

Why retentions should no longer be retained.

Let's abolish retentions in the construction industry.

The principle of cash withholdings belongs in 20th century with plan-printers, tracing-paper, fax machines, slide rules, dumpy-levels and all of those other artifacts without which we couldn't build a building. They are an historical commercial relic of time when ABN Lookup, Contractor License databases, and googled credit searches weren't available to anyone with a phone.

In times of exceptionally tight margins, is it fair withhold 2.5% for such long periods? Why do we even hold them at all?

Cash retentions were originally withheld as a performance guarantee to ensure that a Builder or Subcontractor would honour their liabilities to attend to any emerging defects during the initial warranty period. It allowed a building owner sufficient time to discover any latent defects and have them attended to without getting into a commercial dispute.

While 2.5% of the total head contract sum may be sufficient leverage to compel a builder to attend, if the defect was all due to a single subcontractor, the likelihood of that subby's retention covering the cost of rectification of the defect and making good any consequential damage is remote.

As retentions have continued to lose their commercial clout, more effective alternative remedies have come into play;

- A residential owner is able to claim through the QBCC's Homeowners' Insurance Scheme.
- For commercial projects, a complaint can be made to the QBCC about the workmanship of a Licensed Trade Contractor (because we don't use unlicensed contractors, do we?)

As all licensed contractors are liable under the Act to ensure attendance to problems for 6 years and 9 months, their license is at risk if they don't act on a valid complaint. Some case law, has actually held contractors liable for what is effectively the whole service life of a product or installation. So if we don't fix your problem, our license and our livelihood is at risk.

The other major problems with cash retentions are administration and cost.

We have had to work with some builders who have levied retentions on contract sums of less than \$10,000. This is a withholding of only \$250. I'm not quite sure what \$250 will fix, but it can't be much! The cost of administering this for both sides surely exceeds the dollar value of the retention. But it's my money, it represents a significant portion of my profit....and I wouldn't take \$250 out of my wallet and give it to a builder for no reason. So I want it back.

The timely release of retentions is another problem.

How many subbies get a formal notice from a Builder regarding the date of Practical Completion? Maybe you did because they needed their Form 15s or Form 16s. But did you get a notice of DLP Expiry or formal advice of Final Completion under the contract? Unless you are one of the finishing trades who is the last on site, the time from completion of your subcontract works to Expiry of DLP may actually be much longer than the nominal 12 months. And if a Builder is in dispute at the expiry of DLP, it can drag out even more. We have tried sending closing invoices at 13 months after we finish work, but these are often replied to as being on hold pending DLP expiry. But no further advice is given.

Interestingly, the revisions to the QBCC Act and BIFA Qld 2017 stipulate that onus is now on Builder at Practical and Final Completion to release retentions to all subcontractors within set timeframes. We've yet to see proper compliance with this but are happily waiting...

While speaking with an expert on the QBCC Act and other associated legislation, she advised us of some interesting facts. Retention should not be levied on Variations as a matter of course. Often Builders use the cash retentions from subbies to cover the cost of their own Bank Guarantees under the Head Contract. The Builders' BGs are not varied as the contract sum is adjusted, so why are builders taking more? Nor is the second BG reissued to cover any change in to the Adjusted Final Contract Sum. So why is money withheld from subby variations.

In some ways, the whole issue of retentions has made our forward business plan much easier. We now work for a number of Builders who don't withhold anything. All claims are paid in full and on time. No prizes for guessing who goes to the top of the list if we have to choose which jobs to quote. Nor for guessing who gets preferential pricing from us. Surprisingly, the same builders also seem to be the easiest to get along with on site and are a pleasure to work for.

See you on site,
Cheers,



POSTSCRIPT

If you also agree that retentions should be abolished, perhaps you might write to both the QBCC and the Minister for Housing & Public Works.

BIP@hpw.qld.gov.au (Building Legislation & Policy)

<https://my.qbcc.qld.gov.au/s/contactsupport> (Submissions to QBCC)

If you consider a builder has behaved fraudulently in relation to payments or retentions, the Task Force is still taking submissions. You can find the application form at the link below.

<https://www.specialjointtaskforce.initiatives.qld.gov.au/submissions>
