

Submission by**Hamilton City Council Staff****CONSTRUCTION CONTRACTS (RETENTION MONEY) AMENDMENT BILL****23 July 2021**

It should be noted that the following submission is from staff at Hamilton City Council and does not necessarily represent the views of the Council itself.

1.0 KEY MESSAGES AND CONCERNS

- 1.1 While the Trust provisions have been introduced to protect against a principal insolvency risk, statutory public sector agencies (including local authorities such as Hamilton City Council) do not represent an insolvency risk for 'payees'. Local government agencies are statutory entities with a statutory rating entitlement and have a significant asset base.
- 1.2 Additionally, they are subject to rigorous statutory financial and audit requirements.
- 1.3 The retentions framework under the Act does not provide meaningful additional protection for 'payees' where the 'payer' is a local authority.
- 1.4 The Trust structure for retentions under the Act has the potential to adversely affect Hamilton City Council's ability to borrow to fund public projects. This is because a legislative or regulatory requirement that requires retention monies to be held on Trust impacts a local authority's ability to borrow to fund projects.
- 1.5 Hamilton Council City could be required to make changes to systems, processes, and administrative staff in order to enable administration of the retentions in compliance with its accounting and record keeping obligations under the Act and its common law and statutory duties as a trustee.
- 1.6 Under the Bill, it will be an offence for persons holding a position of director or their delegates if a 'Payer' does not comply with the provisions of the Act.
- 1.7 **In Hamilton City Council's case, this means elected members and senior managers may be at risk personally for Council's non-compliance. This is clearly not appropriate in a local government context.**
- 1.8 **Compliance with the Act by public sector agencies offers nothing more to the payees and is only an administrative and financial burden for local authorities.**
- 1.9 We also support Auckland Council's submission to the Bill i.e., "*Auckland Council considers that the 'retention money held on trust' provisions in the Act have an overly broad application, treating all 'payers' under commercial construction contracts in the same manner. This approach does not recognise that public sector agencies do not represent the same policy concern around insolvency risk that resulted in the introduction of the 'retention money held on trust' legislation in 2017, nor does it recognise the challenges imposed on such agencies by the significant number of construction contracts they are required to administer concurrently. We therefore request that the Committee support an exemption for local authorities from the requirement to hold retentions on trust.*"

2.0 INTRODUCTION

- 2.1 Hamilton City Council staff welcome the opportunity to make a submission to the Construction Contracts (Retention Money) Amendment Bill.
- 2.2 We note that 'Retention Money' refers to part of a part payment under a construction contract that is held back by a payer (e.g., a contractor to a subcontractor, or developer to contractor) as security to ensure a payee (the subcontractor or contractor) fixes any defects with their work.
- 2.3 This can and historically has caused problems when a Contractor becomes insolvent, and/or if retention money has been co-mingled with the Contractor or Developer's other money and assets, resulting in subcontractors not being paid for their work.
- 2.4 The Construction Contracts (Retention Money) Amendment Bill amends the Construction Contracts Act 2002 to strengthen and clarify the Retention Money provision in the Act.
- 2.5 The Bill clarifies that Retention Money must be:
 - Placed on Trust as soon as possible by a contractor for a subcontractor or other party it is being held for.
 - Held on separately from the contractor's other money or assets.
 - Held in a Trust account in a registered bank in New Zealand or in the form of complying instructions.
- 2.6 The Bill also introduces offences and penalties for non-compliance with the Bill's requirements.
- 2.7 We also support the submission made by Auckland Council to the Bill i.e., Auckland Council:
 - *Considers that the 'retention money held on trust' provisions in the Act have an overly broad application, treating all 'payers' under commercial construction contracts in the same manner. This approach does not recognise that public sector agencies do not represent the same policy concern around insolvency risk that resulted in the introduction of the 'retention money held on trust' legislation in 2017, nor does it recognise the challenges imposed on such agencies by the significant number of construction contracts they are required to administer concurrently.*
 - *We therefore request that the Committee support an exemption for local authorities from the requirement to hold retentions on trust.*
- 2.8 Specific concerns about the Bill by Hamilton City Council staff are outlined in section 3.0.

3.0 OUR KEY MESSAGES AND CONCERNS

- 3.1 The Trust provisions have been introduced to protect against a principal insolvency risk.
- 3.2 Statutory public sector agencies, including local authorities such as Hamilton City Council, do not represent an insolvency risk for 'payees'. Local government agencies are statutory entities with a statutory rating entitlement and have a significant asset base.
- 3.3 Additionally, they are subject to rigorous statutory financial and audit requirements.
- 3.4 The retentions framework under the Act does not provide meaningful additional protection for 'payees' where the 'payer' is a local authority.
- 3.5 The Trust structure for retentions under the Act has the potential to adversely affect Hamilton City Council's ability to borrow to fund public projects.
- 3.6 This is because a legislative or regulatory requirement that requires Retention Monies to be held on Trust impacts a local authority's ability to borrow to fund projects.
- 3.7 Hamilton Council City could be required to make changes to systems, processes, and administrative staff in order to enable administration of the retentions in compliance with its

accounting and record keeping obligations under the Act and its common law and statutory duties as a Trustee.

- 3.8 Under the Bill it will be an offence for persons holding a position of Director or their delegates if a 'Payer' does not comply with the provisions of the Act.
- 3.9 In Hamilton City Council's case, this means elected members and senior managers may be at risk personally for Council's non-compliance. This is clearly not appropriate in a local government context.
- 3.10 In short, compliance with the Act by public sector agencies offers nothing more to the payees and is only an administrative and financial burden for local authorities.

4.0 FURTHER INFORMATION AND HEARINGS

- 4.1 Should Parliament's Transport and Infrastructure Committee require clarification of the above points, or additional information, please contact **Igor Magud** (Head of Procurement and Contracts) on 07 838 6923 or 027 808 7956, email igor.magud@hcc.govt.nz in the first instance.
- 4.2 Hamilton City Council staff **do not wish to speak** in support of this submission at the Transport and Infrastructure Committee hearings.

Yours faithfully



Richard Briggs
CHIEF EXECUTIVE