Will the proposed retention deposit scheme ease pressure?

Following the introduction of a Private Members Bill to protect retentions, draft wording to legislate for a retention deposit scheme has been published.

We have previously reported on the Government’s consultation on the use of cash retentions in the construction industry, which concluded in January 2018. Please click here to view an article by Andrew Croft discussing the matter, and click here to see a webinar on Late Payment in January.

This consultation considered alternatives to cash retentions being held by employers and contractors, such as project bank accounts, escrow accounts and bonds, with the intention of reducing cash-flow issues. The extent of further legislation was to become clearer following the outcome of the consultation, and we predicted new laws could be enacted such as, a statutory retention deposit scheme.

However, before consultation was complete and any Government-led Bill was introduced, a Private Members Bill was introduced by Peter Aldous, MP on 9 January 2018. In his motion, Mr Aldous cited the need to rectify an omission from the Latham Report in the Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996) – a secure trust fund for the deposit of retentions.

To support his motion Mr Aldous stated that:

- Retentions are a critical issue for SMEs in the construction industry.
- Overall, almost £8bn of cash retentions has remained unpaid over the last 3 years.
- Almost 50% of those that have had retentions held in the last 3 years have experienced non-payment due to upstream insolvency. Nearly £80k was lost per contract.
Backed by 30 trade associations, Mr Aldous proposed a retention deposit scheme, similar to the scheme for shorthold tenancies. This would be a secure way of ensuring retention monies were released on time and safeguarded against upstream insolvency. Further, the interest on the deposits would fund the scheme with any left over going towards training.

Indeed, Mr Aldous’ motion forewarned of the seriousness of the retention issue subsequently experienced when Carillion went into insolvency. To quote from the Hansard record: “If one of the larger construction companies were to fail, the consequences for SMEs and their supply chains could be disastrous. They could lose all their retentions, adding to the £220million that is already lost annually”.

Following the motion, a draft of the Construction (Retention Deposit Schemes) Bill has now been published.

The draft Bill looks to insert new clauses 111A (the retention deposit scheme) and 111B (contractual requirements) into the Construction Act 1996.

The Scheme

The Bill requires the Secretary of State (or applicable Ministers in Wales and Scotland) to make available a mandatory retention deposit scheme “for the purpose of safeguarding any cash retention withheld in connection with construction contracts”. Such a scheme is also for “facilitating the resolution of disputes arising in connection with such cash retentions”.

Under the scheme:

+ Retention monies are paid into a retention deposit scheme “forthwith”, which we presume is on or before the final date for payment.
+ If the retention is not placed into a retention deposit scheme or the relevant information of the scheme is not given to the payee, then not later than 7 working days after the cash retention was withheld it must be refunded in full.

There is however no detail on how the scheme will operate, including how any monies would be released on certain events such as the insolvency of one of the parties.

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Further, by the wording of the Bill a “construction contract” is defined more widely than s.104 of the Construction Act 1996. The Act would include contracts “created to have a similar effect to a construction contract”. We suspect this will be debated and a tighter definition be used otherwise it could lead to inconsistency with the remainder of the Construction Act 1996 and uncertainty between the parties as to whether their contract needs to use a retention deposit scheme.

The draft Bill was due for its 2nd reading on 27 April 2018 however due to other Parliamentary business this is likely to be pushed back to 15 June 2018. As such it may be sometime before the Bill is enacted into law, and given the issues identified above is likely to undergo amendment to better define how the scheme will be operated and what payments and contracts it applies to. Indeed, it may yet be usurped by a Government-sponsored Bill making more wholesale changes to the Construction Act 1996 following the recent consultation. Nevertheless it is important for the industry to note that politicians seem to be grasping the issues with payment in construction contracts, although no doubt the insolvency of Carillion has helped focus their minds.

While the retention deposit scheme may not reduce financial pressure during a job it will certainly assist in reducing risk of the paying party failing to release retention monies rightly due. In light of the continued uncertainty in the construction industry including the most dramatic fall in output since the second quarter of 2012 of 3.3% over the first three months of 2018, this could be an important step and we will watch with interest as this Bill progresses.

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