



Department for  
Business, Energy  
& Industrial Strategy

# **RETENTION PAYMENTS IN THE CONSTRUCTION INDUSTRY**

**A consultation on the practice of cash  
retention under construction contracts**

**24 October 2017**

The consultation and supporting documents can be found on GOV.UK:

<https://www.gov.uk/government/consultations/retention-payments-in-the-construction-industry>

## RETENTION PAYMENTS IN THE CONSTRUCTION INDUSTRY

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# Ministerial foreword

The Government understands the importance of prompt and fair payment in business, particularly for small and start-up companies. There is evidence that some payment practices prevalent in the construction industry are a barrier to investment, productivity improvements and growth. Cash retention can be one such practice.



**LORD PRIOR OF BRAMPTON**  
Parliamentary Under Secretary of State  
Department for Business, Energy & Industrial  
Strategy

This is why we are actively taking steps to improve payment performance. The Government is encouraging best payment practice within the construction sector through its own procurement activities. We also understand the importance of transparency in driving culture change, which is why we have introduced a requirement to report on payment policies and practices. Voluntary measures such as the Prompt Payment Code and its Construction Supply Chain Payment Charter can also help by setting expectations about good practices, and what standards companies should be seeking to meet.

However, despite examples of positive changes, there is some evidence that there is still scope for improvement in relation to payment practices in the construction sector. Concerns have been expressed by parts of the industry about unjustified late and non-payment of retention payments and the impact on small businesses. Therefore, the Government agreed to undertake a review of retention payments.

This consultation on the contractual practice of cash retention, the research published alongside this, and a second consultation on the effectiveness of the 2011 changes to the “Construction Act”, will be used to help us assess the extent of the issues. While they need to be viewed in light of the broad approach to prompt and fair payment, the information gathered will help us decide whether and what further intervention is needed.

A handwritten signature in blue ink that reads "Dai R." with a horizontal line underneath.

**LORD PRIOR OF BRAMPTON**

Parliamentary Under Secretary of State Department for Business, Energy & Industrial Strategy

# Purpose of consultation

The purpose of this consultation is to seek information on the practice of cash retention under construction contracts and gather views on the supporting documentation.

**Issued:** 24 October 2017

**Respond by:** 19 January 2018

**Enquiries to:** Construction Unit  
Department for Business, Energy & Industrial Strategy  
1 Victoria Street  
London SW1H 0ET

**Email:** [constructionpayment.consultation@beis.gov.uk](mailto:constructionpayment.consultation@beis.gov.uk)

This consultation is relevant to any party to a commercial construction contract as defined by the construction contracts legislation<sup>1</sup>. It is also relevant to adjudicators, arbitrators and lawyers. While this consultation concerns construction specific legislation, it may also be relevant for those with an interest in prompt payment more generally and to insolvency practitioners. The legislation does not apply to residential occupiers.

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<sup>1</sup> [Sections 104 – 106 of Part 2 of the Housing Grants, Construction and Regeneration Act 1996](#)

## **Scope of Consultation**

This consultation relates to the law and practices that apply in England.

It is recognised that businesses operate across the UK and that responses may touch on issues relevant to construction practices in Scotland, Wales and Northern Ireland. We will assume that respondees are content for their views to be shared with officials in the relevant Devolved Administration unless otherwise indicated.

## Executive summary

There is evidence that some payment practices prevalent in the construction industry are a barrier to investment, productivity improvements and growth. Cash retention can be one such practice. Following concerns expressed by parts of the industry, the Government agreed to undertake a review of retention payments.

To support the review, the Government commissioned independent research from Pye Tait. BEIS Research Paper no.17 – Retentions in the Construction Industry<sup>2</sup>, is published alongside this consultation. It illustrates the challenges with retentions - in particular understanding the extent to which this practice has a negative impact and what solutions would be effective and proportionate in addressing this.

A number of key issues were identified by the research:

- Evidence suggests that retention monies being lost due to contractor insolvency affects a large proportion of contractors who use retentions.
- Evidence gathered through the contractor survey indicates that a proportion of construction customers may be making payment of the retention conditional on the performance of obligations under another contract. This indicates that some contractors may still need to be informed about what the 2011 amendments to the 'Construction Act' mean for payment of retentions;
- Qualitative evidence suggested that unjustified late and non-payment of retention monies was a significant issue for some contractors; and
- There is a need to further investigate the suitability and feasibility of wide use of alternative mechanisms to retentions in the construction sector in England, in particular a retention deposit scheme and holding retentions in a trust account.

It is recognised that there are a number of alternative mechanisms to retentions in use through parts of the construction industry. The consultation seeks to gather evidence about these and also mechanisms highlighted in the research that warrant initial further investigation due to their applicability to the whole sector, and because they balance the need to ensure prompt and fair payment with the need to provide surety against defects and costs. Unjustified late and non-payment of a retention or any other amount owed is unacceptable, and it is hoped there can be a variety of suitable mechanisms available to the industry.

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<sup>2</sup> [BEIS Research Paper No. 17: Pye Tait Retentions in the Construction Industry October 2017](#)

This consultation aims to gather views and information on:

- the effectiveness of existing prompt and fair payment measures for retentions;
- views on the Pye Tait independent research on retentions in the construction industry and the BEIS Consultation Stage Impact Assessment;
- late and non-payment of retentions;
- the appropriateness of a “cap” on the proportion of contract value that can be held in retention, and the length of time it can be held;
- the effectiveness of existing alternative mechanisms to retentions; and
- the costs and benefits of holding retentions in a retention deposit scheme or trust account.

Separately from this consultation exercise, we will also consider their wider impact on the economy.

This consultation runs in parallel with one supporting the Post Implementation Review of the 2011 changes to Part 2 of the Housing Grants, Construction and Regeneration Act 1996<sup>3</sup>. That document deals with the general construction payment and dispute resolution framework.

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<sup>3</sup> <https://www.gov.uk/government/consultations/2011-changes-to-part-2-of-the-housing-grants-construction-and-regeneration-act-1996>



# How to respond

The deadline for responses is **19 January 2018**

Your response will be most useful if it is framed in direct response to the questions posed, though further comments and evidence are also welcome.

You can reply to this consultation online at:

<https://beisgovuk.citizenspace.com/im/retention-payments-in-the-construction-industry>

Alternatively, an electronic consultation response form is available. This form can be obtained from:

Construction Unit  
Department for Business, Energy & Industrial Strategy  
1 Victoria Street  
London SW1H 0ET

[constructionpayment.consultations@beis.gov.uk](mailto:constructionpayment.consultations@beis.gov.uk)

When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of a representative body please make it clear who the organisation represents and, where applicable, how the members' views were assembled.

You may make printed copies of this document without seeking permission.

BEIS consultations are digital by default but, if required, printed copies of this consultation can be obtained at the above address. Other versions of the document in Braille, other languages or audio-cassette are available on request.

## Confidentiality and data protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information legislation (primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004).

**If you want information that you provide to be treated as confidential please say so clearly in writing when you send your response to the consultation.** It would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded by us as a confidentiality request.

We will summarise all responses and place this summary on the [GOV.UK website](#). This summary will include a list of names or organisations that responded but not people's personal names, addresses or other contact details.

## Quality assurance

This consultation has been carried out in accordance with the [Government's Consultation Principles](#).

If you have any complaints about the consultation process (as opposed to comments about the issues which are the subject of the consultation) please address them to:

[enquiries@beis.gov.uk](mailto:enquiries@beis.gov.uk)

## What happens next

An analysis of the consultation responses will be produced in accordance with best practice guidance.

The consultation analysis, as well as wider engagement, will help inform the Government's next steps.

The consultation outcome will be published within 12 weeks of the close of the consultation or an explanation if this is not possible.

# Introduction and context

Retention is a contractual practice originally introduced provide security against defective work or the insolvency of construction firms. It consists of the employing party under a construction contract holding a percentage (typically 5%) of the amount due for payment. It is customary that the first half is released at project completion and that the other half is released following the expiry of a defects liability period (typically 12 to 24 months) for the project. The retention system has featured in the construction sector for over 100 years.

The majority of construction contracts include provision for retention. It can be deducted at each level of the supply chain. Research undertaken by the then Department of Business, Innovation and Skills to support Construction 2025 and the Construction Leadership Council<sup>4</sup>, concluded that, on a typical project, to have 50-70 suppliers and sub-contractors at tier 2 is not uncommon and that the actual delivery of the work is undertaken by a disaggregated tier 3 supply chain, and below<sup>5</sup>.

In theory, retention encourages efficiency and productivity for the construction project. It helps ensure that contractors achieve practical completion on a timely basis so their initial retention payment is released. The use of retentions also acts as an incentive for a defect-free project at the end of the defects liability period.

However, as well as the administrative time involved in managing and recovering retention payments, suppliers can experience a drain on working capital and inflated bad debt, compounded by issues such as overdraft fees and limited access to finance as a result.

Due to these concerns about the potential impact of the practice on small firms in the supply chain (which form over 99% of construction businesses in England<sup>6</sup>), particularly the combination of retentions and upstream insolvency, the Government has launched a review of the practice.

The review, of which this consultation is part, is being published alongside independent research carried out by Pye Tait. BEIS Research Paper no.17 – Retentions in the Construction Industry is published alongside this consultation and draws the following headline findings:

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<sup>4</sup> <http://www.constructionleadershipcouncil.co.uk>

<sup>5</sup> [BIS Research Paper No.145: Supply chain analysis into the construction industry October 2013](#)

<sup>6</sup> [BIS UK Population Estimates \(2016\). https://www.gov.uk/government/statistics/business-population-estimates-2016](https://www.gov.uk/government/statistics/business-population-estimates-2016)

- Around three quarters of contractors surveyed had experience of retentions in the last 3 years, either with retentions held and / or holding retentions. These contractors with experience of retentions report that retentions are held on an average of 65% of all their current contracts.<sup>7</sup>
- Retentions do not feature in some standard contract forms used in the industry. They are not used at all in a small number of sub-sectors – for example, the lift industry, which has developed its own specific guarantee, typically used instead of retentions.
- Evidence indicates that a proportion of clients and contractors make calculated decisions as to whether to hold retentions, depending on factors such as project value, type, complexity and strength of the relationship held with the contractor or sub-contractor. Contracts of lower value and / or complexity, such as short-term repair and maintenance projects, are less likely to hold retentions compared with high value complex work.
- According to survey data, the average amount of retention which is typically held from contractors by clients equates to 4.8% of the contract value. Respondents to the client survey concur with an average retention of around 5% of contract value (4.9%).
- Delays in paying retentions appear to be commonplace. Average delays at each tier of the supply chain are several months. The extent of this average delay is significantly longer further down the supply chain (or for tier 2 and 3 contractors compared to tier 1 contractors).<sup>8</sup> Survey evidence also indicates that not all retentions are fully paid and tier 1 contractors have less of an issue with non-payment of retentions monies at either stage compared to the other two tiers.
- There are several possible reasons for late or non-payment of retentions monies, including disputes over defects, contractors becoming insolvent and contractors not asking for their retention money. The research was unable to identify what proportion of this late / non-payment was justified due to variation in opinion from the respondents perspective in the supply chain.
- There is some evidence from the qualitative interviews and workshops that contractors deeper in the supply chain may be more inclined to write off retentions: in some cases because the work was priced to offset the retention costs; in other cases where companies were keen to maintain good working relationships with the main contractor and win future work.

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<sup>7</sup> 'Current' refers to on-going construction contracts at the time the research was conducted

<sup>8</sup> Main contractors with a direct commercial relationship with a client are classed as tier 1. Sub-contractors and suppliers with a direct contract with the tier 1 main contractor are classed as tier 2. Sub-contractors and suppliers working for sub-contractors are classed as tier 3.

- Some delays and non-payments can be for legitimate reasons, for instance while defects are being remedied or because the contractor has not returned to remedy them.
- The 2011 changes to Housing Grants, Construction and Regeneration Act (the “Construction Act”) mean that it is no longer possible to make payment conditional on the performance of obligations under another contract<sup>9</sup>. There is an indication that a number of businesses in the sector do not yet understand, or have no knowledge, of this change and the greater certainty of entitlement to payment it should bring.
- Majority of those holding retentions (whether clients or contractors) do so in a main bank account. This suggests that for contractors there is no protection from upstream insolvencies, as retention monies held against their work are not typically ring-fenced.
- There is substantial variation in the experiences of contractors with retentions, meaning that it is challenging to draw generalised conclusions on their impacts. However, survey evidence indicates that, although the practice of holding retentions is ingrained in the construction sector, it is widely associated with a number of negative impacts including:
  - increased business overheads;
  - weakened relationships throughout - the supply chain;
  - weakened relationships with clients / main contractors;
  - increased costs of projects;
  - constrained business growth; and
  - lack of protection for contractors from upstream insolvencies.
- Retentions are used in a number of other countries some of which have chosen to recognise the impact retentions can have on productivity and regulate the way they are held – a common theme being to ensure the money is ‘ring-fenced’ in some way.
- Consideration was given to a number of other alternatives to retentions, including - Project Bank Accounts, Retention bonds, Performance bonds, Escrow stakeholder accounts, parent company guarantees and retentions held in trust. There is limited evidence of widespread use of these alternative methods of security in lieu of retentions in England. There is more evidence of their use in addition to, rather than as a genuine alternative to, retentions.

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<sup>9</sup> The term “2011 changes” refers to the amendments made to Part 2 of the Housing Grants, Construction and Regeneration Act 1996 by Part 8 of the Local Democracy, Economic Development and Construction Act 2009 and changes made to the Scheme for Construction Contracts (England and Wales) Regulations 1998 by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011. The impact of these changes was assessed in Impact Assessment Number BIS0146/BIS0093. The changes came into effect in October 2011.

- When considering all the methods of contractual security against performance and defects, contractors and clients both rate retentions as the most effective. However, it should be noted that respondents had more experience of retentions compared to the alternative mechanisms.
- The most likely alternatives to retentions are those which appear to be applicable to the whole of the sector, eliminate some of the critical issues associated with retentions (notably the risk of delayed or non-payment of retention monies) and provide the surety against defects as retentions do).
- A retention deposit scheme and holding retentions in a trust account appear to be applicable to the whole of the sector, eliminate some of the critical issues associated with retentions (notably the risk of delayed or non-payment of retention monies) and provide surety against defects.
- Whilst retention bonds also appear to be applicable to the whole of the sector, eliminate some of the critical issues associated with retentions (notably the risks of delayed or non-payment of retention monies, and the impacts of insolvency) and provide the surety against defects as retentions do, there is more evidence that the costs of retention bonds could be a barrier to their implementation sector-wide because costs may be higher for smaller contractors further down the supply chain.

The research drew a number of conclusions and areas for potential further investigation:

- Retention monies being lost to contractor insolvency affects a large proportion of contractors who use retentions. Whilst the evidence indicates that the number of contracts affected is small, the value lost could still be significant.
- Evidence gathered indicates that a proportion of construction customers may be making payment of the retention conditional on the performance of obligations under another contract. Further research to specifically understand the scale of the issue in the construction sector could be valuable.
- Difficulties in robust measurement of the extent to which late and non-payment of retentions has been unjustifiably withheld by contractors. However, qualitative evidence suggest that unjustified late and non-payment of retention monies was a significant issues for some contractors. Further evidence could be gathered but it may well be difficult to reach a robust conclusion due to difference in opinion.
- As and when evaluations become available there should be a review on the effectiveness of international measures targeted at resolving issues with retentions.
- There are a number of alternative methods of security in lieu of retentions used in England. Each have their place in certain circumstances. However opportunity should

be taken to further explore those mechanisms highlighted in the research that warrant initial investigation due to their applicability to the whole sector, and because they balance the need to ensure prompt and fair payment with the need to provide surety against defects. In the first instance there should be further investigation of the suitability and feasibility of wide use of a retention deposit scheme and holding retentions in a trust account for the construction sector.

This consultation aims to further explore:

- the effectiveness of existing prompt and fair payment measures for retentions;
- views on the independent research on retentions in the construction industry and the BEIS Consultation Stage Impact Assessment;
- late and non-payment of retentions;
- the appropriateness of a “cap” on the proportion of contract value that can be held in retention, and the length of time it can be held;
- the effectiveness of existing alternative mechanisms to retentions; and
- the costs and benefits of a “retention deposit scheme”.

The Pye Tait research also highlighted issues with the cost of adjudication and its relevance for small value disputes (which is generally the case with retentions). Given the wider relevance of the issue to disputes under construction contracts, this is being picked up in the parallel consultation to support the Post Implementation Review of the 2011 amendments to Part 2 of the Housing Grants, Construction and Regeneration Act 1996<sup>10</sup>.

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<sup>10</sup> <https://www.gov.uk/government/consultations/2011-changes-to-part-2-of-the-housing-grants-construction-and-regeneration-act-1996>

# The consultation

This consultation comprises the following sections:

- A) Existing measures
- B) Supporting documentation
- C) Late and non-payment of retentions
- D) Retention “Caps”
- E) Existing alternative mechanisms to retentions
- F) “Retention Deposit Schemes”



## Section A – Existing measures

### The effectiveness of existing prompt and fair payment measures for retentions

The impact assessment accompanying this consultation document looked at the impact of the existing prompt and fair payment measures on the practice of retention specifically – rather than their more general effect. It drew the following conclusions:

- **The Prompt Payment Code and Construction Supply Chain Payment Charter<sup>11</sup>**  
While this contains an explicit commitment to remove retentions by 2025, it is a voluntary initiative which will work incrementally and with the grain of industry practices.
- **The Government Construction Strategy 2016 - 2020<sup>12</sup>**  
This does not specifically address retentions but promotes better supply chain management to drive better value for government clients. However, public sector procurement accounts for around 25% of total construction output and the impact on the remaining 75% of private sector construction output is therefore unclear.
- **Project Bank Accounts<sup>13</sup>**  
Project Bank Accounts only partially address the issues associated with retentions. Further, the Pye Tait research indicated that costs associated with set-up and subsequent administration mean that it is unlikely that they will be appropriate across the whole of the construction sector.
- **The Public Contracts Regulations 2015<sup>14</sup>**  
The requirement for all public sector organisations to pay undisputed invoices within 30 days and to ensure this requirement is passed through the supply chain will have only limited impact on retentions, as the requirement to pay within 30 days only applies when the retention is due.

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<sup>11</sup> [The Prompt Payment Code and Construction Supply Chain Payment Charter](#)

<sup>12</sup> [The Government Construction Strategy](#)

<sup>13</sup> [Project Bank Accounts](#)

<sup>14</sup> [The Public Contracts Regulations 2015](#)

The consultation seeks to establish whether people agree with the statement in the impact assessment that existing prompt and fair payment measures do not fully address the specific challenges with retentions.

### Consultation Question

- |     |  |
|-----|--|
| 1a. | To what extent do existing prompt and fair payment measures, such as the Construction Supply Chain Payment Charter, Project Bank Accounts and the Public Contracts Regulations, help to address the specific challenges with retentions? |
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### Consultation Question

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|-----|--|
| 1b. | Please explain the reasons for your answer to question 1a. |
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### Consultation Question

- |     |   |
|-----|---|
| 2a. | Are there any challenges that these do not address? |
|-----|---|
- 

### Consultation Question

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|-----|--|
| 2b. | Please explain the reasons for your answer to question 2a. |
|-----|--|
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## Section B – Supporting documentation

### The Pye Tait research – Retentions in the Construction Industry and BEIS Consultation Stage Impact Assessment

#### Research

The independent research accompanying this consultation, BEIS Research Paper no. 17 – Retentions in the Construction Industry<sup>15</sup>, draws a number of conclusions and areas for potential further investigation:

- Retention monies being lost to contractor insolvency affects a large proportion of contractors who use retentions. Whilst the evidence indicates that the number of contracts affected is small, the value lost could still be significant.
- A proportion of construction customers may be making payment of the retention conditional on the performance of obligations under another contract.
- The extent to which late and non-payment of retentions has been unjustifiably withheld by contractors.
- Alternative methods of security in lieu of retentions used in England.
- The suitability and feasibility of wide use of a retention deposit scheme and holding retentions in a trust account for the construction sector.

**The consultation seeks to establish whether people agree with the findings and conclusions of the independent research.**

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<sup>15</sup> [BEIS Research Paper No. 17: Pye Tait Retentions in the Construction Industry October 2017](#)

## Consultation Question

3a. Do you agree with the findings and conclusions drawn from the Pye Tait research?

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## Consultation Question

3b. Please explain the reasons for your answer to question 3a.

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## Consultation Question

4. Do you have any further comments on the Pye Tait research?

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### Consultation Stage Impact Assessment

The Consultation Stage Impact Assessment<sup>16</sup> uses the findings from the Pye Tait research and other available evidence to provide the Government's initial assessment of the rationale for intervention, and possible options that are being considered for mitigating the issues associated with retentions in the construction payment (namely unjustified non-payment and late payment, and non-payment due to upstream insolvency). It also provides a detailed assessment on the costs and benefits of the policy and the regulatory impact. Where possible, it has used the available evidence and a range of assumptions to produce monetised estimates for a number of the key cost and benefits of the policy options considered.

**The consultation seeks to establish whether people agree with the estimates, methodologies and assumptions in the Consultation Stage Impact Assessment.**

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<sup>16</sup> [BEIS Consultation Stage Impact Assessment – Retention payments in the construction industry](#)

i) Value of retentions held in the construction sector as a whole

The Impact Assessment estimates that the total amount held in retentions in the construction sector in England over the course of a given year is £3.2 billion to £5.9 billion with a central estimate of £4.5 billion (in 2015 prices).

## Consultation Question

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5a. Do you think this estimate is reasonable?

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## Consultation Question

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5b. If no, please explain the reasons for your answer to question 5a.

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i-i Methodology

The methodology to derive this estimate involves multiplying the average typical retentions value obtained from Pye Tait by turnover and then taking account of the number of contractors that do not have experience of using retentions and the proportion of contracts that do not have retentions on them.

Retentions are a proportion of contract value, therefore, we believe that sector turnover is an appropriate basis for estimating the total amount held in retentions over the course of a given year. The Pye Tait research shows that retentions are not held by all construction customers or on all construction contracts thus the Impact Assessment also takes these two factors into account.

### Consultation Question

6a.	Do you agree that this is a suitable methodology for estimating the total amount held in retentions across the sector over the course of a year?
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### Consultation Question

6b.	If no, please explain the reasons for your answer to question 6a. If you think that an alternative methodology is needed, please provide details and supporting evidence.
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### Consultation Question

7a.	Do you agree that, as retentions are a proportion of contract value, sector turnover is a more appropriate basis for estimating the total amount held in retentions over the course of a given year than sector output?
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### Consultation Question

7b.	If no, please explain the reasons for your answer to question 7a. If you think that an alternative methodology is needed, please provide details and supporting evidence.
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#### i-ii Assumptions

The methodology in the Impact Assessment which estimates the value of retentions is based on several assumptions:

1. The average typical retention percentage is 4.85%, taken from Pye Tait survey evidence.

2. Turnover in the construction sector in England is approximately £188 billion, taken from the ONS Annual Business Survey.
3. The proportion of contractors with experience of retentions in any given year is 75%. This is based on the result from the Pye Tait research that around a quarter of contractors surveyed have not had any experience of retentions in the last three years.
4. The proportion of their contracts with retention payments held is 65%. This is based on the result from the Pye Tait research that the three-quarters of contractors with experience of retentions, say retentions are held on an average of 65% of all their current contracts.
5. The number of construction contractors without experience of retentions is proportionate to the value of construction turnover that is not covered by retentions.
6. The number of construction contracts not covered by retentions is proportionate to the value of construction turnover that is not covered by retentions.
7. The proportion of construction customers using retentions and the proportion of their contracts with retentions held stays constant over time (i.e. reflects the snapshot from the Pye Tait research).

## Consultation Question

8a.	Do you think that the assumptions made for this methodology look reasonable?
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## Consultation Question

8b.	If no, please explain the reasons for your answer to question 8a. If you think that alternative assumptions are needed, please provide details and supporting evidence.
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i-iii Sensitivity

To reflect the fact that there is uncertainty in a number of these assumptions, sensitivity analysis has been conducted. A 10% sensitivity to assumption 3 and 20% sensitivity to the assumption 4 to reflect the greater uncertainty around how the proportion of contractors with experience of retentions over the last three years translates to the proportion in one year.

### Consultation Question

9a.	Do you think that the assumptions made for this sensitivity are reasonable?
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### Consultation Question

9b.	If no, please explain the reasons for your answer to question 9a. If you think that alternative assumptions are needed, please provide details and supporting evidence.
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ii) Value of retentions unpaid each year due to upstream insolvencies

The Impact Assessment estimates that the total amount of retentions unpaid each year due to upstream insolvencies is £229 million, in 2015 prices.

### Consultation Question

10a.	Do you think this estimate is reasonable?
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## Consultation Question

10b.	If no, please explain the reasons for your answer to question 10a.
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### ii-i Methodology

The methodology to derive this involves estimating the number of construction enterprises that have experienced non-payment due to insolvency in the last three years, and multiplying this by the average amount lost per contractor over this period due to upstream insolvency, to produce an estimate for the amount lost over three years. This is then divided by three to give an estimate for the amount lost in one year.

## Consultation Question

11a.	Do you agree that this is a suitable methodology for estimating the total amount of retention monies not paid over the course of a year due to upstream insolvencies?
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## Consultation Question

11b.	If no, please explain the reasons for your answer to question 11a. If you think that an alternative methodology is needed, please provide details and supporting evidence.
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### ii-ii Assumptions

The methodology in the Impact Assessment which estimates the value of retentions not paid to contractors due to upstream insolvencies is based on several assumptions:

1. The total number of construction enterprises in England is 229,060, taken from the ONS Annual Business Survey.

2. The proportion of these contractors with experience of having retentions held from them in the last three years is 69%. This is based on the result from the Pye Tait research that 69% of contractors have experience of retentions being held on them in the last three years.

3. The proportion of these contractors that will experience non-payment due to insolvency is 44%. This is based on the result from the Pye Tait research that 44% of contractors with experience of having retentions held from them in the last three years have experienced non-payment due to insolvency of another organisation.

4. The average amount lost per contractor that experiences non-payment due to insolvency is £10,000 over three years. This is based on the Pye Tait research which found that the median amount lost per contractor with experience of non-payment due to upstream insolvency, over the last three years, was £10,000.

5. Dividing the total estimated amount of retentions not paid to contractors over the last three years due to upstream insolvencies by three gives a suitable estimate for the total amount lost in one year.

6. The proportion of construction contractors with retentions held from them, the proportion of them experiencing non-payment due to upstream insolvency, and the average value of non-payment due to upstream insolvencies per contractor stays constant over time (i.e. reflects the snapshot from the Pye Tait research).

## Consultation Question

12a.	Do you think that the assumptions made for this methodology look reasonable?
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## Consultation Question

12b.	If no, please explain the reasons for your answer to question 12a. If you think that alternative assumptions are needed, please provide details and supporting evidence.
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### iii) Transfer generated by the absence of free trade credit

Under Option 2 it is proposed that retention money would need to be held in trust and could not be used by construction customers whilst it is held. This would require those currently holding and making use of retention monies to obtain finance from elsewhere if they want to maintain their current level of expenditure. The Impact Assessment estimates this finance to be approximately £1.5 billion – £2.8 billion per year, with a central estimate of £2.1 billion (in 2015 prices).

#### iii-i Methodology

The methodology to derive this estimate multiplies the total estimated amount held in retentions over the course of a year by the assumed proportion of retentions held by clients and contractors. This is then multiplied by the assumed proportion of retentions that clients and contractors make use of.

### Consultation Question

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|------|--|
| 13a. | Do you agree that this is a suitable methodology for estimating the total amount that construction clients and contractors holding retentions would need to fund from elsewhere, in order to maintain current levels of expenditure? |
|------|--|

### Consultation Question

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|------|---|
| 13b. | If not, please explain the reasons for your answer to question 13a. If you think that an alternative methodology is needed, please provide details and supporting evidence. |
|------|---|

#### iii-ii Assumptions

This methodology uses several assumptions:

1. Half of the estimated total amount held in retentions in the construction sector in England over the course of a given year is held by clients, and half is held by construction contractors. This is a simplifying assumption made in the absence of relevant evidence.
2. Using the Pye Research results which suggests that 33% of clients and 61% of contractors make use of retention monies, we assume that 33% of the total retentions value held by construction clients and 61% of the total retentions value held is used. This is a simplifying assumption made to translate incidence to total value.
3. The proportion of construction customers and clients making any use of retention monies stays constant over time (i.e. reflects the snapshot from the Pye Tait research).

### Consultation Question

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14a.	Do you think that the assumptions made for this methodology look reasonable?
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### Consultation Question

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14b.	If no, please explain the reasons for your answer to question 14a. If you think that alternative assumptions are needed, please provide details and supporting evidence.
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#### iv) Use of retentions monies

The Pye Tait research indicates that approximately 33% of construction clients and 61% of contractors that hold retention monies use it in some way. However, it is not clear from this what proportion of the total value of retention monies are used in a given year.

## Consultation Question

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|------|---|
| 15a. | Over the last year did you make any use of the retentions monies you held (for example, as part of general expenditure, working capital, or to support investment)? |
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## Consultation Question

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|------|---|
| 15b. | If yes, approximately what proportion of the total value of retentions held by you did you make use of last year? |
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## Consultation Question

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| 16. | Do you have any further comments on the Consultation Stage Impact Assessment analysis? |
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## Section C – Late and non-payment of retentions

### Measuring the incidence of unjustified late and non-payment of retention monies

Alongside a wealth of anecdotal evidence and several surveys by trade bodies with a close interest in a particular aspect of the argument, Pye Tait (2017) research indicates that there is frequent late and non-payment of retentions.

It is not known what proportion of this late and non-payment of retention monies is for genuine reasons (for instance, the failure of a supplier to return promptly to correct defects), and what proportion is for unjustified reasons (for instance, non-payment because of a pending payment from another client or because a contractor retained monies for longer than specified in contract terms).

The qualitative information gathered by Pye Tait from workshops and interviews does, however, indicate that *unjustified* late and non-payment of retentions appears to be a significant cause of issues associated with the practice of holding retentions within the construction sector. However, they found that it was not possible to use the survey evidence gathered to measure what proportion of late and non-payment counted by the survey is justified within contract terms, what proportion is unjustified, and what proportion retentions are lost due to insolvencies.

**The consultation questions seek to further understand the value of late and non-payment in the construction sector, and the reasons for this late and non-payment.**

#### Consultation Question

17.	What was your annual turnover last year?
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#### i) Non-payment

#### Consultation Question

18a.	Do you believe that <u>non-payment of retentions due to the company holding the retention becoming insolvent before the retention is paid</u> is a significant issue in the construction sector?
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## Consultation Question

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|------|--|
| 18b. | Please explain the reasons for your answer to question 18a, and if possible provide supporting evidence. |
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## Consultation Question

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| 19a. | Excluding the money not paid because the company holding the retention became insolvent. Do you believe that <u>unjustified non-payment</u> of retention monies is a significant issue in the construction sector? |
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## Consultation Question

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| 19b. | Please explain the reasons for your answer to question 19a, and if possible provide supporting evidence. |
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## Consultation Question

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|------|---|
| 20a. | Do you believe that <u>non-payment of retention monies due to payers citing that obligations under another construction contract have not been met</u> is a significant issue in the construction sector? |
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## Consultation Question

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|------|--|
| 20b. | Please explain the reasons for your answer to question 20a, and if possible provide supporting evidence. |
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## Consultation Question

21a. Approximately, what was the total value of retentions due to be released to you over the last year?

## Consultation Question

21b. If retention money was due, approximately what proportion of this was not released?

## Consultation Questions

22. Please provide further details on the reasons for this non-payment:

	The company holding the retention became insolvent	Payer cited that obligations under another construction contract had not been met	Other reasons
What proportion of the total <u>value</u> of retentions <u>not released</u> to you was because of:  (Note: this row should add to 100%)			



## Consultation Question

23a.	Of the non-payment unpaid for 'other reasons' in question 22 above, in your view, what proportion was unjustified within the contract terms?
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## Consultation Question

23b.	Please explain the reasons for your answer to question 23a.
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ii) Non-payment due to the payer citing that obligations under another construction contract had not been met

## Consultation Question

24a.	Did you challenge the non-payment that occurred due to the payer citing obligations under another construction contract not being met (outlined in question 22)?
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## Consultation Question

24b.	Please explain the reasons for your answer to question 24a.
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iii) Late payment

### Consultation Question

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| 25a. | Do you believe that <u>unjustified late-payment</u> of retention monies is a significant issue in the construction sector? |
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### Consultation Question

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| 25b. | Please explain the reasons for your answer to question 25a, and if possible provide supporting evidence. |
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### Consultation Question

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| 26a. | Do you believe that <u>late payment of retention monies due to the payer citing obligations under another construction contract not being met</u> is a significant issue in the construction sector? |
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### Consultation Question

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| 26b. | Please explain the reasons for your answer to question 26a, and if possible provide supporting evidence. |
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### Consultation Question

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| 27. | Approximately what proportion of the total value of retentions due to be released to you over the last year was paid late? |
|-----|--|
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## Consultation Questions

28. Please provide further details on the reasons for this late-payment:

	Payer cited that obligations under another construction contract had not been met	Other reasons
What proportion of the total <u>value</u> of retentions <u>that was paid late</u> was because of:  (Note: this row should add to 100%)		

iv) Late payment for 'other reasons'

## Consultation Question

29a. Of the late-payment for 'other reasons' in question 28 above, in your view, what proportion was unjustified within the contract terms?

## Consultation Question

29b. Please explain the reasons for your answer to question 29a, and if possible provide supporting evidence.

## Consultation Question

30. For the amount that you believe was 'unjustified' what was the typical length of delay?

v) Late-payment because the payer cited that obligations under another construction contract from another company had not been met

### Consultation Question

31a.	Did you challenge the late payment that occurred due to the payer citing that obligations under another construction contract had not been met (outlined in question 28)?
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### Consultation Question

31b.	Please explain the reasons for your answer to question 31a.
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vi) 2011 amendments to the "Construction Act"

### Consultation Question

32a.	Are you aware that the 2011 amendments to the "Construction Act" mean it is no longer possible to make payment, including retention payments, conditional on the performance of obligations under another contract?
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### Consultation Question

32b.	Over the past year, approximately what proportion of contracts issued to you were inconsistent with the 2011 amendments that payment cannot be made conditional on performance under another contract?
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## Consultation Question

32c.	Did you raise the inconsistencies with the awarding party?
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## Consultation Question

32d.	If you did raise the inconsistencies with the awarding party, typically what was the outcome?
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## Consultation Question

32e.	If you did raise the inconsistencies with the awarding party, what expense did the requirement to clarify the contract(s) incur?
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## Consultation Question

32f.	Would you have challenged <u>non-payment</u> (due to performance of obligations under another contract), if you had known that this is what the “Construction Act” means for retention payments?
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## Consultation Question

32g.	Would you have challenged the <u>late-payment</u> (due to performance of obligations under another contract), if you had known that this is what the “Construction Act” means for retention payments?
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## Consultation Question

32h.	What measures would assist in increasing your awareness of such legislative changes?
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## Consultation Question

33a.	Do you believe those withholding retentions due to reasons that are now illegal under the 2011 changes to the “Construction Act” are doing so due to a lack of awareness of the 2011 changes or for other reasons?
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## Consultation Question

33b.	Please explain the reasons for your answer to question 33a.
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## Consultation Question

34a.	When the 2011 amendments were introduced it was suggested that some parties to construction contracts may respond by simply extending the defects liability period so that the retention was held for longer. Do you believe that this has occurred?
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## Consultation Question

34b.	Please explain the reasons for your answer to question 34a.
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vii) Discount

### Consultation Question

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| 35a. | It has been suggested that some parties to construction contracts ask contractors to give an overall discount on the contract price, in return for ensuring prompt payment. Have you encountered this practice? |
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### Consultation Question

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| 35b. | Have you encountered this practice specifically with regard to retentions payments? |
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### Consultation Question

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|-----|---|
| 36. | Do you have any further comments on late and non-payment of retentions? |
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## Section D – Retention “Caps”

### The appropriateness of a “cap” on the proportion of contract value that can be held, and the length of time it can be held

In advance of, and during this review, the Government has been provided with examples of retentions being held at an onerously high rate, or held for an unnecessarily long period as a way of boosting the cash flow of the party holding the money. On the face of it, a relatively straightforward solution to this issue would be to introduce a “cap” in the time period, or percentage, which could be applied to retentions.

However, the Pye Tait research provides no evidence that a large proportion construction customers are systematically setting retention rates at high levels. It presents a similar picture on the length of time retentions are intended to be held. Their evidence suggests that higher retention percentages are rare – and where they are applied, they could reflect the risks of the specific project.

There is also a risk that introducing a cap could introduce other unintended consequences. A clear potential consequence of imposing a cap on retentions would be that a party would seek to manage an increased exposure to risk through other means.

**The consultation seeks to establish whether people agree.**

### Consultation Question

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|------|--|
| 37a. | Pye Tait research provided no evidence that a large proportion construction customers are systematically setting retention rates at high levels. It presents a similar picture on the length of time retentions are intended to be held. It is therefore suggested that a cap on the time that a retention can be held or the retention rate that can be held would have limited impact. Do you agree? |
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### Consultation Question

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| 37b. | Please explain the reasons for your answer to question 37a. |
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## Section E – Existing alternative mechanisms to retentions

### The effectiveness of existing alternative mechanisms to retentions

The Pye Tait research considered a number of mechanisms already in use within parts of the construction sector, to assess the extent to which they could be used as sector-wide alternatives to retentions. These were:

- Project Bank Accounts (PBAs);
- Retention bonds;
- Performance bonds;
- Escrow stakeholder accounts;
- Parent company guarantees; and
- Retentions held in trust.

For each of the above, the research examined how they operated, estimated costs and suitability as a sector-wide alternative to retentions. In assessing suitability four main criteria were used; applicability to the whole sector, elimination of critical issues associated with the practice of retentions, surety against defects and costs.

Additionally, respondents (clients and contractors) made a number of suggestions about other alternatives to retentions such as procurement frameworks, insurance policies, guarantees and warranties, existing legislation and retention deposit schemes.

The research indicated that there is a need to further investigate the suitability and feasibility of a wide use of alternative mechanisms to retentions in the construction sector in England, but in the first instance a “retention deposit scheme” and holding retentions in trust.

**The consultation questions seek to establish the use and range of alternative mechanisms and their effectiveness in providing surety against defects and critical issues associated with retentions.**

### Consultation Question

38a.	Over the last 5 years, on what proportion of your construction contracts, have alternative mechanisms to retentions, or alternative mechanisms for implementing retentions, been utilised?
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### Consultation Question

38b.	Which alternative mechanisms were utilised?
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### Consultation Question

38c.	Typically, were these alternative mechanisms used in addition to, rather than as an alternative to retentions?
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### Consultation Question

38d.	Do you think that any of these alternative mechanisms would be applicable for wider use across the sector?
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### Consultation Question

38e.	Please explain the reasons for your answer to question 38d. If applicable, please list those alternative mechanisms that you think would be applicable for wider use across the sector.
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## Consultation Question

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|------|---|
| 39a. | The Pye Tait research concludes that a retention deposit scheme and holding retentions in trust appear to be applicable to the whole of the sector. Do you agree? |
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## Consultation Question

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|------|---|
| 39b. | Please explain the reasons for your answer to question 39a. |
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## Consultation Question

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|------|---|
| 40a. | The Pye Tait research concludes that a retention deposit scheme and holding retentions in trust could eliminate some of the critical issues associated with retentions (notably the risk of delayed or non-payment of retention monies) and provide surety against defects. Do you agree? |
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## Consultation Question

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|------|---|
| 40b. | Please explain the reasons for your answer to question 40a. |
|------|---|
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## Consultation Question

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|------|---|
| 41a. | Do you agree that a range of alternative mechanisms could exist within the industry, to account for variation in projects and supply chain circumstances? |
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## Consultation Question

41b.	Please explain the reasons for your answer to question 41a.
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## Consultation Question

42.	Do you have any further comments on the alternative mechanisms to retentions in the construction sector?
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## Section F – Retention deposit schemes

### The scope, operation, features and potential costs of holding retentions in a retention deposit scheme

The practice of holding retentions is widespread in the construction sector but it can be associated with a number of negative impacts for contractors and the sector as a whole. In particular, the cascade system of payment in the industry, and the fact that an insolvency further up the supply chain can cause that cascade to stop, can make exposure to insolvency particularly acute to a participant further down the supply chain. This is particularly magnified by the practice of cash retention where the money can be held for extended periods after the project has been completed, coupled with being typically held in a main bank account rather than a separate account protected from the risk of insolvency.

The Pye Tait research explored the evidence for alternative mechanisms to retentions both in the UK and in a number of other countries. The research concluded that the most likely alternatives to retentions are those which appear to be applicable to the whole of the sector, eliminate some of the potential difficulties associated with retentions (notably the risk of delayed or non-payment of retention monies) and still provide the insurance mechanism for the customer.

The research particularly noted that a number of other countries required, in some respect or other, for the retention money to be held in trust in a separate, ring-fenced account until it is either used to rectify defects or becomes due for payment.

Construction projects can sustain highly complex supply chains with numerous interactions.

The impact assessment underpinning the 2011 changes to the “Construction Act” suggested that there were 432,000 main contract payments in 2005 (the last year for which that data was collected).<sup>17</sup> Research undertaken for BIS in 2013<sup>18</sup> found that it was not uncommon for a tier 1 contractor to have 50 to 70 tier 2 contractors. The same research found that complex tier 2 sub-contracts are also highly disaggregated, typically featuring over 30 contractors at tier 3. This complexity of interaction drives up the costs associated with any intervention. The relatively small expense of an additional transaction (such as treating retention money separately and depositing in trust at stage payments) is multiplied many times to arrive at a significant cost for the whole sector.

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<sup>17</sup>Department for Business, Innovation and Skills (2011). Final Impact Assessment: Revision of the Scheme for Construction Contracts (England and Wales) Regulations 1998 Construction Contracts (England) Exclusion Order 2011 [http://www.legislation.gov.uk/ukia/2011/324/pdfs/ukia\\_20110324\\_en.pdf](http://www.legislation.gov.uk/ukia/2011/324/pdfs/ukia_20110324_en.pdf)

<sup>18</sup> [BIS Research paper no.145: Supply chain analysis into the construction industry October 2013](#)

The Governments of New South Wales, Australia and New Zealand have acknowledged this point in their legislation protecting retention money. In New South Wales the requirement to place retention money in a trust fund is limited to tier 1 contractors and to projects over AUD\$ 20 million. Legislation in New Zealand came into force in March 2017. Retention money must be held on trust, unless a complying financial instrument, such as an insurance or payment bond is obtained.

The Pye Tait research indicates that there is frequent late and non-payment of retention monies, and that this is more pronounced for retention payments to sub-contractors at tier 2 and 3 of the supply chain. Imposing a contract or project value threshold, or limiting the application of any intervention to a single point in the supply chain, would therefore not address the problems that can be created by the practice of retentions within the construction supply chain.

Rather than imposing a threshold, or applying any requirement to a single point in the supply chain, we are therefore consulting on a proposal for retention monies to be held in trust in a separate, ring-fenced account. The features and operation of the retention deposit scheme could be developed in a number of ways. For example, retention monies associated with practical completion and defects liability period could be paid into the scheme at each stage payment or just those retention monies associated with the defects liability could be paid in one lump sum at the start of the defects liability period. There may well be other design options.

In order to further minimise burdens, any measure to require the use of trust accounts for retention money needs to be simple, consistent and transparent, particularly if it is to benefit small firms in the construction supply chain. It is believed that a “retention deposit scheme”, similar to the “Tenancy Deposit Scheme”, represents the best way of achieving this.

This consultation seeks to explore the design, costs and benefits of introducing a “retention deposit scheme” for the retention money.

It is the case that there are wider costs and benefits to the economy, and to parties not subject to construction contracts associated with these proposals. These are being considered in parallel to this consultation.

### A Retention Deposit Scheme

Drawing on international experience, and experience of similar schemes such as the tenancy deposit scheme, it is envisaged that the requirement to hold retentions in a “retention deposit scheme” would have the following features:

- the scheme should be set up on a statutory footing;
- the market will deliver private provision of any retention deposit scheme(s);
- businesses holding retentions under construction contracts (as defined by Part 2 of the Housing Grants, Construction and Regeneration Act 1996) will be required to deposit retentions in the scheme;

- the scheme can only hold retention money (plus any related interest);
- the money will be held in trust;
- where the contract makes no such provision, the Scheme for Construction Contracts will imply relevant terms requiring retention money to be held in a deposit scheme;
- scheme operators would be required to report on an annual basis on their performance; and
- any disputes about the operation, amount and timing of the release of retentions payments will be dealt with by existing dispute resolution processes.

### Operation

It is envisaged that organisations withholding retention payments will be required to register with a Retention Deposit Scheme as an account holder and to:

- register specific contracts and the relevant information (such as start and end dates, payment schedule and retentions terms);
- notify the scheme of the timing, amount and allocation of retention money which is being deposited;
- notify the scheme if any changes are made to the timings and payment due, and why; and
- the scheme operator to pay the retention on the retention release dates.

**The following questions consider the scope, features and operation of a retention deposit scheme. Questions also seek information to help quantify the potential costs of operating such a scheme.**

### i) Scope

#### Consultation Question

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| 43a. | Do you think it is important to place a threshold on the application of any measure requiring retentions to be held in trust or ring-fenced in another way? |
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#### Consultation Question

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| 43b. | Please explain the reasons for your answer to question 43a. |
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## Consultation Question

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| 44a. | Any measure to require the retention money to be held in trust needs to be simple, consistent and transparent. A retention deposit scheme may represent the best way of achieving this. Do you agree? |
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## Consultation Question

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|------|---|
| 44b. | Please explain the reasons for your answer to question 44a. |
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## Consultation Question

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| 45a. | In your opinion, what would be the most appropriate design of a retention deposit scheme? |
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## Consultation Question

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| 45b. | Please explain the reasons for your answer to question 45a. |
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### ii) Features

## Consultation Questions

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| 46<br>a - h. | <p>It is proposed that, if established, a retention deposit scheme should have the following features:</p> <p>Do you agree that the following features should be included?</p> <p>a. The scheme should be set up on a statutory footing.</p> |
|--------------|--|



- b. The market will deliver private provision of any retention deposit scheme(s).
  - c. Businesses holding retentions under construction contracts (as defined by Part 2 of the Housing Grants, Construction and Regeneration Act 1996) will be required to deposit retentions into the scheme.
  - d. The scheme can only hold retention money (plus any related interest).
  - e. The money will be held in trust for the payee.
  - f. Where the contract makes no such provision, the Scheme for Construction Contracts will imply relevant terms requiring retention money to be held in a deposit scheme.
  - g. Scheme operators would be required to report on an annual basis on their performance.
  - h. Any disputes about the operation, amount and timing of the release of retentions payments will be dealt with by existing dispute resolution processes.
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## Consultation Question

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| 46i. | Please explain the reasons for your answers. |
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## Consultation Question

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| 47. | Are there any further features to the retention deposit scheme that you would recommend? |
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iii) Operation

## Consultation Questions

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48  
a - e.

It is proposed that, if established, a retention deposit scheme would operate according to the principals listed below.

Do you agree that the following features should be included?

- a. Organisations withholding retention payments will be required to register with a scheme as an account holder.
- b. The retention holder to register specific contracts and the relevant information (such as start and end dates, payment schedule and retention terms).
- c. The retention holder to notify the scheme of the timing, amount and allocation of retention money which is being deposited.
- d. The retention holder to notify the scheme if any changes are made to the timings and payment due, and why.
- e. The scheme operator to pay the retention on the retention release date.

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## Consultation Question

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48f.

Please explain the reasons for your answers.

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## Consultation Question

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49.

Are there any further features to the operation of the “retention deposit scheme” that you would recommend?

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iv) Costs

## Consultation Question

50. There may be “in-house” costs which companies required to use the scheme will incur. We consider these administrative costs would comprise of the following:
- a. Provision of contract details (such as start and end dates, payment schedule and retention terms) to the retention deposit scheme.
  - b. Notification to the scheme of the timing, amount and allocation of retention money which is being deposited.
  - c. Notification to the scheme operator if any changes are made to the timings and payment due, and why.
- Please give an estimation of how much administration time you think would be reasonable for these processes?
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## Consultation Question

51. Are there any further features to the operation of the “retention deposit scheme” that you would recommend?
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## Consultation Question

52. If you hold retentions, who in your organisation do you envisage would be required to manage your contracts with the retention deposit scheme?
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### Consultation Question

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| 53. | If you have had retentions held from you, what cost per contract would you be willing to incur if it meant that your retention was held in trust in a retention deposit scheme? |
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### Consultation Question

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| 54. | If you currently hold retentions, above what cost per contract for the retention deposit scheme do you think you would no longer choose to hold retentions on your contracts? |
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### Consultation Question

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| 55. | Changes to how retentions can be held would mean that parties to construction contracts would need to familiarise themselves with new guidance. How much time do you think it would be reasonable to expect you to spend reviewing guidance to familiarise yourself with any changes? |
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### Consultation Question

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| 56. | What was the total number of contracts that you issued last year on which you hold retentions? |
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### Consultation Question

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| 57. | Do you have any other comments that might aid the consultation process as a whole? |
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# Summary of consultation questions

## Consultation Questions

1a.	To what extent do existing prompt and fair payment measures, such as the Construction Supply Chain Payment Charter, Project Bank Accounts and the Public Contracts Regulations, help to address the specific challenges with retentions?
1b.	Please explain the reasons for your answer to question 1a.
2a.	Are there any challenges that these do not address?
2b.	Please explain the reasons for your answer to question 2a.
3a.	Do you agree with the findings and conclusions drawn from the Pye Tait research?
3b.	Please explain the reasons for your answer to question 3a.
4.	Do you have any further comments on the Pye Tait research?
5a.	Do you think this estimate is reasonable?  (Estimate for the value of retentions held in the construction sector as a whole, as estimated in the Consultation Stage Impact Assessment. This is estimated to be £3.2 billion to £5.9 billion with a central estimate of £4.5 billion, in 2015 prices.)
5b.	If no, please explain the reasons for your answer to question 5a.
6a.	Do you agree that this is a suitable methodology for estimating the total amount held in retentions across the sector over the course of a year?  (Impact Assessment methodology for estimating the total amount held in retentions across the sector over the course of a year.)
6b.	If no, please explain the reasons for your answer to question 6a. If you think that an alternative methodology is needed, please provide details and supporting evidence.
7a.	Do you agree that, as retentions are a proportion of contract value, sector turnover is a more appropriate basis for estimating the total amount held in retentions over the

	course of a given year than sector output?
7b.	If no, please explain the reasons for your answer to question 7a. If you think that an alternative methodology is needed, please provide details and supporting evidence.
8a.	Do you think that the assumptions made for this methodology look reasonable? (Impact Assessment methodology for estimating the value of retentions.)
8b.	If no, please explain the reasons for your answer to question 8a. If you think that alternative assumptions are needed, please provide details and supporting evidence.
9a.	Do you think that the assumptions made for this sensitivity are reasonable? (Impact Assessment sensitivity analysis assumptions applied to the estimate for the total amount held in retentions across the sector over the course of a year.)
9b.	If no, please explain the reasons for your answer to question 9a. If you think that alternative assumptions are needed, please provide details and supporting evidence.
10a.	Do you think this estimate is reasonable? (Impact Assessment estimate for the total value of retentions not paid across the construction sector over a year due to upstream insolvencies. This is estimated to be £229 million, in 2015 prices.)
10b.	If no, please explain the reasons for your answer to question 10a.
11a.	Do you agree that this is a suitable methodology for estimating the total amount of retention monies not paid over the course of a year due to upstream insolvencies? (Impact Assessment methodology for estimating the total amount of retention money unpaid each year due to upstream insolvencies.)
11b.	If no, please explain the reasons for your answer to question 11a. If you think that an alternative methodology is needed, please provide details and supporting evidence.
12a.	Do you think that the assumptions made for this methodology look reasonable? (Impact Assessment methodology for estimating the value of retentions not paid to contractors due to upstream insolvencies.)

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12b.	If no, please explain the reasons for your answer to question 12a. If you think that alternative assumptions are needed, please provide details and supporting evidence.
13a.	Do you agree that this is a suitable methodology for estimating the total amount that construction clients and contractors holding retentions would need to fund from elsewhere, in order to maintain current levels of expenditure?  (Impact Assessment methodology for estimating finance from elsewhere to maintain current level of expenditure.)
13b.	If not, please explain the reasons for your answer to question 13a. If you think that an alternative methodology is needed, please provide details and supporting evidence.
14a	Do you think that the assumptions made for this methodology look reasonable?  (Impact Assessment assumptions.)
14b.	If no, please explain the reasons for your answer to question 14a. If you think that alternative assumptions are needed, please provide details and supporting evidence.
15a.	Over the last year did you make any use of the retentions monies you held (for example, as part of general expenditure, working capital, or to support investment)?
15b.	If yes, approximately what proportion of the total value of retentions held by you did you make use of last year?
16.	Do you have any further comments on the Consultation Stage Impact Assessment analysis?
17.	What was your annual turnover last year?
18a.	Do you believe that <u>non-payment of retentions due to the company holding the retention becoming insolvent before the retention is paid</u> is a significant issue in the construction sector?
18b	Please explain the reasons for your answer to question 18a, and if possible provide supporting evidence.

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19a.	Excluding the money not paid because the company holding the retention became insolvent. Do you believe that <u>unjustified non-payment</u> of retention monies is a significant issue in the construction sector?		
19b.	Please explain the reasons for your answer to question 19a, and if possible provide supporting evidence.		
20a.	Do you believe that <u>non-payment of retention monies due to payers citing that obligations under another construction contract not being met</u> is a significant issue in the construction sector?		
20b.	Please explain the reasons for your answer to question 20a, and if possible provide supporting evidence.		
21a.	Approximately, what was the total value of retentions due to be released to you over the last year?		
21b.	If retention money was due, approximately what proportion of this was not released?		
22.	Please provide further details on the reasons for this non-payment:		
		The company holding the retention became insolvent	Payer cited that obligations under another construction contract had not been met
	What proportion of the total <u>value</u> of retentions <u>not released</u> to you was because of:  (Note: this row should add to 100%)		
23a.	Of the non-payment unpaid for 'other reasons' in question 22 above, in your view, what proportion was unjustified within the contract terms?		
23b.	Please explain the reasons for your answer to question 23a.		
24a.	Did you challenge the non-payment that occurred due to the payer citing obligations		



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	under another construction contract not being met (outlined in question 22)?		
24b.	Please explain the reasons for your answer to question 24a.		
25a.	Do you believe that <u>unjustified late-payment</u> of retention monies is a significant issue in the construction sector?		
25b.	Please explain the reasons for your answer to question 25a, and if possible provide supporting evidence.		
26a.	Do you believe that <u>late payment of retention monies due to the payer citing obligations under another construction contract not being met</u> is a significant issue in the construction sector?		
26b.	Please explain the reasons for your answer to question 26a, and if possible provide supporting evidence.		
27.	Approximately what proportion of the total value of retentions due to be released to you over the last year was paid late?		
28.	Please provide further details on the reasons for this late-payment:		
		Payer cited that obligations under another construction contract had not been met	Other reasons
	What proportion of the total <u>value</u> of retentions <u>that was paid late</u> was because of:  (Note: this row should add to 100%)		
29a.	Of the late-payment for 'other reasons' in question 28 above, in your view, what proportion was unjustified within the contract terms?		
29b.	Please explain the reasons for your answer to question 29a, and if possible provide supporting evidence.		
30.	For the amount that you believe was 'unjustified' what was the typical length of		

	delay?
31a.	Did you challenge the late payment that occurred due to the payer citing that obligations under another construction contract had not been met (outlined in question 28)?
31b.	Please explain the reasons for your answer to question 31a.
32a.	Are you aware that the 2011 amendments to the “Construction Act” mean it is no longer possible to make payment, including retention payments, conditional on the performance of obligations under another contract?
32b.	Over the past year, approximately what proportion of contracts issued to you were inconsistent with the 2011 amendments that payment cannot be made conditional on performance under another contract?
32c.	Did you raise the inconsistencies with the awarding party?
32d.	If you did raise the inconsistencies with the awarding party, typically what was the outcome?
32e.	If you did raise the inconsistencies with the awarding party, what expense did the requirement to clarify the contract(s) incur?
32f.	Would you have challenged the <u>non-payment</u> (due to performance of obligations under another contract), if you had known that this is what the “Construction Act” means for retention payments?
32g.	Would you have challenged the <u>late-payment</u> (due to performance of obligations under another contract), if you had known that this is what the “Construction Act” means for retention payments?
32h.	What measures would assist in increasing your awareness of such legislative changes?
33a.	Do you believe those withholding retentions due to reasons that are now illegal under the 2011 changes to the “Construction Act” are doing so due to a lack of awareness of the 2011 changes or for other reasons?
33b.	Please explain the reasons for your answer to question 33a

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34a.	When the 2011 amendments were introduced it was suggested that some parties to construction contracts may respond by simply extending the defects liability period so that the retention was held for longer. Do you believe that this has occurred?
34b.	Please explain the reasons for your answer to question 34a.
35a.	It has been suggested that some parties to construction contracts ask contractors to give an overall discount on the contract price, in return for ensuring prompt payment. Have you encountered this practice?
35b.	Have you encountered this practice specifically with regard to retentions payments?
36.	Do you have any further comments on late and non-payment of retentions?
37a.	Pye Tait research provided no evidence that a large proportion construction customers are systematically setting retention rates at high levels. It presents a similar picture on the length of time retentions are intended to be held. It is therefore suggested that a cap on the time that a retention can be held or the retention rate that can be held would have limited impact. Do you agree?
37b.	Please explain the reasons for your answer to question 37a.
38a.	Over the last 5 years, on what proportion of your construction contracts, have alternative mechanisms to retentions or alternative mechanisms for implementing retentions been utilised?
38b.	Which alternative mechanisms were utilised?
38c.	Typically, were these alternative mechanisms used in addition to, rather than as an alternative to retentions?
38d.	Do you think that any of these alternative mechanisms would be applicable for wider use across the sector?
38e.	Please explain the reasons for your answer to question 38d. If applicable, please list those alternative mechanisms that you think would be applicable for wider use across the sector.
39a.	The Pye Tait research concludes that a retention deposit scheme and holding retentions in trust appear to be applicable to the whole of the sector. Do you agree?

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39b.	Please explain the reasons for your answer to question 39a.
40a.	The Pye Tait research concludes that a retention deposit scheme and holding retentions in trust could eliminate some of the critical issues associated with retentions (notably the risk of delayed or non-payment of retention monies) and provide surety against defects. Do you agree?
40b.	Please explain the reasons for your answer to question 40a.
41a.	Do you agree that a range of alternative mechanisms could exist within the industry, to account for variation in projects and supply chain circumstances?
41b.	Please explain the reasons for your answer to question 41a.
42.	Do you have any further comments on the alternative mechanisms to retentions in the construction sector?
43a.	Do you think it is important to place a threshold on the application of any measure requiring retentions to be held in trust or ring-fenced in another way?
43b.	Please explain the reasons for your answer to question 43a.
44a.	Any measure to require the retention money to be held in trust needs to be simple, consistent and transparent. A retention deposit scheme may represent the best way of achieving this. Do you agree?
44b.	Please explain the reasons for your answer to question 44a.
45a.	In your opinion, what would be the most appropriate design of a retention deposit scheme?
45b.	Please explain the reasons for your answer to question 45a.
46 a – h.	<p>It is proposed that, if established, a retention deposit scheme should have the following features:</p> <p>Do you agree that the following features should be included?</p> <ul style="list-style-type: none"><li>a. The scheme should be set up on a statutory footing.</li><li>b. The market will deliver private provision of any retention deposit scheme(s).</li></ul>

- c. Businesses holding retentions under construction contracts (as defined by Part 2 of the Housing Grants, Construction and Regeneration Act 1996) will be required to deposit retentions into the scheme.
- d. The scheme can only hold retention money (plus any related interest).
- e. The money will be held in trust for the payee.
- f. Where the contract makes no such provision, the Scheme for Construction Contracts will imply relevant terms requiring retention money to be held in a deposit scheme.
- g. Scheme operators would be required to report on an annual basis on their performance.
- h. Any disputes about the operation, amount and timing of the release of retentions payments will be dealt with by existing dispute resolution processes.

46i.	Please explain the reasons for your answers.
47.	Are there any further features to the retention deposit scheme that you would recommend?
48 a – e.	<p>It is proposed that, if established, a retention deposit scheme would operate according to the principles listed below.</p> <p>Do you agree that the following features should be included?</p> <ul style="list-style-type: none"> <li>a. Organisations withholding retention payments will be required to register with a scheme as an account holder.</li> <li>b. The retention holder to register specific contracts and the relevant information (such as start and end dates, payment schedule and retention terms).</li> <li>c. The retention holder to notify the scheme of the timing, amount and allocation of retention money which is being deposited.</li> <li>d. The retention holder to notify the scheme if any changes are made to the timings and payment due, and why.</li> <li>e. The scheme operator to pay the retention on the retention release date.</li> </ul>

48f.	Please explain the reasons for your answers.
49.	Are there any further features to <u>the operation</u> of the “retention deposit scheme” that you would recommend?
50.	<p>There may be “in-house” costs which companies required to use the scheme will incur. We consider these administrative costs would comprise of the following:</p> <ul style="list-style-type: none"> <li>a. Provision of contract details (such as start and end dates, payment schedule and retention terms) to the retention deposit scheme.</li> <li>b. Notification to the scheme of the timing, amount and allocation of retention money which is being deposited.</li> <li>c. Notification to the scheme operator if any changes are made to the timings and payment due, and why.</li> </ul> <p>Please give an estimation of how much administration time you think would be reasonable for these processes?</p>
51.	Are there any further features to <u>the operation</u> of the “retention deposit scheme” that you would recommend?
52.	If you hold retentions, who in your organisation do you envisage would be required to manage your contracts with the retention deposit scheme?
53.	If you have had retentions held from you, what cost per contract would you be willing to incur if it meant that your retention was held in trust in a retention deposit scheme?
54.	If you currently hold retentions, above what cost per contract for the retention deposit scheme do you think you would you no longer choose to hold retentions on your contracts?
55.	Changes to how retentions can be held would mean that parties to construction contracts would need to familiarise themselves with new guidance. How much time do you think it would be reasonable to expect you to spend reviewing guidance to familiarise yourself with any changes?
56.	What was the total number of contracts that you issued last year on which you hold retentions?

57. | Do you have any other comments that might aid the consultation process as a whole?
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