

SCSI Professional Guidance

# Retention

Guidance note

1st edition



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1st Edition

Published by  
Society of Chartered Surveyors Ireland (the Society),  
38 Merrion Square,  
Dublin 2, Ireland  
Tel: + 353 (0)1 644 5500  
Email: info@scsi.ie

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Published April 2016.

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# Acknowledgements;

This guidance note has been adapted from the Royal Institution of Chartered Surveyors (RICS) *Retention Guidance Note* for use in Ireland. The Society would like to thank the RICS for the kind permission to adapt the UK version for use in Ireland.

## **SCSI Working Group**

Chair: John Costello (Costello Surveyors)

John Brennan (Brennan Associates)  
Fiona Dawson (Institute of Technology, Carlow)  
Laura Firth (Healy Kelly Turner & Townsend)  
Shane McCullagh (McCullagh Lupton Quinn)  
Amy McNally (Buildcost)  
John Mernagh (Healy Kelly Turner & Townsend)  
Charles Mitchell (Dublin Institute of Technology)  
Aidan Nolan (Aidan Nolan & Associates)  
Martin O'Neill (Institute of Technology, Carlow)  
Martin Sinnott (MGM Partnership)  
Robert Smyth (Waterford Institute of Technology)  
Keith Williams (Healy Kelly Turner & Townsend)  
Secretarial: Maria Murphy (Healy Kelly Turner & Townsend)

## SCSI/RICS professional guidance note

This is a guidance note. It provides advice to the Society's members on aspects of their work. Where recommendations are made for specific professional tasks, these are intended to represent 'best practice', i.e. recommendations which in the opinion of the Society meet a high standard of professional competence.

Although members are not required to follow the advice and recommendations contained in the note, they should note the following points. When an allegation of professional negligence is made against a surveyor, a court or tribunal may take account of the contents of any relevant guidance notes published by the Society in deciding whether or not the member had acted with reasonable competence.

In the opinion of the Society, a member conforming to the practices recommended in this note should have at least a partial defence to an allegation of negligence if they have followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.

It is for each surveyor to decide on the appropriate procedure to follow in any professional task. However, where members do not comply with the practice recommended in this note, they should do so only for a good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice. Also, if members have not followed this guidance, and their actions are questioned in an RICS disciplinary case, they will be asked to explain the actions they did take and this may be taken into account by the Panel.

In addition, guidance notes are relevant to professional competence in that each member should be up to date and should have knowledge of guidance notes within a reasonable time of their coming into effect.

## Document status defined

SCSI/RICS produces a range of professional guidance and standards documents. These have been defined in the table below. This document is a guidance note.

Document status defined		
Type of document	Definition	Status
SCSI/RICS practice statement	Document that provides members with mandatory requirements of the Rules of Conduct for members	Mandatory
SCSI/RICS code of practice	Standard approved by SCSI that provides users with recommendations for accepted good practice as followed by conscientious surveyors	Mandatory or recommended good practice (will be confirmed in the document itself)
SCSI/RICS guidance note	Document that provides users with recommendations for accepted good practice as followed by competent and conscientious surveyors.	Recommended good practice
SCSI/RICS information paper	Practice based information that provides users with the latest information and/or research	Information and/or explanatory commentary

# 1. Introduction

This guidance note introduces the subject by looking at the general principles of retention, including areas such as law; reasons for introduction within a contract; levels of retention, and how amounts are deducted, certified or released.

The guidance note then focuses on how the standard forms of contract deal with the issue. A list of the contracts reviewed is included within the table of contents. This paper reviews methods and limits of deduction, inclusion of the retention amount to be included within the contract, release and set off against sums held.

This guidance note concludes with a review of common issues including areas such as commonly occurring problems; financing; insolvency, and defects rectification.

Guidance is given for each of the main groups of contracts and the forms in most regular use within those groups, under the following headings, which map to the Assessment of Professional Competence (APC):

- General principles (Level 1 - Knowing)
- Practical application (Level 2 - Doing)
- Practical considerations (Level 3 - Doing/Advising)

## 2. General principles (Level 1 - Knowing)

### 2.1 Reason for inclusion of retentions within the contract

Retention is a sum, generally deducted at each monthly payment notice, to provide the client with some security that the contractor/sub-contractor will return to correct any defects during the defects period, defects correction period, or defects liability period. If the contractor/sub-contractor does not return to correct the defects then the retention held may be used to fund the payment of others to correct the defects. It is advisable to check the contract on the ability to do this, and the relevant notices that should be given to the incumbent contractor prior to appointing others to undertake the works.

### 2.2 Amounts of retention and caps

The level of retention held is usually a percentage of the value of the contract works. It is generally applied to the value of the contract works, including variations and changes, not just to the contract sum. Sometimes contracts will place a cap on the maximum level of retention that can be deducted. For example, this could be ten per cent of the contract price/lump sum.

Other limits or caps may be set as to the maximum amount of retention that may be deducted from payments. The RIAI, FIDIC and NEC forms of contract demonstrate this and this is detailed further within this guidance note.

Some contracts also contain retention free amounts and therefore the contractor can be paid up to a certain sum prior to the retention being deducted. Retention bonds are an alternative and these are considered elsewhere within this guidance note.

### 2.3 General principles of release of retentions

Generally, a portion of the retention is released upon completion of the works. The remainder is released when the defects period, defects correction period or defects liability period has expired and the relevant certification under the contract has been issued to confirm this. It is advisable to check the details of the individual contracts as release is slightly different in each. The release of retention is different if there is sectional completion, partial possession or the like under the contract. The majority of contracts allow for partial release of the retention at each sectional completion but the final release will vary between contracts. The final portion may be released either at the expiry of the defects liability period for each section or the expiry of the defects liability period for the works as a whole. The majority of contracts also allow for partial release of retention upon partial possession by the client/employer.

Sub-contractors should review contracts to determine when the release is triggered. This may be by completion of the sub-contractor's works or the main contractor's works.

The Construction Contracts Act 2013 (Section 3 (5)) prohibits "pay when paid" provisions, in most cases, and that prohibition applies to sub-contract retention. Note that this legislation is not yet in force at the time of writing this Guidance Note.

The contract should be reviewed for the effect upon retention in the event that the contract is terminated. Generally, clauses regarding the release of retention cease to apply in the event of termination but this may vary dependent on the reason for termination and the conditions of contract.

For quantity surveyors or project managers running multiple contracts or programmes of work, it is advisable to set up a tracking process of retention for clients and contractors/sub-contractors. This may avoid late release of retention or a surprise payment required by a client/employer. It should be noted that interest might become due for the late release of retention monies once contractual prerequisites have been completed the contract terms should be checked for provisions about interest.

## 2.4 Alternatives, e.g. retention bonds

Rather than deduct a physical sum from a contractor's interim payment, it is possible to procure a retention bond to cover retention that would otherwise have been deducted. There are examples of suitable retention bonds in the contracts reviewed within this guidance note. Retention bonds are generally issued in favour of the client/employer who has waived his rights, under the contract, to the deduction of cash retention amounts. Bonds are generally set to the standard levels of retention which would otherwise be contained in the contract.

The contracts reviewed in this guidance note contain retention bonds appropriate to use with the same form of contract. For an example, refer to the Text for Retention Bond which is contained within the appendices of the RIAI conditions. This is simply a bank guarantee to pay the beneficiary (generally the client/employer), up to a limit of the guaranteed amount if the contractor (referred to as the Applicant), 'has failed to carry out his obligation(s) under the contract'. An example is also included in the GCCC model forms (MF1.15) and the RIAI blue and yellow forms. Note that the retention bond guarantees all the Contractor's contractual obligations but the amount is only the retention.

It is recognised that there is opposition from contractors and sub-contractors to the use of retention in many areas as there is a view that this impacts upon cash flow. The removal of retention provisions without the use of an appropriate bond is not a decision to be taken lightly and should be thoroughly reviewed with the client/employer with a clear explanation of the risks prior to pursuing this route.

## 3. Practical application (Level 2 - Doing)

### 3.1 Contract specific clauses for retention

This section contains the detail of the retention provisions within each of the contracts, but for ease of reference, this has also been summarised in the following table. Practitioners are strongly advised to always review the precise wording of the contract, especially where older or later versions of the contract may be in use and clients/employers often amend the wording of the standard forms of contract.

Contract	Retention Bond Option	Entry into Contract	Default Level	Sectional Completion Release	Completion Release	Final Release (subject to Defects Issues)	Caps or Limits	Other Comments
GCCC - Public Works Contract for Building Works Designed by Employer PW-CF1	After substantial completion	Schedule Part 1	10%	Yes	50% upon substantial completion (subject also to sectional completion).	Upon issue of Defects Certificate	N/A	See GCCC Public Works Contracts Guidance Notes (GN 1.5) for recommended retention levels
GCCC - Public Works Contract for Building Works Designed by Contractor PW-CF2	After substantial completion	Schedule Part 1	10%	Yes	50% upon substantial completion (subject also to sectional completion).	Upon issue of Defects Certificate	N/A	See GCCC Public Works Contracts Guidance Notes (GN 1.5) for recommended retention levels
GCCC - Public Works Contract for Civil Engineering Works Designed by Employer PW-CF3	After substantial completion	Schedule Part 1	10%	Yes	50% upon substantial completion (subject also to sectional completion).	Upon issue of Defects Certificate	N/A	See GCCC Public Works Contracts Guidance Notes (GN 1.5) for recommended retention levels
GCCC - Public Works Contract for Civil Engineering Works Designed by Contractor PW-CF4	After substantial completion	Schedule Part 1	10%	Yes	50% upon substantial completion (subject also to sectional completion).	Upon issue of Defects Certificate	N/A	See GCCC Public Works Contracts Guidance Notes (GN 1.5) for recommended retention levels
GCCC Public Works Contract for Minor Building and Civil Engineering Works Designed by Employer PW-CF5	After substantial completion	Schedule Part 1	10%	Yes	50% upon substantial completion (subject also to sectional completion).	Upon issue of Defects Certificate	N/A	See GCCC Public Works Contracts Guidance Notes (GN 1.5) for recommended retention levels

Contract	Retention Bond Option	Entry into Contract	Default Level	Sectional Completion Release	Completion Release	Final Release (subject to Defects Issues)	Caps or Limits	Other Comments
GCCCShort Public Works Contract PW-CF6	No	Schedule	10%	No	50% upon substantial completion	Upon issue of Defects Certificate	N/A	Retention levels are set out in the Schedule to the contract
GCCCPublic Works Investigation Contract PW-CF7	No	Schedule - it is stated as payment milestone	3%	No	N/A	12 Months after investigation complete and Clause 4.4 complied with	N/A	Retention levels are set out in the Milestones Table in the Schedule to the contract
GCCCPublic Works Short Investigation Contract PW-CF8	N/A	N/A	N/A	N/A	N/A	N/A	N/A	This contract does not have any facility for retention
GCCCPublic Works Framework Agreement PW-CF9								No requirement for retention in the framework document itself however retention is applied at the relevant rate when a works contract is entered into under the framework
GCCCPublic Works Contract for Early Collaboration PW-CF10	Yes	Schedule 3	N/A	Yes	50% upon substantial completion	After issue of Defects Certificate	Schedule 3 permits the entry of a retention free amount and a limit of retention	See GCCC Public Works Contracts Guidance Notes (GN 1.5) for recommended retention levels

Contract	Retention Bond Option	Entry into Contract	Default Level	Sectional Completion Release	Completion Release	Final Release (subject to Defects Issues)	Caps or Limits	Other Comments
GCCC Public Works Term Maintenance and Refurbishment Contract PW-CF11	N/A	N/A	N/A	N/A	N/A	N/A	N/A	This contract does not have any facility for retention but there is an option to include, in a payment, up to 90% of the value of a task not completed. The full value is paid when the task is completed.
RIAI Articles of Agreement and Conditions of Contract for Building Work With and Without Quantities (blue and yellow forms)	After practical completion	Appendix	N/A	Yes	50% upon practical completion (subject also to sectional completion).	Upon issue of Final Certificate	10%	See Liaison Committee Code of Practice for Tendering and Contractual Matters 2006 for recommended retention levels.
RIAI Articles of Agreement and Conditions of Building Contract SF 88 (pink form)	No	Amount included in Conditions	10%	No	50% upon practical completion	Upon issue of Final Certificate	10% retention is included in the conditions	See Liaison Committee Code of Practice for Tendering and Contractual Matters 2006 for recommended retention levels.
RIAI Building Contract (white form)	No	Contract information	N/A	No	50% upon practical completion	Upon issue of Final Certificate	Retention limit can be entered in Contract Information Section	See Liaison Committee Code of Practice for Tendering and Contractual Matters 2006 for recommended retention levels.

Contract	Retention Bond Option	Entry into Contract	Default Level	Sectional Completion Release	Completion Release	Final Release (subject to Defects Issues)	Caps or Limits	Other Comments
NEC ECC Options A & B	No	Option clause X16 in contract data	N/A	No	Half at completion or the employer taking over the whole of the works.	Upon Defects Certificate.	Retention free amount is possible. Maximum retention limit only if the contract is amended.	Not usually selected if performance bond is required.
NEC ECC Options C to E	No	Option clause X16 in contract data	N/A	No	Half at completion or the employer taking over the whole of the works.	Upon Defects Certificate.	Retention free amount is possible. Maximum retention limit only if the contract is amended.	Not usually selected if performance bond is required. Calculated on gross subcontract payments so retention is not duplicated.
NEC ECC Option F	No	Option clause X16 in contract data	N/A	No	Half at completion or the employer taking over the whole of the works.	Upon Defects Certificate	Retention free amount is possible. Maximum retention limit only if the contract is amended.	Not usually selected if performance bond is required.
FIDIC Red Book	Yes	Appendix to Tender	N/A	Yes - 40% of the retention released for the section.	50% upon issue of Taking-Over Certificate.	A further 40% is released for sections. Expiry of defects notification period for all of the works releases the final retention.	Limit of retention entered into the Appendix to Tender.	Employer certifies the amount to be paid for nominated subcontractors. No payments are made if performance security is not in place.
FIDIC Orange Book	No	Appendix to Tender	N/A	Yes - 50% released proportional to the value of works as stated in the Appendix to Tender.	50% upon issue of Taking-Over Certificate.	Upon expiry of the contract period.	Limit of retention entered into the Appendix to Tender.	No payments are made if performance security is not in place.

### 3.1.1 GCCC contracts

#### General

Several of the retention sections of the GCCC contracts are identical. These GCCC Public Works Contracts are as follows:

- Building Works Designed by Employer
- Building Works Designed by Contractor
- Civil Engineering Works Designed by Employer
- Civil Engineering Works Designed by Contractor
- Minor Building and Civil Engineering Works designed by the Employer

These Contracts are reviewed in detail under the heading of Standard and Minor Contracts. Other GCCC contracts have been reviewed and brief comments are also noted. It is important to check the particular wording in a contract, especially when older or amended versions of the contract are being used. The GCCC Public Works Contract for Building Works Designed By the Employer (Document Reference PW-CF1 v.1.8 4 September 2012) has been used in the preparation of this guidance note.

#### Standard and Minor Contracts PW-CF1 to PW- CF5

Details of the retention requirements are to be completed in the Schedule Part 1L.

The percentage of retention can also be entered in the Schedule Part 1L. In the event that this is left blank, the default retention level is ten per cent.

The contract states that amounts to be included in interim payments shall be subject to the deduction of retention. It also notes that the employer can deduct from the payment other sums which are due from the contractor under the contract. It is recommended that appropriate notice be given for this prior to those other deductions. No notice is needed for the deduction of retention.

The final payment process is also detailed but there is no retention deduction included within this.

The Employer's Representative prepares a certificate, for the employer and the contractor, of the amount due and the retention to be deducted in each payment.

The employer pays the amount due to the contractor on the interim certificate which includes the deduction of any retention and previous payments.

If a retention bond is selected for the contract, retention is not deducted once substantial completion has been achieved but the Employer's Representative still prepares a certificate showing the retention that would have been deducted from the interim payment.

The retention bond must be provided by the contractor to the employer within 10 Working days of the issue of Substantial Completion. The bond is to be as per the format set out in the contract and should state the maximum amount and the expiry date.

If the retention that would have been deducted exceeds the amount stated in the bond then the contractor can either have the bond value increased or the excess retention will be deducted from the payment.

Only half of the retention is deducted for the works, or section of the works, where substantial completion has been achieved but a Defects Certificate has not been issued. It is therefore important to understand the value of each section of works in order to accurately calculate the level of retention to be deducted, or for adjustments to the bond value.

Once the Defects Certificate is issued, no retention is held from the payment certificate. Refer to the contract clause 11.5 regarding the final statement.

For the standard wording for the retention bond see GCCC Model form MF1.15.

### **Short Public Works Contract PW-CF6**

The Short Public Works Contract (Document Reference PW-CF6 v.1.6 8 August 2011) has similar principles to the Standard and Minor Contracts. The significant variances are:

- + there is no sectional completion provision within the contract
- + there is no facility to enter the requirement for a retention bond; and
- + the level of retention is determined by the value of works that will be paid rather than the value that will be withheld.

Details of the retention requirements are to be completed in the Schedule. Retention is stated as the amount to be paid rather than the amount to be withheld, i.e. a percentage of 90 per cent is entered in the schedule if the intention is to deduct ten per cent retention. There is a default value of percentage of work to be paid of 90 per cent.

There is a requirement to state in the schedule the amount to be paid once Substantial Completion has been certified. As an example, this would be entered into the contract as 95 per cent if the intention was only to deduct 5 per cent retention. There is a default value of percentage of work to be paid of 95 per cent following Substantial Completion but prior to Final Statement.

The contract states that amounts to be included in payments shall be subject to any deductions permitted by this contract. It is advisable to check the contract conditions for any notices that might be required for deductions. All works are subject to the percentage adjustments prior to and after Substantial Completion but before final statement.

The final statement process is also detailed, once the Defects Certificate is issued, but obviously there is no retention deduction included within this.

### **Public Works Investigation Contract PW-CF7**

The Public Works Investigation Contract (Document Reference PW-CF7 v 1.0 28 July 2009) has similar principles to the Standard and Minor Contract. The significant variances are:

- + there is no sectional completion provision within the contract
- + there is no facility to enter the requirement for a retention bond; and
- + the level of retention is determined by the value of works that will be paid rather than the value that will be withheld.

Details of the retention requirements are to be completed in the Schedule under the heading of the Milestone Table (clause 7.1). Retention is stated as the amount to be paid at the completion of a Milestone rather than the amount to be withheld, i.e. a percentage of 3 per cent is entered in the Milestone Table to be paid 12 Months after the investigation is complete if intention is to deduct three per cent retention. This amount is not referred to as retention but this process is the same as holding retention. The Milestone Table in the Schedule template indicates 97% to be paid up to issue of the final report and 3% to be paid 12 months after the report. There is no default value if the contract is left blank.

There is a requirement to state in the Milestone Table the amount to be paid once completion of each Milestone has been achieved. As an example, this would be entered into the Milestone table as a total of 97 per cent for the completion of all of the Milestones if the intention was to deduct 3 per cent retention.

If the intention is not to deduct retention, then 100 per cent should be entered for the completion of all of the Milestones and there should be no milestone for 12 months after the investigation is complete.

The contract states that the Employer must pay the Contractor the Price in instalments as scheduled.

The final statement process is also detailed, once the Defects Certificate is issued, but obviously there is no retention deduction included within this.

### **Public Works Short Investigation Contract PW-CF8**

There is no facility within this contract for retention.

### **Public Works Framework Agreement PW-CF9**

This agreement uses the term of one of the above contracts PW-CF1 to PW-CF8. The contract to be used will be noted in clause 2.2 of the framework agreement. For details on retention refer to PWCF1 to PW-CF8 as appropriate.

### **Public Works Contract for Early Collaboration PWCF10**

The Public Works Contract for Early Collaboration has similar principles to the Standard and Minor Contract. The significant variances are:

- there is no default retention amount
- there is a facility to enter limit of a retention; and
- there is a facility to enter a retention free amount

Details of the retention requirements are to be completed in Schedule 3. There is no default value if the contract is left blank.

The employer may enter a retention free amount in Schedule 3. The retention free amount can be completed as nil to act as a more traditional contract. Retention is then applied in each assessment for payment to the sum (price for work done to date and not to any other sums), in excess of the retention free amount.

The employer may also enter a limit of retention in Schedule 3. If no limit of retention is required this section can be left blank. Retention is then applied in each assessment for payment up to the sum entered as the limit of retention, once this limit is reached no further retention is held on the rest of the payments.

The contract states that the retention percentage scheduled is deducted from each interim advance for a Task or Early Works. If there is a scheduled retention-free amount for a Task, Retention is not deducted until total payments for the Task to the Contractor have reached that amount. If there is a scheduled limit of retention for a Task, Retention is not deducted from payments for that Task after the total Retention has reached that limit.

All works are subject to the percentage adjustments prior to and after Practical Completion but before final statement notice.

The Contractor may invoice the Employer for half the Retention held for a Task when the Employer Representative has certified Substantial Completion of the Works in the Task. If, at the time of invoicing, the Contractor gives the Employer a retention bond for the second half of the Retention, executed by a surety approved by the Employer, the Contractor may invoice the Employer for the whole Retention. Otherwise, the Contractor may invoice the second half after the issues of the Defects Certificate.

#### **Public Works Term Maintenance and Refurbishment Contract PW-CF11.**

There is no facility within this contract for retention but there is an option to include, in a payment, up to 90% of the value of a task not completed. The full value is paid when the task is completed.

## 3.1.2 RIAI contracts

### **General**

The retention sections in two of the RIAI contracts are identical. These are the RIAI Articles of Agreement and Conditions of Contract as follows:

- For building work where quantities form part of the contract (yellow form)
- For building work where quantities do not form part of the contract (blue form)

These Contracts are reviewed in detail under the heading of Standard Contracts. The RIAI Articles of Agreement and Conditions of Building Contract SF 88 (pink form) and RIAI Building Contract (White Form) have also been reviewed and brief comments are also noted.

It is important to check the particular wording in a contract, especially when older or amended versions of the contract are being used.

The RIAI Articles of Agreement and Conditions of Contract for building work where quantities form part of the contract (yellow form) has been used in the preparation of this guidance note.

## Standard Contracts - Blue and Yellow forms

Details of the retention requirements are to be completed in the Appendix.

There is no default level for retention in this contract therefore it is essential that you enter the percentage that is to be retained. If it is not the intention to deduct retention then nil or zero should be entered. See Liaison Committee published Code of Practice for Tendering and Contractual Matters 2006 for recommended retention levels. This Code is under review at the date of this Guidance Note.

The contract states that amounts to be included in interim certificates shall be subject to the deduction of retention as noted elsewhere within the contract. The sum is noted as being retained by the employer.

The final payment process is also detailed but there is no retention deduction included within this.

The Architect prepares a certificate, for the employer and the contractor, showing the retention to be deducted in each interim certificate.

The employer pays the amount due to the contractor on the interim certificate which includes the deduction of any retention and previous payments.

The contract states:

'...as and when such an amount is so retained it shall be held upon trust by the Employer for the Contractor without obligation to invest.....'

The contract may allow for a joint account retention fund ( clause 35g). If so the employer must place the retention monies in a separate bank account to comply with clause 35(g). The contractor benefits/suffers from interest earned or value lost on this account.

A retention bond is mandatory once Practical Completion has been certified, per clause 35 (f) (1), and retention is not deducted from the payment but the Architect still prepares a certificate showing the retention that would have been deducted from the payment. In practice it can be difficult for some contractors to provide a retention bond and consideration should be given to deleting clause 35(f) (1). If this is done retention continues to be deducted from payments.

The retention bond must be provided by the contractor to the employer after the issue of the certificate of Practical Completion. The bond is to be as per the format set out in the contract and should state the maximum amount and the expiry date.

Note that the retention bond guarantees all the Contractor's contractual obligations but the amount is only the retention.

If the retention that would have been deducted exceeds the amount stated in the bond then the contractor can either have the bond value increased or the excess retention will be deducted from the payment.

Only half of the retention is deducted for the works, or section of the works, where practical completion has been achieved but a Final Certificate has not been issued. It is therefore important to understand the value of each section of works in order to accurately calculate the level of retention to be deducted, or for adjustments to the bond value.

Once the Final Certificate is issued, no retention is held from the payment certificate.

The standard wording for the retention bond is contained within the back pages of the contract (pg 27).

**RIAI Articles of Agreement and Conditions of Building Contract SF 88 (pink form)**

This Contract has similar principles to the Standard Contracts. The significant variances are:

- + there is no sectional completion provision within the contract
- + there is no facility to enter the requirement for a retention bond.

Details of the retention requirements are included in the text in the Conditions which state that a retention amount of 10%.

After practical completion retention is stated within the contract as the amount to be paid to the contractor of 95% of the total amount rather than the amount to be withheld.

The final certificate process is also detailed, once the defects liability period has ended is issued, there is no retention deduction included within this.

**RIAI Building Contract (white form)**

This Contract has similar principles to the Standard Contracts. The significant variances are:

- + there is no sectional completion provision within the contract
- + there is no facility to enter the requirement for a retention bond; and
- + there is a facility to set a retention limit

Details of the retention requirements are to be completed in the Contract Information.

The percentage of retention must also be entered in the Contract Information. There is no default level for retention in this contract therefore it is essential that you enter the percentage that is to be retained. If it is not the intention to deduct retention then nil or zero should be entered.

The employer may also enter a retention Limit in the Contract Information. If no limit of retention is required then you should insert "no Limit" in this section. Retention is then applied in each payment up to the sum entered as the limit of retention, once this limit is reached no further retention is held on the rest of the payments.

The contract may allow for the retention money being paid into a joint account (clause 2.6.4). If so the employer must place the retention monies in a separate bank account to comply with this clause. The interest due on the account shall be payable to the Contractor.

It is stated within the contract that when the Architect certifies that the works are practically complete the contractor is entitled to receive half the retentions fund. The final certificate shall include the remainder of the retention money.

### 3.1.3 NEC Engineering and Construction Contract

The NEC suite of contracts contains a set of guidance notes and while individual NEC options are reviewed, a summary of the guidance notes is included as an introduction to the principles.

As well as retention provision, the ECC has provision to retain 25 per cent of any sums due until such time as the contractor submits a programme for acceptance (if a programme is not referenced within the contract

data). For the purposes of this guidance note, this has not been classed as retention and therefore is not included in any further detail.

### **NEC ECC guidance notes**

Retention is introduced into the contract by the selection of option clause X16. In order for this clause to be included within the contract the option clause should clearly be identified in section 1 of part 1 of the contract data.

In the contract data part 1, the employer/project manager should insert the retention free amount (a sum up to which the contractor can be paid without the deduction of retention), and a percentage of retention. The figures inserted in the guidance notes are indicative only and the appropriate figures will be entered by the project manager/employer.

As previously explained, retention is deducted as security for the employer and an incentive for the contractor to complete the works. It is noted that retention will affect the contractor's cash flow and it is advisable to consider this when completing the contract data.

The employer may enter a retention free amount in the contract data. The retention free amount can be completed as nil to act as a more traditional contract. Retention is then applied in each assessment for payment to the sum (price for work done to date and not to any other sums), in excess of the retention free amount.

Options C to F use gross payments to subcontractors so that retention is not duplicated. However, it is also noted in the contract that option clause X16 is not used with the main contract Option F.

The guidance note advises that where a performance bond is required in accordance with the contract then the retention clause is not normally selected.

There is no maximum amount of retention that can be deducted although it is noted in the guidance that this can be created by amending the contract data. It is recommended that surveyors take extreme caution before amending a standard form of contract.

Half of the retention is released in the next payment assessment, four weeks after the earlier of completion or the employer taking over the whole of the works. The remainder is released in accordance with the payment core clause contained within each of the options once the Defects Certificate has been issued. It is recommended that payment clauses are reviewed where the contractor has not corrected notified defects. Once the Defects Certificate has been issued then no amount is retained.

### **Options A and B**

Please refer to section 3.1.2 on NEC ECC guidance notes as there are no changes to the retention provision for this option.

### **Option C**

Please also refer to section 3.1.2 on NEC ECC guidance notes.

In this option defined cost for subcontractors is defined as:

‘...the amount of payments due to subcontractors for work which is subcontracted without taking account of the amounts deducted for retention’.

This reinforces the issue in the guidance notes review and ensures that retention is effectively not deducted twice. However, this does mean that where the retention option is not selected in the main contract then the contractor does not have retention deducted and is paid the gross amount of defined cost in the assessment. However, the contractor may choose to deduct retention from the sub-contractor if the appropriate optional clause is selected in the sub-contract.

#### **Option D**

There is no change to Option C. Please also refer to the guidance note review in section 3.1.2.

#### **Option E**

There is no change to Option C. Please also refer to the guidance note review in section 3.1.2.

#### **Option F**

There is no change to Option C. Please also refer to the guidance note section above.

Please also refer to the guidance notes regarding the use of option clause X16 with main Option C.

## 3.1.4 FIDIC Red Book and Orange Book

### **Red Book (Conditions of Contract for Construction - for building and engineering works designed by the employer).**

The definition of retention money is as follows:

“Retention Money” means the accumulated retention moneys which the Employer retains under Sub-Clause 14.3 [Application for Interim Payment Certificates] and pays under Sub-Clause 14.9 [Payment of Retention Money].

Note that this is a quotation from the first edition 1999 and therefore may be subject to revisions, including the sub-clause references, in future editions.

The contractor is required to submit an application for payment, referred to in the contract as a Statement, after the end of each month, which should include:

‘any amount to be deducted for retention, calculated by applying the percentage of retention stated in the Appendix to Tender to the total of the above amounts, until the amount so retained by the Employer reaches the limit of Retention Money (if any) stated in the Appendix to Tender’.

It is noted that no payments are made unless the employer has received and approved the performance security. Please refer to the contract and guidance notes for further advice on payment and security/performance bonds. Also, there is provision for a minimum payment certificate/notice. Please refer to the contract for more details.

Retention release is dependent upon the issue of the Taking-Over Certificate. This triggers the first half of the retention release, which is certified by the engineer. A Taking-Over Certificate may be issued for a section or part of the works. Here, only 40 per cent of the retention is released rather than half and this is proportional to

the estimated value of the section, compared to the estimated contract price. This automatically increases to 50 per cent once the whole of the works has a Taking-Over Certificate.

The engineer then certifies the remaining retention after the latest expiry of the defects notification periods. However, if there was a Taking-Over Certificate issued for sections of the works then only a further 40 per cent of the retention is released after the expiry of the defects notification period for that section. Again, this is proportional based on the estimated value of the section compared to the estimated final contract price.

Certification of the retention will be withheld if remaining work is outstanding in accordance with the defects liability clause. The amount withheld is the estimated cost of the work to be undertaken and this is released once this outstanding work is completed.

It is also advisable to note the following requirement when calculating the proportions of retention release for sections of the work, as previously noted:

*'When calculating these proportions, no account shall be taken of any adjustments under Sub-clause 13.7 [Adjustments for Changes in Legislation] and Sub-Clause 13.8 [Adjustment for Changes in Cost]'.*

A review of the general payment clauses is recommended but the application is the estimated value of works up to the month end including variations, changes in legislation and cost as defined elsewhere in the contract. It is also noted that the contract contains provision for advance payment, which will be stated in the Appendix to Tender if the employer wishes this to be applicable. In summary, the contractor will receive reduced payments until the advance payment sum is repaid. It is interesting to note that the employer certifies the amounts which are due to nominated subcontractors and the contractor then pays the sum thereby certified. The engineer may then request evidence that the contractor has paid such sums to the nominated sub-contractor after the deduction of retention, prior to issuing a payment certificate/ notice to the contractor.

The defects liability clause may be relevant as it contains clauses regarding extension of the defects notification period to a limited period and clauses, should the contractor fail to rectify defects. The latter may lead to the contractor having to pay the employer the cost of rectifying the defects or determine a reduction in the contract price. While it is not stated in the clause, the balance of retention due back to the contractor will be used in determining the payments required from one party to the other.

### **Guidance for the preparation of particular conditions**

The contract contains guidance notes as previously covered, and there is guidance on retentions as follows.

Payment of retention money: If the employer wishes to have a guarantee in place and allow retention to be released, a suitable clause will need to be added to the contract. This will need to be included in the tender documents and an appropriate form is included as an annex within the contract. An example of a suitable clause is also included within the guidance.

### **Appendix to Tender**

The percentage of retention to be deducted and the limit of retention money will be entered in the Appendix to Tender, which will be sent to the tenderers during the tender process.

It is also noted that the contract contains a minimum amount of interim payment certificates/notices. Please refer to the contract for more detail.

### Orange Book (Conditions of Contract for Design- Build and Turnkey)

The definition of retention money is as follows:

“Retention Money” means the accumulated retention monies retained by the Employer under Sub-Clause 13.3’.

Note that this is a quotation from the first edition in 1995 and therefore may be subject to revisions, including the sub-clause references, in future editions.

The contractor is required to submit an application for payment, referred to in the contract as a Statement, after the end of each month, which should include:

‘any amount to be deducted for retention, calculated by applying the percentage of retention stated in the Appendix to Tender to the total of the above amounts, until the amount so retained by the Employer reaches the limit of Retention Money (if any) stated in the Appendix to Tender’.

It is noted that no payments are made unless the employer has received and approved the performance security. Please refer to the contract and guidance notes for further advice on payment and security/performance bonds. Also, there is provision for a minimum payment certificate / notice. Please refer to the contract for more details.

Retention release is dependent upon issue of the Taking-Over Certificate. This triggers the first half of the retention release. A Taking-Over Certificate may be issued for a section or part of the works. Here, part of the first half of the retention is certified by the employer’s representative proportionally to the value of the section of the works which is contained in the Appendix to Tender. Once taking-over is certified for all of the works, the retention release will then equate to 50 per cent of the retention held.

The employer’s representative then certifies the remaining retention upon the expiry of the contract period, which effectively means 365 days after the whole of the works are certified as complete by the employer’s representative. It shall be noted that this period can be extended up to a maximum period of two years if the works cannot be used due to defects or damage after the take over of the works. It is advisable to refer to the defects liability clause within the contract. Unlike the Red Book, the Orange Book does not allow for proportional release of the second half of the retention where there is sectional take over.

Certification of the retention will be withheld if remaining work is outstanding in accordance with the defects liability or tests after completion clauses. The amount withheld is the estimated cost of the work to be undertaken.

A review of the general payment clause is recommended but the application is the estimated value of works up to the month end, including variations and changes in legislation and cost, as defined elsewhere in the contract. It is also noted that the contract contains provision for advance payment, which will be stated in the Appendix to Tender if the employer wishes it to be applicable. The contractor will receive reduced payments until the advance payment sum is effectively repaid.

The defects liability clause may be relevant as it contains clauses regarding extension of the defects notification period to a limited period and clauses should the contractor fail to rectify defects. The latter may lead to the contractor having to pay the employer the cost of rectifying the defects or determine a reduction in the contract price. While it is not stated in the clause, the balance of retention due back to the contractor will be used in determining the payments required from one party to the other.

### Guidance for the preparation of conditions of particular application

The contract contains guidance notes as previously stated and there is guidance on retentions as follows.

Payment of retention money: If the employer wishes to have a guarantee in place and allow retention to be released, a suitable clause will need to be added to the contract. This will need to be included in the tender documents, however there is not an appropriate form included as an annex. An example of a suitable clause is included within the guidance.

### Appendix to Tender

The percentage of retention to be deducted and the limit of retention money, should be entered in the Appendix to Tender, which should be sent to the tenderers during the tender process. It is also noted that the contract contains a minimum amount of interim payment certificates/ notices. Please refer to the contract or other guidance notes regarding payments for more detail.

## 3.1.5 Common contract features

It can be seen from the three suites of contracts reviewed that, in general, the contracts use similar principles:

- There are sections in the contract to enter the level of retention to be deducted.
- The amount of retention may be capped at a certain level.
- Retention is applicable to some but not always all of the amount applied for or later certified.
- A percentage, usually 50 per cent, of the retention is released upon completion of the works but prior to the defects liability period. Retention is generally released for sections of the work where there is sectional completion within the contract.
- A proportion of the retention is released upon certification of sectional completion. This is usually dependent upon the value of the section.
- The remainder of retention is certified and released at the end of the defects liability period. This may result in multiple releases where there is sectional completion.
- Where the contractor does not rectify defects, the client/employer may use the retention held to cover the cost of rectification of those works by others.
- Retention bonds are sometimes available where there is no requirement to deduct 'cash' retention.

Please refer to individual contracts if they have not been reviewed within this guidance as they may vary from the general principles set out above.

## 4. Practical considerations (Level 3 – Doing / Advising)

### 4.1 Common issues

#### 4.1.1 Problems with release

Retention certification and release will be affected if there are defects in the works discovered in the defects liability period but then not corrected in such period. Dependent on the conditions of contract, an amount may be set off against the retention release in order that defects may be rectified by others should the client/employer require. It is advisable to check the exact wording of the specific contract in this regard. Any sum set off against the retention should be fully justified. Dependent on the conditions of contract, the rectification/making good defects certificate may not be issued until all defects are complete, which may be some time after the expiration of the contractual rectification period. This often results in a change in personnel from those who were involved in the day to day administration of the project to those who deal with retention release. It is therefore important that as they finish their involvement on the project, clear records are kept to allow others to administer the certification of final retention monies at the end of the project. Some contracts issue a certificate, e.g. NEC ECC, listing the defects outstanding at the end of the defects period.

On smaller projects or further down the supply chain, the level of retention held may be a very insignificant sum. Therefore, the retention sum is not large enough to incentivise the (sub) contractor back to correct the defective works. This will, of course, depend on the value of the contract and therefore the retention held and the severity of the defect. Also of consideration may be the importance of the client/employer to the contractor or sub-contractor. When filling in the particulars of such a contract or sub-contract, it is advisable to consider whether or not retention should be deducted. In some cases, the cost of administering the retention withheld at the end of the contract may be high in proportion to the actual payment sum, or some of the problems outlined may occur. However, the employer may still wish retention provisions to apply.

#### 4.1.2 Financing/insolvency

There is a possibility that the employer/client, contractor or sub-contractor may become insolvent at any stage or during the defects liability period. The RIAI form of contract deals with this by noting the “joint account retention fund” shall be held upon trust by the Employer for the contractor. This will protect the contractor in the event of insolvency of the employer, if the money is actually set aside in a separate marked account or fund, rather than just held in a regular client account. It will therefore be the responsibility of the administrator or liquidator to apply for or administer the retention as applicable. If the retention is not set aside in a separate marked account, this is likely to lead to a delay in such payment.

After a client/employer goes into liquidation, a bank’s charge over the fund will take precedence over the prior contractual obligation of the client/ employer to place funds in a separate account, i.e. if the client/employer is in breach of his obligation to set aside the retention fund, and the contractor has not successfully insisted this takes place, the obligation and breach are not considered when prioritising unsecured creditors.

This is the position in the standard forms, however it is common for these provisions to be amended by clients and the signed agreement should be consulted.

### 4.1.3 Latent defects

The contractor/sub-contractor will be issued with a list of defects to be made good in accordance with the provisions of the relevant contract, following completion of which retentions will normally be released. Sometimes the contractor/sub-contractor will continue to receive notification of latent defects, in addition to the list issued at the end of the defects liability/rectification period. The contractor/sub-contractor is entitled to receipt of retention payments/release from retention bonds, once the contractual provisions have been complied with, notwithstanding that the rectification of some latent defects may remain outstanding.

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Society of Chartered  
Surveyors Ireland  
38 Merrion Square,  
Dublin 2, Ireland  
Tel: + 353 (0)1 644 5500  
Email: [info@scsi.ie](mailto:info@scsi.ie)