulting in the wider benefits and rigor of the Bill not being realised. The regulator (MBIE) is the obvious agency to enforce the Bill.
 - Also of concern is the level of the fines set in the Bill. Considering the value of retentions held, which often amount to millions of dollars. Master Electricians suggests these fines be increased to ‘up to \$500,000 for a company’ and ‘up to \$100,000 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 collection and distribution. They are entitled to be paid reasonable fees and cost for doing so.
 - This section provides a clear determination as to the ownership of the retentions and will save significant cost and time delays, leading to creditors receiving a greater proportion of the retentions owed than has historically been the case. Having the costs deducted from the retention fund rather than the general assets of the failed business, which is a fair attribution of cost.
- There will be some time/cost in administering the separate account(s) and reporting functions, however most of these functions are already needed to administer the retention monies. Any overall additional time/cost would negligible.

Summary

Master Electricians supports the Construction Contracts (Retention Money) Amendment Bill with the following provisos:

- a sub-clause is added to s18C, 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, and

- clause 18FC (6) is amended to provide absolute clarity, and
- a mechanism is introduced for reporting non-compliance and the ability to enforce penalties, and
- the penalties for non-compliance are raised to ensure they are relative and an actual deterrent.

Contact

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