

# Retention Money Guidance for the Construction Contracts Act 2002

For people who withhold retention money

AUGUST 2023





**Ministry of Business, Innovation and Employment (MBIE)**  
**Hīkina Whakatutuki – Lifting to make successful**

MBIE develops and delivers policy, services, advice and regulation to support economic growth and the prosperity and wellbeing of New Zealanders.

Retention Money Guidance for the Construction Contracts Act 2002 is produced by the Building System Performance branch at MBIE.

This document is issued as guidance under section 18M(b) of the Construction Contracts Act 2002.

While MBIE has taken care in preparing the document, it should not be relied upon as following all relevant clauses of the Construction Contracts Act 2002 and the Construction Contracts (Retention Money) Amendment Act 2023 in all cases that may arise.

**More information**

Information, examples and answers to your questions about the topics covered here can be found on our website: [www.building.govt.nz](http://www.building.govt.nz)

**Disclaimer**

This document is a guide only. It should not be used as a substitute for legislation or legal advice. The Ministry of Business, Innovation and Employment is not responsible for the results of any actions taken on the basis of information in this document, or for any errors or omissions.

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# Purpose

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The purpose of this guidance is to support property owners, developers, contractors and subcontractors, along with legal, accounting and insolvency professionals, with understanding of their rights, duties and obligations in respect of changes to the retention money regime (the retention regime) of the [Construction Contracts Act 2002](#) (the CCA). It covers the relevant aspects of the CCA and the Construction Contracts (Retention Money) Amendment Act 2023 (the Amendment Act).

## **This guidance seeks to:**

- act as a guide to the CCA and the Amendment Act as they relate to changes in the retention regime
- explain the purpose and context of the Amendment Act and how it makes changes to the CCA
- define terms such as **party A** and **party B** in regards to how they are referred to in the Amendment Act
- explain the roles and responsibilities of people who withhold retention money, people who have retention money withheld from them, and insolvency professionals (and others)
- detail how people who withhold retention money can meet reporting requirements to the people they withhold retention money from
- explain what happens to retention money held in the event of insolvency or receivership
- provide information on the consequences of non-compliance or misrepresentation
- provide definitions and explanations of key terms/concepts used in the CCA and the Amendment Act.

**Note:** This guidance applies to commercial contracts only, not to contracts with homeowners. This means this guidance does not apply to construction contracts with a residential occupier.

## **Limitations of this guidance:**

This document is a general guide to support property owners, developers, contractors and subcontractors, along with legal, accounting and insolvency professionals, and others who will be involved in the retention regime. While the Ministry of Business, Innovation and Employment (MBIE) has taken great care in preparing this guide, it provides guidance only and should not be used to establish all the requirements of the Construction Contracts Act 2002 and the Construction Contracts (Retention Money) Amendment Act 2023 on its own. Readers must refer to the Construction Contracts Act 2002 and the Construction Contracts (Retention Money) Amendment Act 2023 as their primary source documents, and be aware that for specific situations or problems, it may be necessary to seek independent legal advice.

## **Acknowledgements**

This guidance has been prepared by the Building System Performance team at MBIE, with specialist support from an independent construction contracts advisor and industry professionals.

We would like to acknowledge and thank those who have contributed to the development of this guidance.

# Who is this guidance for?

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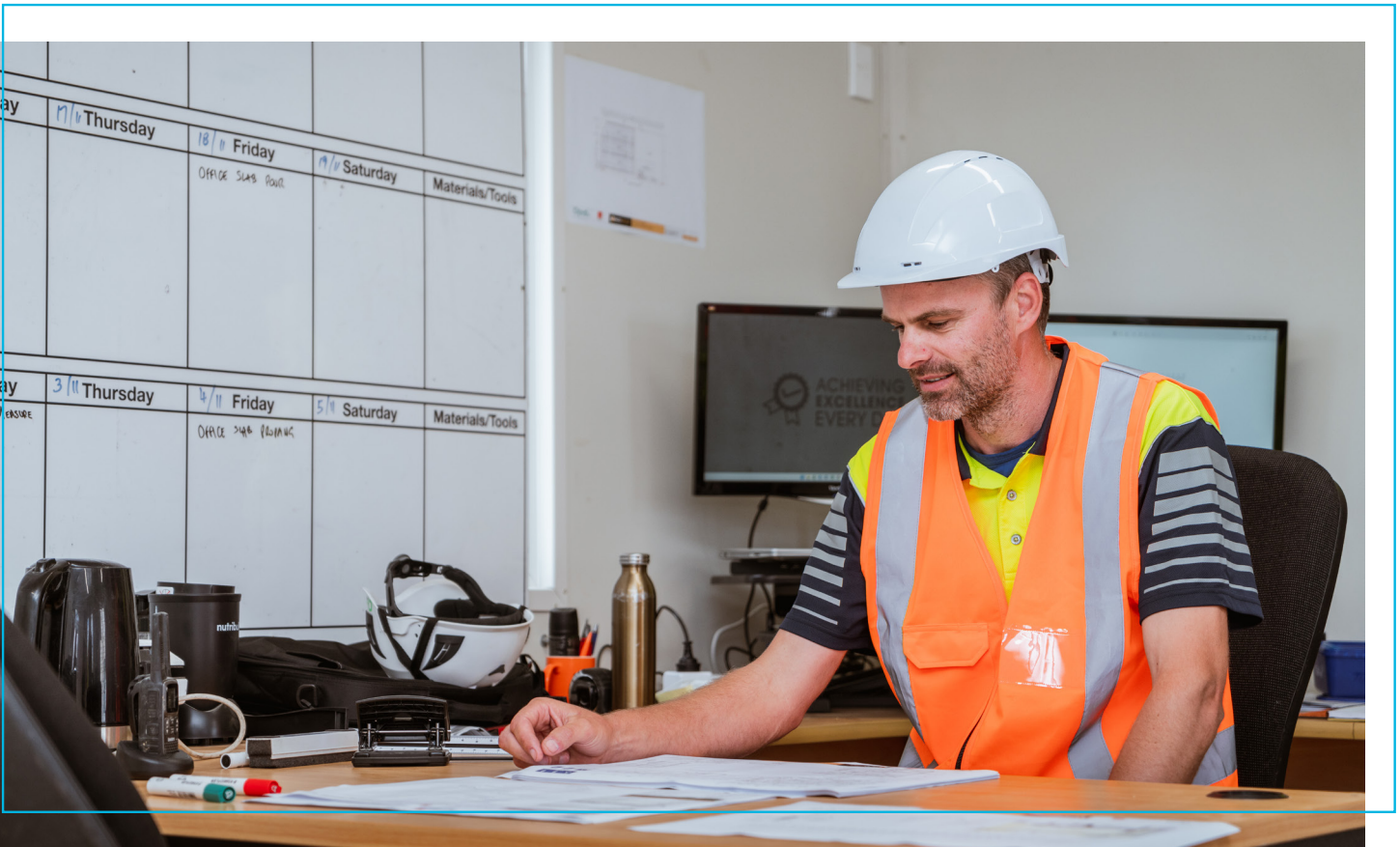
This guidance is for:

- property owners, developers, contractors and anyone who withholds retention money
- contractors and subcontractors who have retention money withheld from them as a security for performance
- legal, accounting and insolvency professionals.

## What the law says

The following legislation may be useful:

- [Construction Contracts Act 2002](#)
- [Construction Contracts \(Retention Money\) Amendment Act 2023](#).



# Background

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The retention provisions in the Construction Contracts Act 2002 (the CCA) were put in place to protect retention money owed to subcontractors in the event of a business failure and to ensure retention money withheld under construction contracts is responsibly managed.

Amendments to the CCA occurred in 2017, where the retention regime required retention money in commercial construction contracts to be held on trust in the form of cash or other liquid assets readily convertible to cash.

On 5 April 2023, the Construction Contracts (Retention Money) Amendment Act 2023 was passed. The changes in the Amendment Act further strengthen and clarify protection for subcontractors' retention money and make it easier for subcontractors to access retention money without a court order, in the event of a company's insolvency.

The Amendment Act comes into effect on 5 October 2023, where it will become part of the Construction Contracts Act 2002.

The overall objective of the Amendment Act is to:

- strengthen and clarify the status of retention money as being held on trust
- ensure that a party withholding retention money cannot use it as working capital
- improve the transparency of retention money through proper accounting and regular reporting
- clarify what happens when a party withholding retention money goes into receivership or liquidation
- introduce offences and penalties for companies and other organisations and their directors (or equivalent) who fail to comply with their obligations under the retention regime.

## When the retention regime does not apply

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The retention regime does not apply to contracts of a value below the *de minimis* amount. However, the retention regime does not currently set a *de minimis* amount. This means the retention money regime applies to all retention money withheld under commercial construction contracts.

### What the law says

The Amendment Act states under section 18B(4)(b):

Despite subsection (2), a retainable amount does not become retention money if—

...

(b) the total retainable amount under the contract is less than the *de minimis* amount prescribed in regulations.

# Overview of the retention money regime

---

## Purpose of retention money

It is common in the construction industry for a payer (a contractor or principal) to withhold an amount otherwise payable to another party as security for performance of its obligations under the contract. The money which is withheld or retained is known as **retention money**.

This retention money provides a principal (or contractor) with an amount as security for the performance of its contractors (or subcontractors) of its obligations under the contract, including remedying defects in the works. However, retention money can only be withheld if a commercial construction contract allows it.

## Roles and responsibilities

The CCA and the Amendment Act outline the roles and responsibilities for those who operate within the retention regime.

### Ministry of Business, Innovation and Employment (MBIE)

Under the CCA, MBIE's Chief Executive has a range of roles and responsibilities. It is the administering agency for complaints under the Amendment Act. The Chief Executive has delegated their role and responsibilities for these functions through to named individuals of MBIE. For the purposes of this guidance document, we refer to MBIE's Chief Executive.

Under the Amendment Act, MBIE's Chief Executive holds various powers to enforce retention money provisions, including taking prosecutions for non-compliance.

#### What the law says

Section 18M covers the *Functions of the chief executive*:

The chief executive has the following functions in relation to this subpart:

- (a) to disseminate information and provide educational programmes on matters relating to this subpart:
- (b) to publish guidance information on the requirements of this subpart:
- (c) to monitor compliance with this subpart:
- (d) to take enforcement action (including taking proceedings for offences) if the chief executive considers that it is desirable to do so—
  - (i) to enforce compliance with this subpart; or
  - (ii) to establish or clarify any matter of principle relating to this subpart or the interpretation of any provision of this subpart:
- (e) to provide advice to the Minister in relation to this subpart and to matters relating to retention money generally:
- (f) to carry out any other functions and duties specified in this subpart:
- (g) to take all necessary steps for the implementation and administration of this subpart:
- (h) to carry out any functions that are incidental and related to, or consequential upon, the functions set out in paragraphs (a) to (g).



To read more about offences and penalties for non-compliance, see the *Offences and penalties* section.



## How the retention regime operates

Payer and payee are the terms used to identify the parties to a construction contract. The payee is entitled to receive progress payments from the payer as the construction work is carried out.

This guidance document refers to the two parties involved, known as “party A” or “party B”.

| Who?  | What is their role as parties to a construction contract?             |
|---|---|
|  party A | The payer who withholds retention money (for the benefit of party B). |
|  party B | The payee from whom the retention money is withheld.                  |

Any retention money withheld is trust money, set aside by party A for the benefit of party B, and party A cannot avoid any of its obligations as trustee under the retention regime.

### EXAMPLE

*Marama’s property firm engages Andy to build a new warehouse. As their contract allows Marama to withhold retention money, her firm will have the duties and obligations of **party A** from the time retention money is deducted from Andy’s first progress payment until all of the retention money has been paid back to Andy, unless after giving the required notice it has been used to remedy non-performance of Andy’s obligations under the contract. Andy’s firm becomes **party B**, whose retention money is protected.*

*As the retention money is trust money, Marama must ensure her firm complies with all of its party A obligations under the retention regime, which include:*

- *setting the money aside in a designated bank account*
- *keeping proper accounting records with a separate ledger for each party B*
- *providing quarterly reports to Andy’s firm*
- *releasing the retention money when the work is completed, and Andy has fulfilled all his contractual obligations.*

*Failing to comply could result in significant fines for Marama’s firm, and for Marama personally as a director.*

The retention regime does not give a payer the right to withhold retention money from a payee – that right only arises under a **commercial construction contract** that allows retention money to be withheld. However, the retention regime will apply even where money is withheld as security for the performance of contractual obligations, despite the contract not allowing retention money to be withheld. More information on this is in the *Progress payments* section.

### What the law says

Section 5 defines a **commercial construction contract** as a contract for carrying out construction work in which none of the parties is a residential occupier of the premises that are the subject of the contract.

## Party A vs party B

Construction projects usually involve a series of separate construction contracts and associated payer/payee relationships. These allow the payments from the property owner to flow down to the contractor and, in turn, to the subcontractors who perform the majority of the construction work.



You are **party A** if you:

- hire an organisation or a person to perform construction work under a commercial construction contract
- have a construction contract that allows you to withhold retention money
- withhold payment of an amount otherwise payable to party B as security for the performance of their contractual obligations.



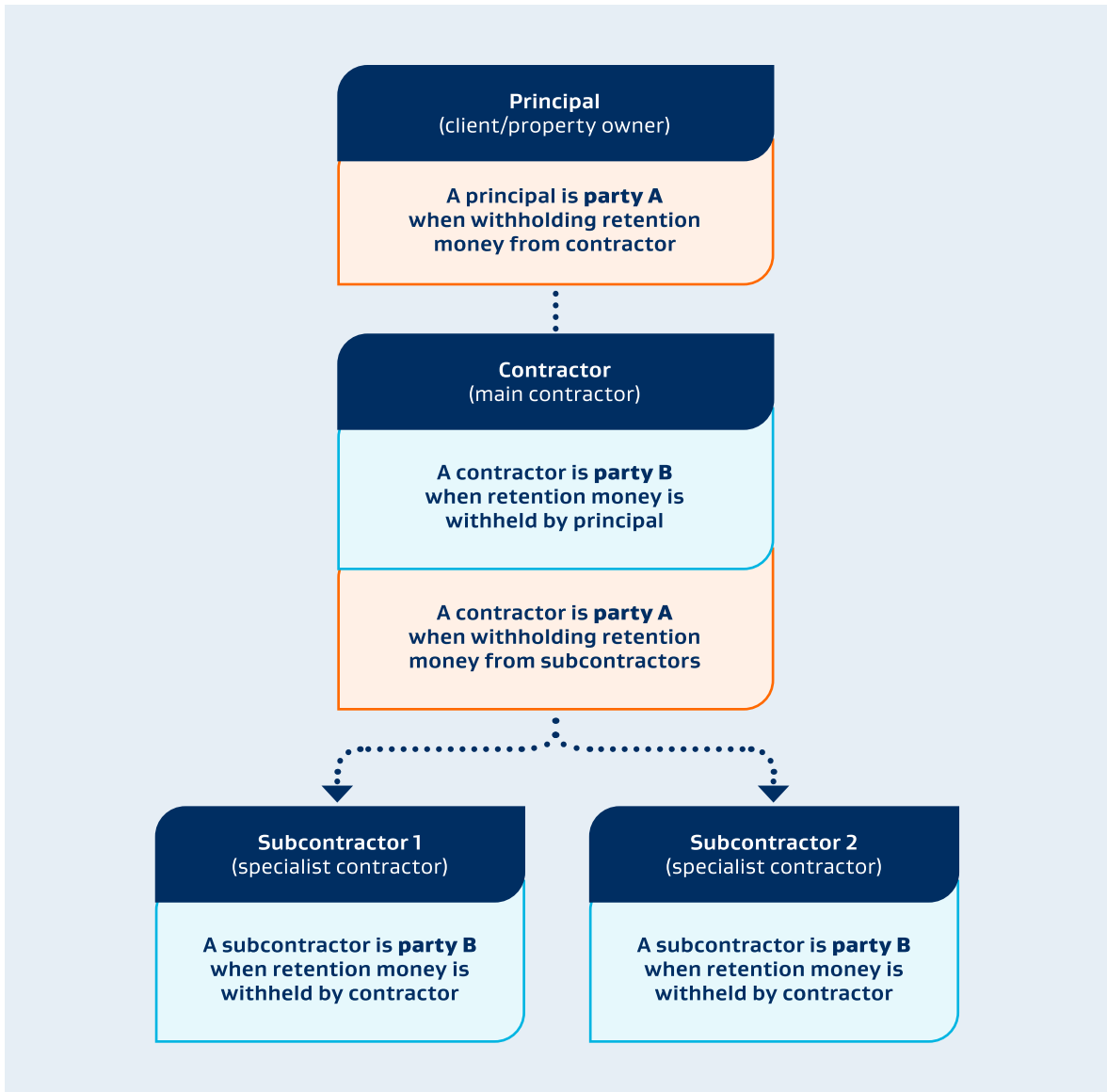
You are **party B** if:



- a party A withholds retention money from you under a commercial construction contract.

As shown below, a company can be party A under some contracts, and party B under others.



**EXAMPLE – PARTY A OR PARTY B**



| Checklist to determine if you are party A or party B  |  |
|---|--|
| If the following applies to me or my company or organisation:<br><input checked="" type="checkbox"/> I have engaged a contractor on a building project<br><input checked="" type="checkbox"/> the subcontract agreement allows me to withhold retention money<br><input checked="" type="checkbox"/> I have withheld retention money from my subcontractor.   | <br><b>I am party A</b> |
| If the following applies to me or my company or organisation:<br><input checked="" type="checkbox"/> I have been engaged as a subcontractor on a building project<br><input checked="" type="checkbox"/> the subcontract agreement allows the person/organisation engaging me to withhold retention money<br><input checked="" type="checkbox"/> the company/organisation engaging me has withheld retention money from a progress payment. | <br><b>I am party B</b> |

## All retention money is held on trust

Party A may withhold retention money from amounts otherwise payable to party B where the commercial construction contract specifies:

- party A can withhold retention money
- what the purpose of withholding retention money is
- the amount or percentage of retention money that party A can withhold from party B
- when party A must pay the retention money to party B.

The retention money withheld by party A automatically becomes **trust property**. This means the retention money cannot be used by party A as working capital or cashflow, and it is protected if party A becomes insolvent.

**Retention money ceases to be trust property** only when it has been:

- paid to party B
- used to remedy defects in party B's obligations under the contract but only if:
  - the use of money for that purpose is permitted by the contract
  - any provisions of the contract relating to the use of retention money are complied with
  - at least 10 working days before using the money, party A gives party B written notice setting out its intention to use the retention money for that purpose and detailing the non-performance to be remedied
- given up in writing by party B or otherwise ceases to be payable to party B.

Until that time, party A is legally obliged, as a trustee, to protect, account for, and release the retention money to party B when it is properly due.

### What the law says

In section 18C of the Amendment Act, it outlines that retention money is held on trust.

Section 18C(3) outlines when retention money ceases to be trust property.

#### 18C Retention money is held on trust

...

(3) Retention money ceases to be trust property when 1 or more of the following applies to it:

- (a) it is paid to party B;
- (b) party B, in writing, gives up any claim to it;
- (c) it is used to remedy defects in the performance of party B's obligations under the construction contract, but only if—
  - (i) the use of the money for that purpose is permitted by the contract; and
  - (ii) any provisions of the contract relating to the use of the retention money are complied with; and
  - (iii) at least 10 working days before using the money for that purpose, party A gives party B written notice setting out—
    - (A) party A's intention to use the retention money for that purpose; and
    - (B) details of the defects to be remedied;
- (d) it otherwise ceases to be payable to party B.



## Trustees of retention money

If you are considered party A, you must as soon as practicable deposit retention money withheld from each party B into a bank account that is only used for holding retention money and complies with the CCA.

The retention money is considered to be held on trust and must stay in the bank account until it is either paid to party B or ceases to be retention money.

Party A then has specific obligations and duties as trustee of the retention money.

### WHAT PARTY A MUST DO AS TRUSTEE OF PARTY B'S RETENTION MONEY

Party A must:

- ✓ deposit all retention money withheld from each party B in a compliant bank account  
**Note:** alternatively, party A may arrange for a complying instrument to protect the retention money – see the *Complying instruments* section.
- ✓ hold the retention money in the bank account or accounts until it ceases to be trust property
- ✓ keep detailed accounting records of all bank accounts and transactions
- ✓ provide the accounting details to party B upon request and free of charge
- ✓ report to each party B as soon as practicable after any retention money is withheld
- ✓ provide each party B with a detailed report on all retention money at least once every three months, and continue to do so until the party A's obligations as trustee of the retention money trust have ended
- ✓ give party B at least 10 working days advance written notice before using retention money to remedy any non-performance or defects
- ✓ release retention money to each party B when it has completed its contractual obligations.

### EXAMPLE

*Andy's construction firm is about to engage subcontractors under subcontract agreements that allow for retention money to be withheld. In accordance with his accountant's advice, Andy has set up a separate bank account, proper accounting records and quarterly reporting for his subcontractors' retention money. He has also updated the company's standard subcontract agreement and implemented processes to ensure each subcontractor's retention money is promptly released when they have fulfilled all of their contractual obligations. Andy is now ready to engage those subcontractors.*

The Amendment Act does not state whether retention money should be goods and services tax (GST) inclusive or exclusive. This matter should be clarified by the contract.

MBIE recommends seeking your own legal advice regarding this matter.

Inland Revenue Department has produced information and guidance to help you understand your GST obligations.

- [GST: Time of supply - payments of deposits, including to a stakeholder \(ird.govt.nz\)](https://ird.govt.nz)
- [Special supplies \(ird.govt.nz\)](https://ird.govt.nz) – in the *Progress payments and successive supplies* section of the website.

## When should retention money be paid out to party B?

Unless party B has notified party A in writing that it gives up its rights to the retention money, party A must pay out the retention money when party B has:

- completed the work
- performed all of its contractual obligations
- remedied any notified defects in the performance of its obligations under the contract
- remedied any defects during any defects liability period specified in the contract.

## Using retention money to remedy defects or non-performance

Party A can only use retention money to remedy defects in the performance of party B's obligations under the construction contract. If that arises, party A must:

- ensure the use of the money for that purpose is permitted by the contract
- comply with any other contractual provisions relating to the use of party B's retention money
- give party B 10 working days' advance notice in writing, stating party A's intention to use the retention money and details of the defects in performance to be remedied.

### EXAMPLE

*Wiremu enters into a commercial construction contract with Pete the Painter which allows Wiremu to withhold retentions. Wiremu is dissatisfied with the quality of Pete the Painter's work. He has emailed Pete several times requiring substandard areas of walls to be repainted, but Pete has not responded. Wiremu's next email gives a further 10 working days' notice, specifying the unperformed contractual obligation, in this case being the defective painting work:*

**RE: WAREHOUSE BUILDING – PAINTING (subcontract number x)  
NOTICE OF INTENTION TO USE RETENTION MONEY TO REMEDY DEFECTS**

Kia ora Pete,

As you have not responded to my emails dated [date] and [date] regarding defective work under our contract. I am giving you formal notice in accordance with clause [x] of the subcontract agreement:

I am holding [\$x] in retention money. This is notice that under . . . of the subcontract, the retention funds are permitted to be used for the purpose of remedying defects in your performance of the works under the contract.

Unless you have remedied the defective work listed below within 10 working days from this date, we will use your retentions for that purpose. The defects to be remedied are:

- **[list items]**

Ngā mihi,  
Wiremu

# Retention regime compliance

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## Compliance of the parties

The CCA prevents parties agreeing in their contract that they will not comply with the retention regime when retention money is withheld. This ensures party A cannot avoid any of its obligations under the retention regime.

There are consequences for party A if they fail to comply with its obligations under the retention money regime.

## Liability for interest on the late payment of retention money

If party A fails to release retention money to party B on the day it becomes payable, party A may have to pay interest to party B. The interest accrues at the higher of any rate specified in future regulations or in the contract.


**Note:** Until the regulations have been made, the effective interest rate will be the one under the contract. Party A should establish processes to ensure retention money is paid to each party B when it is due.



## Offences and penalties

Party A and its directors (or persons holding equivalent positions) may commit an offence and be liable to fines if they withhold retentions but fail to comply with certain obligations under the retention regime.

The below table outlines the offences and fines that each party may be subject to upon conviction:

|  OFFENCE   | For each offence (up to) |           |               |
|---|--------------------------|-----------|---------------|
|   | Relevant section         | Party A   | Each director |
| Failing to keep retention money in a separate bank account or provide a complying instrument  | 18DA                     | \$200,000 | \$50,000      |
| Failing to use retention money only to remedy defects in the performance of obligations, or to give 10 working days' written notice | 18DA                     | \$200,000 | \$50,000      |
| Failing to keep proper accounting and other records of retention money  | 18FC                     | \$50,000  | -             |
| Failing to provide reports to party B   | 18FD                     | \$50,000  | -             |
| Providing false or misleading information to party B  | 18FD                     | \$50,000  | -             |
| Obstructing, hindering or resisting MBIE's Chief Executive (or their delegate) in the execution of their investigation              | 18Q                      | \$200,000 | \$50,000      |
| Providing information or document that is false or misleading to MBIE's Chief Executive   | 18O                      | \$200,000 | \$50,000      |

## MBIE's compliance approach

MBIE has the responsibility to monitor compliance with the retention regime.

Penalties and offences are to deter poor or illegal behaviour. They are used as a last resort following non-compliance.

Party B can raise a concern with the Chief Executive of the MBIE if they believe a party A is failing to comply with its obligations under the retention money regime.

The retention regime provides the Chief Executive of MBIE with wide powers, which include taking enforcement action where party A fails to comply with its obligations under the retention money regime.

MBIE will release more information on its compliance approach in October 2023.

You can email if you have a concern or complaint at [CCRMComplaints@mbie.govt.nz](mailto:CCRMComplaints@mbie.govt.nz).



## Getting the contract right

It is important to get the contract right, as party A's right to withhold retention money lies only in the relevant construction contract.

### Information that should be in contracts

Where party A intends to withhold retention money under a commercial construction contract, party A should ensure that the contract contains certain minimum information regarding the retention money.

#### INFORMATION ABOUT RETENTION MONEY IN CONTRACTS

A contract providing for retention money to be withheld should contain:

- ✔ the payer's right, as party A, to withhold retention money from progress payments
- ✔ the purpose for withholding retention money, eg as security for the proper completion of party B's obligations under the contract, including remedying defects
- ✔ the percentage or amount of retention money party A may withhold from each progress payment and in total
- ✔ the criteria to be satisfied before party A must release retention money to party B (release of retention money cannot be conditional on anything other than party B having completed its contractual obligations)
- ✔ the date when party A must release retention money to party B, or how the due date is established (the date cannot be later than when party B completes its contractual obligations to the agreed standard)
- ✔ the procedures to be followed before party A can use the retention money to remedy any defects in party B's obligations under the contract.

#### The contract should **not** contain:

- ⊗ any "prohibited provisions" (eg provisions that make payment of retention money or the date for payment conditional on anything other than party B's completion or require party B to pay party A's cost of administering retention money) – see *Prohibited provisions* section below.

The date on which party B is said to have completed their contractual obligations will vary according to the nature of the obligations under the contract. Some subcontractors (for example, those engaged in temporary work, scaffolding or demolition) may be entitled to receive their retention money when they complete their work and leave the site. However, work done by other subcontractors may not be considered complete until the entire contract is completed by the main contractor and handed over to the client.

#### EXAMPLE

*XY&Z Construction has won a contract for a new warehouse building. The subcontract agreements with Rubble Demolition for demolition of an existing building and Hydraulix Plumbing for plumbing work allows XY&Z to withhold retention money from both.*

*As Hydraulix Plumbing's work will be complete upon practical completion of the warehouse, the subcontract agreement provides for half of the retention money to be due when XY&Z achieves practical completion of the warehouse, and the remainder upon expiry of the agreed defect liability period when Hydraulix has remedied any notified defects. All of Rubble Demolition's retention money will be payable when the demolition is completed, possibly before XY&Z has started work on site.*

## Example of a retention money provision in a construction contract

The example below addresses the:

- purpose for which retention money can be withheld
- amount of retention money
- timing of when retention money is to be paid out
- process to be followed to use the retention money to remedy non-performance of party B's obligations under the contract.

### EXAMPLE OF A RETENTION MONEY PROVISION:

#### **Retention money**

1. *The owner may withhold payment of an amount otherwise payable to the contractor as security for the performance of the contractor's obligations under this contract (**retention money**).*
2. *The retainable amount shall be 10 per cent of the first \$200,000, 5 per cent of the next \$800,000, and 1.75 per cent of any amount in excess of \$1 million of the total amount otherwise payable to the contractor, up to a maximum of \$200,000.*
3. *Half of the retention money shall be paid to the contractor within five working days of the date of completion. The balance shall be paid within five working days of the end of the **defects period** (three months after the date of completion), less any amounts the owner was entitled to use to remedy defects in the contractor's obligations.*
4. *Unless the contractor has remedied the defects in the performance of its contractual obligations within 10 working days of receiving notice under the Construction Contracts Act 2002, the owner may use the retention money to remedy those notified defects.*

## Prohibited provisions in contracts

The parties to a commercial construction contract will not be bound by any prohibited provisions within their contract, which will be void.

A prohibited provision is one that:

- makes payment of retention money, or the timing of such payment, conditional on anything other than party B having performed all of its obligations under the contract
- requires party B to pay any administration fees or costs associated with complying with the retention regime
- avoids, or has the effect of avoiding, the retention money regime.

Whether or not a clause in the contract is a prohibited provision may be a matter for legal interpretation.

If the parties disagree, the matter be resolved through **adjudication**.



**Adjudication** is a fast-track process for resolving construction contract disputes under the CCA. For details, refer to the [New Zealand Legislation website](#).

## Progress payments

There are other instances where withheld money must be treated as retention money. For example, if party A deducts money from a progress payment to party B as security for the performance of obligations where the construction contract does not expressly provide for retention money to be withheld. The payer will assume all obligations and liabilities of party A in respect of that retention money.

### What the law says

18B Application of subpart and meaning of retention money

(5) This subpart also applies if one party to a commercial construction contract (party A) withholds payment of an amount that would otherwise be payable to another party (party B) as security for the performance of party B's obligations under the contract even though the contract does not provide for that.

### EXAMPLE

*Jason offers a subcontract agreement to his subcontractors that states:*

*A maximum of 95 per cent of the contract price shall be paid up to completion. The remaining five per cent, not as a retention, will be paid three months later subject to completion of defects.*

*The final five per cent of the subcontract price to be withheld from the value of completed work is clearly intended as security for remedying any defects, so it is effectively retention money.*

*Therefore, from the date of completion of each subcontract, Jason will be party A in respect of that retention money.*

**Note:** Third-party **escrow agents** may fall under this. However, this is by a case-by-case basis. For example, if money is in escrow and is being held as security for performance, it would be treated as retention money.



An **escrow agent** is a person or entity that acts as a third-party intermediary between parties who take part in a transaction.

## In summary – implementing the retention regime

The following checklist summarises the key steps each party A should take to prepare for the amended retention regime.

### PARTY A RETENTION REGIME IMPLEMENTATION CHECKLIST

In order to prepare for the retention regime changes, each party A should:

- ☑ establish suitable retention money bank accounts with a registered bank in NZ or arrange a complying instrument
- ☑ inform the bank that the account is for the purpose of holding retention money that party A holds on trust under the CCA
- ☑ establish suitable accounting and reporting systems and records
- ☑ implement reporting to each party B –as soon as practicable after any retention money is withheld, and at least every three months
- ☑ implement internal management reports to ensure compliance with the retention money regime
- ☑ ensure accounting and administration staff understand retention money regime changes
- ☑ make company directors aware of the changes, including their personal potential liability as directors for failure to comply with the requirements (in addition to liability against the company)
- ☑ establish regular compliance and audit/internal reviews to ensure and verify compliance with the retention money regime
- ☑ review and update existing currently used forms of contract, subcontract, or consultancy agreements to align with the retention money regime
- ☑ establish procedures to record the expected date(s) of practical and end of defects liability periods for each party B by contract to ensure party A pays retention money when properly due
- ☑ ensure project managers and quantity surveyors are aware of and comply with the retention money regime. This includes the contract requirements for withholding retention money and for paying the retention money to each party B when it is properly due.



# Accounting

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## Requirements for bank accounts

Party A must ensure the balance (excluding any interest earned) in retention money bank accounts, together with the value of any complying instruments, is always equal to or greater than the amount of retention money to be secured.

## Bank accounts

Each bank account for holding retention money must comply with the following requirements

### REQUIREMENTS FOR A RETENTION MONEY BANK ACCOUNT

Party A must ensure:

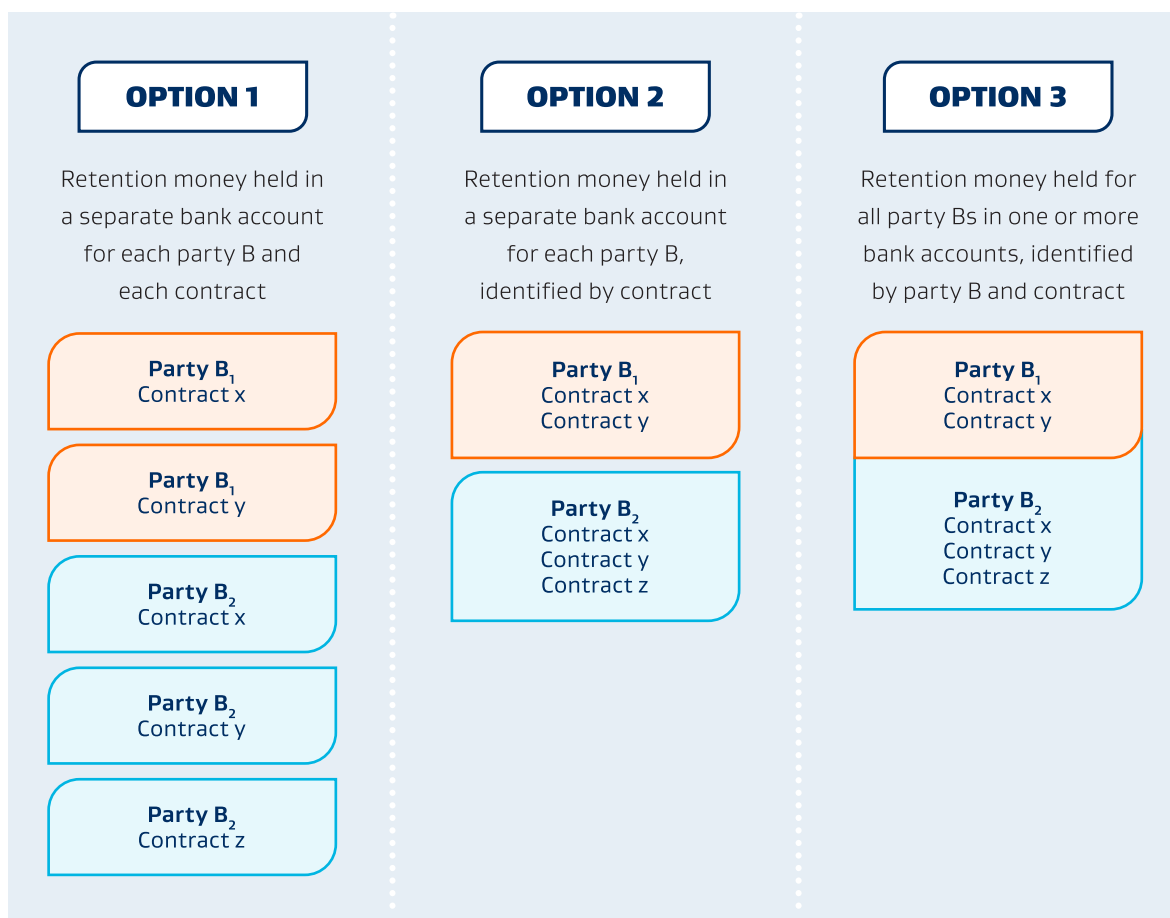
- ✔ the account contains only retention money withheld under the retention regime
  - The account may contain interest earned on the retention money, which belongs to party A
- ✔ the account is with a registered New Zealand bank
- ✔ the bank has been informed the account is for holding retention money under the CCA
- ✔ the account holder is either:
  - party A, as trustee of the retention money
  - an independent trustee of an approved type, in which case party A must inform the account holder that the account is for holding retention money under the CCA.

**Note:** approved types of independent trustee include lawyers, law firms, the Public Trust, trustee companies, chartered accountants, licensed auditors, registered audit firms, or for council-controlled organisations (CCOs), the local authority with shares in, control of, or a right to appoint directors to that CCO.

The retention regime provides three options for setting up bank accounts:

1. A unique bank account for some or all of the companies classified as a party B on a particular contract.
2. A unique account for each party B on one or more contracts between party A and party B.
3. One or more accounts holding retention money for more than one party B, with each party B recorded as a beneficial owner of the retention money.

Example options for setting up bank accounts for the retention regime:



## Alternatives to holding retention money on trust

### Complying instruments

Instead of depositing retention money into a bank account, party A may arrange for a complying instrument of an equivalent amount for party B. Party A does not need to hold retention money in a bank account if they hold a complying instrument for payment of an equivalent amount to party B.

A complying instrument is an insurance product, bond, or guarantee issued by a registered bank or licensed insurer that provides surety for the retention money held on trust for one or more party B.

Costs for establishing and maintaining the complying instrument cannot be passed on to a party B – this includes the premium or fee paid by party A to the bank, insurer, or other related costs.

Party A must still comply with accounting and reporting requirements.

If party A applies for a complying instrument, the issuer may require additional financial information. Party A may also be subjected to certain checks to verify compliance with the requirements of Anti-Money Laundering and Countering Financing of Terrorism legislation in New Zealand.

### What the law says

The Construction Contracts Act 2002 defines “complying instruments” in section 18FB:

- (2) The issuer of the instrument must be—
  - (a) a licensed insurer;
  - (b) a registered bank;
  - (c) any other person, who is not an associate of party A, prescribed or within a class prescribed in regulations.
- (3) The instrument must—
  - (a) be issued in favour of party B or endorsed with party B’s interest; and
  - (b) require the issuer to pay the retention money to party B if party A fails to pay that money on the date on which it is payable under the construction contract; and
  - (c) enable party B to enforce that promise against the issuer; and
  - (d) comply with any requirements that are prescribed in regulations and that apply in respect of the instrument.
- (4) The premium or other money that is payable, or that may become payable, to the issuer for the instrument must have been fully paid by party A and all terms and conditions must have been satisfied so that the instrument is, and remains, in effect.

**Subsection 5 states an instrument can be of any kind (such as insurance, a bond, or a guarantee), but it has to comply with the requirements laid out in sections 18FB(2) and (4).**

**Note:** The issuer may use other terms for their complying instrument, such as “retention instrument” or “financial instrument”.

Party A must ensure a complying instrument is properly issued, meets all criteria and remains in effect.

### COMPLYING INSTRUMENT CHECKLIST

A complying instrument must:

- be issued by a licensed insurer or registered bank
- be issued in favour of, or endorsed with, one or more party Bs’ interest
- require the issuer to pay retention money to party B if party A fails to pay retention money due under the contract
- enable party B to enforce the promise of payment against the issuer
- comply with other requirements that may be specified in regulations (if any such regulations are made).

An example complying instrument is shown below (image provided with permission of Aon Insurance).

# Retention Instrument

## Between

(Company Number)

(Party A); and

## For the benefit of:

**Those parties listed as Beneficiaries in the Current Schedule (as defined below), and from time to time (each a Beneficiary and together the Beneficiaries)**

### Important Notice:

1. A Beneficiary should obtain independent legal advice in relation to this Instrument. For this Instrument to operate effectively, Party A must properly manage its retentions and regularly deliver updated Retentions Schedules to the Issuer. The Issuer will not monitor Party A's administration of retained amounts or compliance with the CCA more generally.
2. The maximum liability of the Issuer under this Instrument to a Beneficiary is capped at that Beneficiary's Relevant Retention Amount. A Beneficiary's Relevant Retention Amount may be increased or reduced from time to time by Party A delivering to the Issuer a new Retentions Schedule. Beneficiaries may be added or removed from this Instrument from time to time by Party A delivering to the Issuer a new Retentions Schedule. The Issuer will rely on each Retentions Schedule given by Party A as being true correct and accurate in all respects and is not required to verify the accuracy of any Retentions Schedule.
3. If a Beneficiary's Relevant Retention Amount is reduced or a Beneficiary is removed from this Instrument, Party A must first have certified to the Issuer that: (A) the reduction or removal (as applicable) is because all relevant retained amounts have now been paid or otherwise applied in accordance with the relevant subcontract or that the relevant amounts are now being retained in another manner in compliance with the CCA; and (B) Party A has notified the Beneficiary of the reduction or removal (as applicable). The Issuer will rely on each such certification as being true correct and accurate in all respects and is not required to verify the accuracy of any such certification.
4. This Instrument might not cover all retention amounts payable by Party A to a Beneficiary. Retention amounts payable to a Beneficiary by Party A will only be covered by this Instrument if:
  - (a) the relevant subcontract or the project to which it relates is listed next to that Beneficiary's name in the "Current Schedule" and the retention amount is clearly marked in the "Current Schedule" as being covered by this Instrument; and
  - (b) the retention was retained by Party A during the "Relevant Period".
5. The Current Schedule will change regularly in accordance with clause 5.
6. The initial Relevant Period commences on the date of this Instrument and ends on The End Date shown in the Retention Details. This may be amended in accordance with clause 6. Party A will (and the Issuer may) notify the then current Beneficiaries if this period is shortened.

## EXAMPLE

After Tokomoa set up their accounting and reporting system in response to the complaint from XY&Z Construction (see above example on page 17), their accountant suggested they explore the possibility of arranging a complying instrument. Tokomoa has a strong balance sheet, with \$150,000 held in a retention money bank account, which will increase.

Following an application process, their insurer issued a complying instrument for \$200,000. Tokomoa promptly notified its party B contractors of the new retention security arrangement in an updated retention money report.

Tokomoa will only need to hold retention money in a bank account if the total amount withheld from all party Bs exceeds \$200,000. If that happens, they plan to increase the value of the complying instrument, so it exceeds the expected maximum amount of money held on retention.

## Accounting and record keeping

Party A must establish accounting systems and processes and maintain records for all retention money it withholds for each party B, contract by contract.

### COMPLYING INSTRUMENT CHECKLIST

The accounting and records that must be kept by party A include:

#### Bank account(s)

- full details of all bank accounts in which retention money is held
- whether each bank account holds retention money for more than one party B

#### Complying instruments

- full details of all complying instruments securing retention money for each party B

#### Transactions

- each transaction into or out of each bank account, with the transaction showing the relevant party B and the contract to which the transaction relates

#### For each party B

- the bank account or accounts in which that party B's retention money is held
- any complying instruments securing that party B's retention money
- each contract for which retention money is held or is secured for that party B.



## Making records available and providing reports

Each party A (whether a contractor, owner, developer, public body, board of trustees, government agency or otherwise) automatically becomes a trustee of retention money withheld and must comply with requirements for bank accounts, accounting, records and reporting.

The cost involved by party A in establishing and maintaining bank accounts, accounting and records, and providing reports cannot be passed on to any party B.

Two categories of report are recommended:

### 1 Reports to each party B

The reports party A must give each party B that detail how party A is protecting party B's retention money.

(see *CHECKLIST OF ACCOUNTING AND RECORDS TO BE KEPT BY PARTY A* above).

### 2 Internal management reports

Any internal management and control reports that party A and its directors consider necessary to ensure the company or organisation is complying with its obligations as party A and trustee under the retention regime.

Implementing a reporting system may be straightforward for party A contractors whose existing accounting systems comply with pre-existing requirements under the 2017 retention regime. However, they will need to make adjustments to comply with the Amendment Act, including establishing compliant bank accounts and providing reports to their subcontractors (and other party Bs).

See *In summary – implementing the retention regime*.

Suggested report types and indicative samples for each category are shown below.

## Providing reports and other information

Party A must:

- provide each party B with a detailed written report as soon as practicable after any retention money is withheld or upon request
- provide each party B with detailed reports on all retention money withheld from the specified party B **at least quarterly** until the retention money ceases to be trust property – the reports must include whether the retention money has been paid to party B, is given up by party B in writing, or has been properly used by party A to remedy party B's failure to remedy defects
- make available free of charge upon request by party B the information that party A is required to keep about party B's retention money.

## Information to include in reports

The following checklist sets out the accounting and other information that party A must give to party B.

### INFORMATION REQUIRED IN REPORTS TO EACH PARTY B

The reports provided by party A to each party B must include the following information:

- ☑ the total amount of retention money retained by party A from that party B, by contract
- ☑ the date and amount of each transaction into and out of the bank account
- ☑ the contract to which the transaction relates
- ☑ full details of the bank account(s) in which that party B's retention money is held:
  - if party A is the account holder – name of bank, branch, account name and account number
  - if party A is not the account holder, the name and category of the account holder.
- ☑ the balance held for party B in each bank account, for each contract
- ☑ the following details for any complying instrument:
  - the name of the issuer
  - a unique identifier such as policy number
  - the protected amount for party B in that complying instrument.
- ☑ a statement that party B may inspect party A's accounts and records regarding the retention money held for that party B. For example:

*This is a report on retention money withheld from you as party B under subpart 2A of the Construction Contracts Act 2002. You may inspect the accounts and records that section 18FC of that Act requires us to keep in relation to retention money withheld from you.*
- ☑ any other information that may be specified in regulation (no regulations have been issued)
- ☑ all sources of security if retention money has been secured by more than one complying bank accounts or instruments.

## Suggested reports

### Retention money transaction report to be provided after each transaction

A contract-specific report containing the information in the following checklist is required at the time of, or as soon as practicable after, each retention money transaction.

#### INFORMATION TO INCLUDE IN RETENTION MONEY TRANSACTION REPORT TO PARTY B

Party A's retention money transaction reports to each party B should include:

- ✓ the amount of any retention money transaction
- ✓ the total amount of retention money withheld
- ✓ how the total amount of retention money has been secured ie in bank accounts and/or complying instruments
- ✓ details of those bank accounts or complying instruments, including specific identifiers
- ✓ a statement stating party B may inspect the accounts and records what section 18FC of the Act requires party A to keep in relation to the retention money.

#### **EXAMPLE:**

*This is a report on retention money withheld from you as party B under subpart 2A of the Construction Contracts Act 2002. You may inspect the accounts and records that section 18FC of that Act requires us to keep in relation to retention money withheld from you.*

## Example retention money transaction report

### Cathedral Builders

101 Cathedral Builders Drive,  
Christchurch 8013

SUBCONTRACTOR

#### Crucial Concrete Placement Ltd

1516 Crucial Downs Road,  
Rotoruna 1516

**Period to:** 31/08/24  
**Date:** 31/08/24  
**Code:** CONCSUB

### RETENTION MONEY TRANSACTION REPORT - BY CONTRACT

CONTRACT

#### 1404 The Toolhouse

| Date   | Reference | Other reference    | Description     | Transaction     |                 |             | Balance                |
|--|-----------|--------------------|-----------------|-----------------|-----------------|-------------|------------------------|
|  |           |                    |                 | Amount withheld | Amount released | Amount used | Net retention withheld |
| 25/03/24   | 1401/4    | Payment Schedule 1 | Withheld amount | \$25,000.00     |                 |             | \$25,000.00            |
| 25/08/24   | 1401/23   | Payment Schedule 2 | Withheld amount | \$17,500.00     |                 |             | \$42,500.00            |
| <b>Net retention money withheld to date on this contract</b> |           |                    |                 |                 |                 |             | <b>\$42,500.00</b>     |

The retention money is secured by the following:

| Account or instrument  | Holder        | Account No         | Branch       |
|------------------------|---------------|--------------------|--------------|
| Retention Bank Account | KZB Bank      | 13-0165-0057899-01 | Christchurch |
| Complying Instruments  | ZNZ Insurance | XXX099             | Auckland     |

This is a report on retention money withheld from you as party B under subpart 2A of the Construction Contracts Act 2002. You may inspect the accounts and records that section 18FC of that Act requires us to keep in relation to retention money withheld from you.

**Note:** The above information is to be provided as soon as practicable after each transaction withholding or releasing retention money. It may be issued as a separate report, or the retention money information may be incorporated within a payment schedule.

## When including information in a payment schedule

The shaded area in the following extract from a typical payment schedule shows the additional information required for reporting as soon as practicable after retention money is deducted from or paid to party B. In this example, the typical payment schedule could double as the transaction report.

### Example payment schedule

**PAYMENT SCHEDULE No:** \_\_\_\_\_

**Construction Contract:** \_\_\_\_\_ **Date:** \_\_\_\_\_

**Payment Claim No:** \_\_\_\_\_ **Construction Work:** \_\_\_\_\_

**Due Date for Payment:** \_\_\_\_\_ **For Period To:** \_\_\_\_\_

|                                       |                                       |             |                     |
|---------------------------------------|---------------------------------------|-------------|---------------------|
| Total value of work completed to date |                                       |             | \$650,000.00        |
| Less retentions                       | 10% on \$200k, 5% to \$1m             | \$20,000.00 |                     |
|                                       | 5% to \$1m                            | \$22,500.00 |                     |
|                                       | 1.75% above \$1m                      | \$0.00      | \$42,500.00         |
| Net payable to date                   |                                       |             | \$607,500.00        |
| Less previous payments                |                                       |             | \$275,000.00        |
| This payment                          | Scheduled Amount excluding GST        |             | \$332,500.00        |
| GST                                   |                                       | 15%         | \$49,875.00         |
| <b>Total including GST</b>            | <b>Scheduled Amount including GST</b> |             | <b>\$382,375.00</b> |

This is a report on retention money withheld from you as party B under subpart 2A of the Construction Contracts Act 2002. You may inspect the accounts and records that section 18FC of that Act requires us to keep in relation to retention money withheld from you.

|  |                    |
|--|--------------------|
| Total retentions held on this contract                                 | \$42,500.00        |
| Retentions held in previous payments                                   | \$25,000.00        |
| <b>Retention amount deducted / (released) in this progress payment</b> | <b>\$17,500.00</b> |

The retention money is secured by the following:

| Account or instrument  | Holder        | Account No         | Branch       |
|------------------------|---------------|--------------------|--------------|
| Retention Bank Account | KZB Bank      | 13-0165-0057899-01 | Christchurch |
| Complying Instruments  | ZNZ Insurance | XXX099             | Auckland     |



## Quarterly retention money statements

Party A must also give party B a report containing certain information at least once every three months or at any time requested by party B, until retention money ceases to be trust property (ie when it is paid to party B, party B gives up any claim to it in writing or it is used to remedy defects).

### INFORMATION TO INCLUDE IN A QUARTERLY REPORT TO PARTY B

The required information in party A's quarterly retention money report to each party B is:

- ☑ the retention money withheld by party A:
  - the total amount of retention money being withheld
  - the amount withheld on each contract
  - the date and amount of each transaction of retention money withheld from progress payments or paid to party B.
- ☑ how each retention money account balance is secured and the specific details of:
  - the bank account(s) where the retention money is held
  - any complying instrument issued in favour of party B or endorsed with party B's interest.
- ☑ a statement outlining that party B may inspect the accounts and records what section 18FC of the Amendment Act requires party A to keep in relation to the retention money.



## Example of quarterly retention money statement

### Cathedral Builders

101 Cathedral Builders Drive,  
Christchurch 8013

SUBCONTRACTOR

#### Crucial Concrete Placement Ltd

1516 Crucial Downs Road,  
Rototuna 1516

Period to: 31/08/24  
Date: 31/08/24  
Code: CONCSUB

### QUARTERLY RETENTION MONEY STATEMENT - ALL CONTRACTS

#### TOTAL RETENTION MONEY WITHHELD ALL CONTRACTS

CONTRACT

#### 1404 The Toolhouse

| Date                   | Reference | Other reference | Description  | Retention withheld | Balance            |
|------------------------|-----------|-----------------|--|--------------------|--------------------|
| 25/03/24               | 1401/4    |                 | Payment Schedule 1   | \$25,000.00        | \$25,000.00        |
| 25/08/24               | 1401/23   |                 | Payment Schedule 2   | \$17,500.00        | \$42,500.00        |
| 28/09/24               | 1401/44   |                 | Payment Schedule 3<br>50% retention release at completion                            | -\$21,250.00       | \$21,250.00        |
| 25/02/25               | 1401/65   |                 | Payment Schedule 4<br>Retention used to remedy defects. Refer notice issued 1 Feb 25 | -\$5,000.00        | \$16,250.00        |
| <b>Closing Balance</b> |           |                 |  |                    | <b>\$16,250.00</b> |

CONTRACT

#### 1417 Smiths Residence

| Date                   | Reference | Other reference | Description        | Retention withheld | Balance            |
|------------------------|-----------|-----------------|--------------------|--------------------|--------------------|
| 31/07/24               | 1417/59   |                 | Payment Schedule 1 | \$10,429.00        | \$10,429.00        |
| 25/02/25               | 1417/89   |                 | Payment Schedule 2 | \$12,000.00        | \$22,429.00        |
| <b>Closing Balance</b> |           |                 |                    |                    | <b>\$22,429.00</b> |

**TOTAL RETENTION MONEY BEING WITHHELD \$38,679.00**

Your retention money is secured by the following:

| Account or instrument  | Holder        | Account No         | Branch       |
|------------------------|---------------|--------------------|--------------|
| Retention Bank Account | KZB Bank      | 13-0165-0057899-01 | Christchurch |
| Complying Instruments  | ZNZ Insurance | XXX099             | Auckland     |

This is a report on retention money withheld from you as party B under subpart 2A of the Construction Contracts Act 2002. You may inspect the accounts and records that section 18FC of that Act requires us to keep in relation to retention money withheld from you.

## Internal management reporting

Party A should consider adopting certain internal management reports that provide directors and managers with confidence that party A is complying with the retention regime. Management reports should address the:

- total retention money withheld
- adequate retention money cover
- retention money due/overdue.

These may be separate reports, or one comprehensive report, updated and reviewed at least monthly. The total retention money withheld should correspond with party A's balance sheet.

### SUGGESTED RETENTION INFORMATION IN INTERNAL MANAGEMENT REPORTS

#### Total retention money withheld, for each creditor by contract and in total

- ✓ the construction contract
  - eg project name and number, and subtrade where party B is a subcontractor to party A
- ✓ opening balance
- ✓ the retention money transactions over this period (withheld, applied to remedy non-performance, or released)
- ✓ closing balance
- ✓ when any retention money is next due (expected completion/defect period expiry)

#### Adequacy of retention security

- ✓ how the retention money is secured (bank account or complying instrument)
- ✓ check amount of security against total retention money withheld

#### Retention money due/ overdue

- ✓ check whether any retention release has been overlooked
- ✓ may need to update due date if forecast completion dates delayed.

## Example of retention money internal report

### Cathedral Builders

101 Cathedral Builders Drive,  
Christchurch 8013

#### RETENTION MONEY REGISTER - INTERNAL REPORT

Report Date: 5/04/25

Period to: 31/03/25

#### TOTAL RETENTION MONEY WITHHELD

| CREDITOR: CRUCIAL CONCRETE PLACEMENT LTD              |                  |                       |                        |
|---|------------------|-----------------------|------------------------|
| Contract No   | Contract Name    | Expected release date | Net retention withheld |
| 1401  | The Toolhouse    | Nov-25                | \$16,250.00            |
| 1417  | Smiths Residence | Jun-26                | \$22,429.00            |
| Net retention money withheld to date on this creditor |                  |                       | \$38,679.00            |

| CREDITOR: GRAND GARDENS LTD                           |               |                       |                        |
|---|---------------|-----------------------|------------------------|
| Contract No   | Contract Name | Expected release date | Net retention withheld |
| 1361  | The Toolhouse | Nov-25                | \$40,900.00            |
| 1315  | Johns Road    | Feb-25                | \$24,571.00            |
| 1382  | City Grand    | Mar-25                | \$21,345.00            |
| Net retention money withheld to date on this creditor |               |                       | \$86,816.00            |

| TOTAL RETENTION MONEY WITHHELD ALL CREDITORS | \$125,495.00 |
|--|--------------|
|--|--------------|

#### RETENTION MONEY COVER - ADEQUACY OF RETENTION SECURITY

Your retention money is secured by the following:

| Account or instrument                             | Holder        | Account No         | Branch       |              |
|---|---------------|--------------------|--------------|--------------|
| Retention Bank Account                            | KZB Bank      | 13-0165-0057899-01 | Christchurch | \$51,523.24  |
| Less interest earnings on retention money account |               |                    |              | -\$1,523.24  |
| Net retention Bank Account Balance                |               |                    |              | \$50,000.00  |
| Complying Instruments                             | ZNZ Insurance | XXX099             | Auckland     | \$100,000.00 |
| Total Retention security held                     |               |                    |              | \$150,000.00 |
| Net surplus / (deficit) *                         |               |                    |              | \$24,505.00  |

\* If in surplus there is sufficient cover. If in deficit additional security required either by additional funds in bank account or increasing complying instrument value

#### RETENTION MONEY DUE/ OVERDUE FOR RELEASE

Retention money is due or overdue on the following contracts

| Creditor          | Contract No | Contract Name | Amount withheld | Expected release date |             |
|-------------------|-------------|---------------|-----------------|-----------------------|-------------|
| Grand Gardens Ltd | 1315        | Johns Road    | \$24,571.00     | Feb-25                | **Overdue** |
| Grand Gardens Ltd | 1382        | City Grand    | \$21,345.00     | Mar-25                | **Now Due** |

\*\*If Overdue or Now Due verify contract completion status with project QS, instruct release of adjust expected completion date

# Receivership and liquidation

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## Retention money is protected

Retention money is protected if party A goes into receivership or liquidation.

- The retention money held on trust for the benefit of party B will not be available for a receiver, liquidator or other appointed agent to use to pay party A's debts.
- Upon appointment, a receiver or liquidator will become trustee of the retention money for all party Bs. The new trustee must notify party B within 10 working days of their appointment. This person will be responsible for collecting, managing or disbursing the retention money, after deducting only their reasonable fees and costs reasonably incurred in expense.

**Note:** provisions relating to party A going into liquidation or receivership also apply to construction contracts entered into or renewed before 5 October 2023, when the Amendment Act comes into force.

### What the law says

The transitional provisions of the Amendment Act are laid out in Schedule 1 – **transitional provisions** modify the operation of a new Act or other legislation for a finite time.

#### 1 Transitional matters

- (1) This Act, as amended by the Construction Contracts (Retention Money) Amendment Act 2023 (the 2023 Act), applies in relation to a commercial construction contract that—
  - (a) is entered into after the 2023 Act commenced; or
  - (b) was entered into before the 2023 Act commenced and is renewed afterwards.
- (2) This Act, as in force before the 2023 Act commenced, continues to apply in relation to any other commercial construction contract that was entered into before that Act commenced.
- (3) However, sections 18J to 18L apply in relation to a receivership or liquidation that commences after the 2023 Act commenced (regardless of when the construction contract was entered into or when the retention money was withheld).



## Duties of receivers or liquidators

If party A is under a receivership or liquidation process, the retention money must still be administered by the receiver, administrator or liquidator in accordance with the requirements of the retention money regime.

Recovery of fees is limited to the administration of the retention money, not to party A's wider insolvency work.

The receiver or liquidator appointed as the new trustee (ie party A) must keep clear and separate records of the administration of the retention money trust and the wider insolvency process. The reason for this is retention money held on trust is *not* an asset in the insolvency of party A.

When a receiver or liquidator is appointed, they become the new trustee and must comply with party A's obligations to collect, manage and distribute retention money. The new trustee must notify party B of their appointment within 10 working days of becoming trustee and give party B all of the information that the new trustee gives to unsecured creditors of party A, which it is given to those creditors.

## Determining when retention money is due

When determining each party B's entitlement to the retention money and the due date for any release to party B of that money, the receivers or liquidators appointed as the new trustee must consider a variety of factors in respect of each project and its associated party B contract.

This includes:

- the completion status of the wider project (if applicable)
- the completion status of party B's work under its contract
- whether the works are to cease or continue (for example, where there is a continuity guarantee)
- the records relating to retention money held for party B and associated bank accounts or complying instruments
- any existing defects in the performance of party B's obligations under the contract
- if the project is complete, any remaining defects notification period.

The new trustee will need to obtain and reference information from party A's accounting and contract management records, banking, and (where applicable) insurance/bonding arrangements. The new trustee may also need to communicate with other parties, such as project staff, party A management, party B, project principals (where applicable), and third-party consultants.

The new trustee may decide to make interim partial distributions of amounts to party Bs to ensure the efficient and effective return of funds to those affected by the insolvency.

**Note:** "Interim partial distributions" is a provision payment, typically to meet a pressing need for party B, that will be considered during the final reckoning of accounts. This will not exceed the final entitlement for party B.

## Distributing retention money

Independent assessments and/or formal advice from third parties such as contract administrators or professional quantity surveyors may be required to determine the status of a party B's work and its associated entitlement to the retention money withheld.

The new trustee may wish to consider a principles-based approach to optimise the ultimate return of retention money where the cost of this process (determining party B's entitlement to retention money) is likely to exceed the value of the retention money held. For example, a large number of low-value party B balances.

The following scenarios provide examples of approaches to the payment of retention money held for a party B on a principles-based approach and commercial discussion.

In each scenario, party A is a head contractor responsible for delivering a project to the principal, and party B is a subcontractor to that party A.



| INSOLVENCY SCENARIO   | RELEVANT FACTS  | POTENTIAL OUTCOMES  |
|---|---|---|
| <p><b>Scenario 1</b></p> <p>Project at early stage when party A becomes insolvent</p> | <ul style="list-style-type: none"> <li>• Wider project works 50% complete</li> <li>• Party B's works 40% complete</li> <li>• Party A will not be completing the project (ie, the works have ceased)</li> <li>• No defects identified in performance of party B's obligations under the contract to date.</li> </ul>                                 | <ul style="list-style-type: none"> <li>• Unlikely to be able to determine with any confidence whether defects in performance of party B's obligations under the contract that may be identified in the future relate to the work done by party B, or are a result of the works having ceased</li> <li>• Full retention money balance may be released as soon as is practicable.</li> </ul>  |
| <p><b>Scenario 2</b></p> <p>Project at late stage when party A becomes insolvent</p>  | <ul style="list-style-type: none"> <li>• Wider project works are 95% complete</li> <li>• Party B's works are 90% complete</li> <li>• Party A will not be completing the project (ie, the works have ceased)</li> <li>• No defects have been identified in performance of party B's obligations under the contract to date.</li> </ul>               | <ul style="list-style-type: none"> <li>• It may be possible to determine if future defects can be attributed to party B's completed works</li> <li>• The new trustee may propose releasing a portion of the retention money balance held for party B, with that sum consistent with the contract (eg 50%). This situation is similar to what would have happened if the project had reached practical completion, in which case party A would have withheld the balance for the specified defects-notification period</li> <li>• At the completion of the defects period, and subject to resolution/agreement of any notified defects, the new trustee releases the balance to party B</li> <li>• The above may require consultation between both the principal for the project and party B.</li> </ul> |
| <p><b>Scenario 3</b></p> <p>Project is complete when party A becomes insolvent</p>    | <ul style="list-style-type: none"> <li>• Wider project works are 100% complete</li> <li>• Party B's works are 100% complete and party A has already paid the 50% retention money release at practical completion</li> <li>• Party A will not continue to remedy project defects directly</li> <li>• No known defects identified to date.</li> </ul> | <ul style="list-style-type: none"> <li>• Because the defects-notification period has already commenced, party A continues to hold the balance of retention money until the end of the defects-notification period</li> <li>• The new trustee consults with the project principal and party B regarding any defects in performance of the obligations under the contract identified during the remainder of the period</li> <li>• On completion of the defects-notification period, the new trustee releases the retention balance, less any notified/agreed deductions, to party B.</li> </ul>  |

## When a party is placed in an insolvency process

### When party B is deemed insolvent

If party B is placed into receivership, liquidation or any other insolvency process (such as a voluntary administration):

- the rights and obligations of both party A and party B regarding retention money are unchanged
- the receiver, liquidator or other appointee over party B may receive and request reports and information as set out in this guidance
- party A must follow the same processes under the retention regime for using the retention money to remedy defects in each party B's performance under the relevant contract.

In addition to the contract, any commercial negotiations between party A and party B about the status of the contracted work and activities required for completion will determine the outcome of the retention money.

From the date on which party B is deemed insolvent, the outcome relating to the retention money held by party A will take into account:

1. The contract.
2. The actions taken by party A under the termination or other relevant provisions of the contract.
3. Any commercial negotiations between party A and party B about the status of the contracted work and activities required for completion.

### When party A is deemed insolvent

If party A is placed into receivership and/or liquidation, the first appointed receiver or liquidator will automatically become trustee of the retention money held by party A – referred to as the 'new trustee'. For example, this applies whether or not this is a receivership over all or substantially all assets.

The new trustee can be replaced as trustee if:

- they apply to the High Court to be replaced because they are either unwilling to assume this role or unable to continue in it
- party B applies to the High Court to have the new trustee replaced.

If party A is placed into another form of insolvency (such as voluntary administration), the trustee of the retention money remains as party A. All provisions of the CCA regarding retention money continue to apply, as set out in this guidance.

## When a new trustee is appointed

Under a receivership or liquidation, the new trustee is responsible for collecting, managing, using, and releasing retention money in the same way required of party A. In addition, the new trustee:

- must notify party B of their appointment within 10 working days
- must provide party B with all information ordinarily provided, as part of the insolvency process, to party A's unsecured creditors, and to give that information to party B at the same time as it is given to those creditors
- is entitled to receive reasonable fees and costs associated with their role as trustee of the retention money held (the entitlement is, however, subject to the right of the new trustee or a party B to apply to the High Court for a review or a fixing of such fees)
- is not liable for any unlawful or improper action taken by party A or any other trustee of the retention money prior to their appointment.

The new trustee should report any concerns they have about a previous party A (whether this is a director, manager or trustee) who fails to comply with their obligations under the retention regime to the Chief Executive of MBIE.

## Distribution of retention money by new trustee

An insolvency event will not, of itself, trigger the release of the retention money held on trust. The contract, together with any commercial negotiations between the parties, will continue to determine party B's entitlement to retention money held by party A. This will be at the date of party A's insolvency and the date on which any amount can be released.

### Balance of retention money account in deficit

It is possible at a certain point in time for the retention money bank account to be in deficit – this means the balance of that account is lower than the value of retention money that party A required to hold in the bank account. For example, when the retention money withheld from a progress payment to a party A has become trust property, but the funds have not yet been transferred to the separate retention money bank account.

After deducting associated costs, the receiver or liquidator must distribute or authorise the release of the balance of the retention money (net of any authorised deductions to remedy defects) to each party B.

If the retention money held in separate bank accounts (together with the value of any complying instruments) is found to be in deficit, the receiver, liquidator, or appointee under any other form of insolvency process should:

- undertake an assessment
- seek legal advice regarding any associated impact on party A's wider insolvency.

The balance may be distributed proportionately to each party B's respective balance in the ledger records if:

- the retention money balances held in retention money trust bank accounts are insufficient to meet all retention money trust obligations (other than those relating to reasonable costs)
- it is not clear which party B the deficit applies to (such as where an account holds retention money for more than one party B).



### **What the law says**

Section 18EA of the Amendment Act lays out what happens to the treatment of unallocated withdrawals or deposits.

(1) This section applies if retention money held by party A for 2 or more party Bs is (or is recorded in the ledger records as being) kept in the same bank account.

(2) If—

(a) retention money is withdrawn from the bank account; and

(b) the ledger records do not record which party B the withdrawal is attributable to; and

(c) it is not otherwise clear from the circumstances which party B the withdrawal is attributable to,—  
the amount withdrawn is to be apportioned between the party Bs in proportion to their respective balances in the ledger records at the time the withdrawal is made.

(3) If—

(a) there is a deficiency in the amount of retention money held in the bank account for 1 or more of the party Bs; and

(b) an amount is deposited into the bank account; and

(c) the ledger records do not record which of those party Bs the deposit is attributable to; and

(d) it is not otherwise clear from the circumstances which party B the deposit is attributable to,—  
the amount deposited is to be apportioned between the party Bs referred to in paragraph (a) in proportion to their respective balances in the ledger records at the time the deposit is made.

# Glossary

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| Term                              | Definition  |
|-----------------------------------|---|
| Adjudication                      | A fast-track process for resolving construction contract disputes under the CCA.  |
| Commercial construction contracts | A contract for carrying out construction work in which none of the parties is a residential occupier of the premises that are the subject of the contract.                                  |
| Defects period                    | An amount of time – often a year – where if you notice anything wrong with the work done by your contractor, you can notify them of what is wrong and they must put it right at their cost. |
| <i>De minimis</i> amount          | The maximum dollar value of any construction contract amount before the retention regime applies.   |
| Escrow agent                      | A person or entity that acts as a third-party intermediary between parties who take part in a transaction.  |
| Party A                           | The person/organisation who withholds money as a security for performance under a commercial construction contract.   |
| Party B                           | The person/organisation who has money withheld from them under a commercial construction contract.  |
| Retention money                   | An agreed portion of money in commercial construction contracts that is withheld, which is payable to the subcontractors who perform the construction work.                                 |
| Transitional provision            | A clause that modifies the operation of a new Act or other legislation for a finite time.   |
| Trust property                    | Money or other assets owned or held on trust.   |



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