

Minimum Standards on Retentions Drafting for JCT and NEC Contracts

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Introduction

Build UK and its members support the abolition of retentions in the construction industry by no later than 2025, in accordance with the ambition set out by the Construction Leadership Council (CLC) in 2014. To achieve this, Build UK has developed a [roadmap](#) setting out key milestones for implementation by the industry.

As part of the move towards zero retentions, members have agreed a number of ‘minimum standards’ on retentions. By implementing these minimum standards within their contracts, members can help to reduce the challenges associated with the existing use of cash retentions. However, they should not be viewed as best practice and in those sectors where the minimum standard is already not to accept cash retentions, for example in the piling and lift sectors, this should be maintained.

This guide details the drafting amendments that are required to the JCT Design & Build (D&B) 2016 Contract and Sub-Contract and the NEC4 Engineering and Construction Contract (ECC) and Subcontract (ECS) to give effect to the minimum standards.

In preparing these contract amendments, Build UK has had assistance from Law Firm of the Year (Lawyer Awards 2021) **Pinsent Masons LLP** for their construction industry expertise and experience in working with industry standard forms.

Policy

The following general policy points form the basis of the drafting amendments and the spirit of these also need to be adopted and filtered through project contracting structures:

1. Any arrangements for retention in any sub-contract should be **no more onerous** than those implemented in the main contract. This is to ensure fairness and transparency throughout the supply chain and contractors/sub-contractors should actively ensure that retention arrangements are filtered down.
2. Retention should be deducted from payments made in respect of **permanent works only**. This is because retention is primarily security against defects that become apparent after the permanent works are completed. The risk of defects in temporary/preliminary works such as scaffolding/demolition works is considered low enough not to require any security by way of retention. For contracts which relate to works that are exclusively temporary and/or preliminary in nature (for example scaffolding) no retention should be applied at all.
3. Retention should not be applied at all to contracts at any tier with a **starting value of less than £50,000**. This is because retention should be used as security against meaningful losses; the risk on contracts of such values is not high enough to justify retention.
4. Where retention is withheld, it should be deducted as a **single sum towards the end of the construction period** rather than from interim payments throughout the construction period. This is to improve cash-flow for contractors and sub-contractors whilst still preserving security for clients, as retention is only taken when practically needed. This means that no retention is taken on any amount until works/sections have been completed at which point retention of 1.5% (see point 5) of the contract value is withheld from the final payment in respect of such works/section (subject to the drafting as set out below) until the expiry of the applicable rectification period.
5. Retention **percentages should be reduced to 1.5%** from the current standard position of 3% under the JCT D&B Contract and the current example entry (NEC4 User Guide) of 3%. This is because retention should only be withheld when needed and 1.5% is generally considered to be the average market level as at practical completion, noting that current levels of retention are not sustainable, particularly for lower tier contractors.
6. In accordance with the Construction Act Amendment 2011¹, the release of retention under sub-contracts should clearly **not be linked** to release of retention under the main contract and will have independent triggers for release.

Contract/Sub-Contract Value and Work Type

Threshold Test

The value of the contract and the work type should be treated as a 'first hurdle' in respect of retention.

For all contracts (i) of a starting value less than £50,000 and/or (ii) relating to works that are exclusively temporary and/or preliminary in nature (for example scaffolding), only a total prohibition on use of retention should be enforced.

¹ [Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011/2333.]

a. No Retention

Having applied the above threshold test, in situations where retention is not to be withheld, the drafting provisions below are not applicable. Instead the only action required is to:

- **JCT D&B Contract** – state in the Contract Particulars that the Retention Percentage is "Nil" and (as applicable) to state that the Retention Bond does not apply
- **NEC4** – state in the Contract Data that Option X16 does not apply.

b. Retention

For contracts in which a retention is to be withheld, please use the appropriate drafting provisions below to amend the contract to ensure that the retention is compliant with the minimum standards.

Drafting Provisions – JCT

Amendments to JCT D&B Contract (Main Contract)

1. Insert a new entry to the Contract Particulars as follows:

3.4.2.6	Sub-Contractor Release Date	Retention	[<i>X</i> ² months after the date of practical completion of the sub-contract works/section (as applicable).][the anticipated date for practical completion of the Works/Section (as applicable) hereunder as at the time at which the sub-contract is entered into, plus an amount of time equal to the Rectification Period.] (Delete as applicable)
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2. Contract Particulars 4.18.1 (Retention Percentage):

- Change to "Contract Particulars 4.18.2"
- Insert "1.5"³⁴ into the relevant section of the Contract Particulars.

3. Add definition of "Retention Excluded Works" as follows: "means works that are exclusively temporary and/or preliminary in nature including, for example, scaffolding."

4. Add a definition of "Retention Deduction Date" as follows: "see clause 4.18.2."

5. The bracketed wording in the definition of "Retention Percentage" shall be amended to "(against reference to clause 4.18.2)".

6. Remove the "." from the end of clause 3.4.3 and replace with ";".

7. Insert a new sub-clause 3.4.2.6 as follows:

"that any retention to be withheld under the sub-contract shall be released, on a fair and reasonable basis (subject to all sub-contract works defects having been rectified), upon the date set out in the Contract Particulars."

8. Insert a new sub-clause 3.4.4 as follows:

"where retention is to be withheld under any sub-contract (including sub-contracts of any tier):

- .1 the provisions regarding retention under the sub-contract shall be no more onerous than those relating to retention under this contract;
- .2 retention shall only be withheld under sub-contracts with a starting value greater than £50,000;
- .3 retention shall not be withheld under sub-contracts that relate solely to Retention Excluded Works;"

² [Note – time period to be confirmed at sub-contract level.]

³ [Note – this is a maximum amount, any percentage lower than this is acceptable.]

⁴ [Note – the level flowed down to sub-contractors should be no more onerous than this – if for example only 0.5% is applied under the Main Contract, the sub-contract should not be higher than this level. See note below in sub-contract amendments.]

9. Insert a new clause 3.4.5 as follows:

"the Contractor shall provide to the Employer, on request, a copy of any sub-contract entered into (with commercial details, other than retention provisions and payment terms, redacted)."

10. Sub-clause 4.12.1:

Insert the following after "Retention": "as applicable in accordance with clause 4.18.2".

11. Sub-clause 4.12.3.1:

After "3.6," insert "4.18.2,".

12. Sub-clause 4.13.1:

Insert the following after "Retention": "as applicable in accordance with clause 4.18.2".

13. Sub-clause 4.13.3.2:

After "3.6," insert "4.18.2,".

14. Sub-clause 4.16.2:

Replace "each Interim Payment" with "the Retention Deduction Date".

15. Sub-clause 4.17.3:

Delete "in respect of Interim Payments issued after the date of the failure" and replace with "from the relevant Retention Deduction Date until the Retention Release Date".

16. Sub-clause 4.17.4:

Delete sub-clause 4.17.4 and replace with "Not used".

17. Clause 4.18

Delete clause 4.18 and replace with:

"At the relevant Retention Deduction Date the Retention which may be deducted and retained by the Employer shall be the percentages of the amounts set out in clause 4.18.2.2.1 or 4.18.2.2.2 (as applicable). Upon the issue of the Notice of Completion of Making Good (or last such notice) the Employer shall release the Retention to the Contractor (the 'Retention Release Date')."

18. Insert new clause 4.18.2 as follows:

“.1 The Employer shall be entitled to deduct a sum equivalent to the Contract Sum at the time of Practical Completion (as adjusted or altered in accordance with the express provisions of these Conditions) multiplied by the Retention Percentage (the 'Retention') as a single lump sum, subject to sub-clause 4.18.2.2, from the payment immediately following practical completion of the Works or a Section⁵ (such date of deduction being the 'Retention Deduction Date').

.2 In the event it is anticipated that:

- .1 the payment referenced in sub-clause 4.18.2.1 will be insufficient to cover the Retention at the relevant Retention Deduction Date (including due to pay less deductions pursuant to sub-clause 4.9.5) and/or there will not be any payment made

⁵[This is to allow for deduction of retention by section.]

- in respect of practical completion as set out in Sub-Clause 4.18.2.1, a proportion equivalent to such anticipated shortfall may be deducted from the payment immediately preceding practical completion; and/or
- .2 the retention shortfall payment referenced in sub-clause 4.18.2.2.1 will be insufficient to cover the Retention as at the date of such payment (including due to pay less deductions pursuant to sub-clause 4.9.5) a proportion equivalent to such anticipated shortfall may be deducted from the payment immediately preceding that payment and from sequential prior payments in the same manner, always only to the extent necessary to ensure that as at the relevant Retention Deduction Date the full amount of Retention can be deducted and provided that such deductions have been included in:
 - .1 the relevant Interim Payment Application issued by the Contractor pursuant to and in accordance with sub-clause 4.7.3;
 - .2 the relevant Payment Notice issued by the Employer pursuant to and in accordance with sub-clause 4.7.5; and/or
 - .3 (as applicable) a Pay Less Notice issued by the Employer pursuant to and in accordance with sub-clause 4.9.5 and clause 4.10.
 - .3 In the event that the sums taken under and in accordance with clause 4.18.2 amount to less than the Retention, the Employer shall be entitled to recover the same as a debt due on demand from the Contractor (which shall only be used as the Retention and shall be subject to the provisions of clause 4.18)."

Amendments to Main Contract Template Retention Bond (Schedule 6: Part 3)

1. In paragraph 1, delete "from amounts included in Interim Payments".
2. In paragraph 2, delete the remainder of the paragraph following "(figures and words)".
3. Delete paragraph 4.2 in its entirety. In paragraph 4.3, delete the words: "which shall not exceed the amount stated pursuant to clause 4.2 above"
4. Notes (2):
Delete the last sentence.

Amendments to JCT D&B Sub-Contract

Note: these amendments should be used in all tiers of JCT D&B Sub-Contract i.e. between Contractors and Sub-Contractors and between Sub-Contractors and Sub-subcontractors etc.⁶

1. Add a definition of "Retention Deduction Date" as follows: "see **clause 4.12.**"
2. Add definition of "Retention Excluded Works" as follows: "means works that are exclusively temporary and/or preliminary in nature including, for example, scaffolding."
3. Insert a new item to the Sub-Contract Particulars as follows:

3.4.2.6	Sub-subcontractor Retention Release Date	[⁷ <i>X months after</i> the date of practical completion of the sub-subcontract works/section (as applicable)][the anticipated date for practical completion of the Sub-Contract Works/Section (as applicable) as at the time at which the sub-subcontract is entered into, plus an amount of time equal to the Rectification Period under the Sub-Contract.] (Delete as applicable)
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4. Sub-Contract Particulars (item 11):
 - The Retention percentage is:

Insert "1.5"⁸ into the relevant section of the Sub-Contract Particulars.⁹
 - The Retention Release Date is:

Delete the bracketed wording and replace with "(If no date is specified, the Retention Release Date shall be upon an agreed calendar date of [*X months after*] the date of practical completion of the Sub-Contract Works/Section (as applicable)][the anticipated date for Practical Completion of the Works/Section (as applicable) under the Main Contract as at the time this Sub-Contract is entered into, plus an amount of time equal to the Rectification Period under the Main Contract.]" (Delete as applicable)
5. Remove the "." from the end of clause 3.3.2.3 and replace with ";".
6. Insert a new clause 3.3.2.4 as follows:

"that any retention to be withheld under the sub-subcontract shall be released, on a fair and reasonable basis (subject to all sub-contract works defects having been rectified), upon the date set out in the Contract Particulars."
7. Insert a new sub-clause 3.3.3 as follows:

"where retention is to be withheld under any sub-subcontract (including sub-subcontracts of any tier):
 - .1 the provisions regarding retention under the sub-subcontract shall be no more onerous than those relating to retention under this contract;
 - .2 retention shall only be withheld under sub-subcontracts with a starting value greater than £50,000;

⁶ [This is to ensure that the treatment of retention is equitably filtered down the supply chain.]

⁷ [Note – time period to be confirmed at sub-contract level.]

⁸ [Note – this is a maximum amount, any percentage lower than this is acceptable.]

⁹ [Note – this level should be no more onerous than the Main Contract – if for example only 0.5% is applied under the Main Contract, the sub-contract should not be higher than this level.]

.3 retention shall not be withheld under sub-subcontracts that relate solely to Retention Excluded Works."

8. Insert a new clause 3.3.4 as follows:

"the Sub-Contractor shall provide to the Contractor, on request, a copy of any sub-subcontract entered into (with commercial details, other than retention provisions and payment terms, redacted), which the Contractor shall be entitled to provide to the Employer."

9. Clause 4.12.1:

Delete clause 4.12.1 and replace with:

"4.12.1.1 At the relevant Retention Deduction Date the Retention which may be deducted and retained by the Contractor shall be the percentages of the amounts set out in clause 4.12.1.2 (as applicable). Upon the Retention Release Date the Contractor shall release the Retention to the Sub-Contractor."

4.12.1.2

.1 The Contractor shall be entitled to deduct a sum equivalent to the Sub-Contract Sum at the time of practical completion (as adjusted or altered in accordance with the express provisions of these Conditions) multiplied by the Retention percentage (the 'Retention') as a single lump sum, subject to sub-clause 4.12.1.2.2, from the payment immediately following practical completion of the Sub-Contract Works or a Section¹⁰ (such date of deduction being the 'Retention Deduction Date').

.2 In the event that it is anticipated that:

.1 the payment referenced in sub-clause 4.12.1.2.1 will be insufficient to cover the Retention at the relevant Retention Deduction Date (including due to pay less deductions pursuant to sub-clause 4.7.5) and/or there will not be any payment made in respect of practical completion as set out in Sub-Clause 4.12.1.2.1, a proportion equivalent to such anticipated shortfall may be deducted from the payment immediately preceding practical completion; and/or

.2 the retention shortfall payment referenced in sub-clause 4.12.1.2.2.1 will be insufficient to cover the Retention as at the date of such payment (including due to pay less deductions pursuant to sub-clause 4.7.5) a proportion equivalent to such anticipated shortfall may be deducted from the payment immediately preceding that payment and from sequential prior payments in the same manner,

always only to the extent necessary to ensure that as at the relevant Retention Deduction Date the full amount of Retention can be deducted and provided that such deductions have been included in:

.1 the relevant Payment Application issued by the Sub-Contractor pursuant to and in accordance with clause 4.6;

.2 the relevant Payment Notice issued by the Contractor pursuant to and in accordance with sub-clause 4.7.2; and/or

.3 (as applicable) a Pay Less Notice issued by the Contractor in pursuant to and in accordance with sub-clause 4.7.5.

.3 In the event that the sums taken under and in accordance with clause 4.12.1.2.2 amount to less than the Retention, the Contractor shall be entitled to recover the same as a debt due on demand from the Sub-Contractor (which shall only be used as the Retention and shall be subject to the provisions of clause 4.12)."

10. Sub-Clause 4.12.2.2:

Change the reference to "4.12.1.2" to "4.12.1".

¹⁰[This is to allow for deduction of retention by section.]

11. Clause 4.13.1:

Delete 4.13.1 and replace with "Not used".

12. Clause 4.13.3:

Delete "in respect of interim payments made after the date of the failure" and replace with "from the relevant Retention Deduction Date until the Retention Release Date".

13. Clause 4.13.4:

Delete clause 4.13.4 and replace with "Not used".

Amendments to Sub-Contract Template Retention Bond (Schedule 3: Part 2)

1. In paragraph 1, delete "from amounts included in Interim Payments".
2. In paragraph 2, delete the remainder of the paragraph following "(figures and words)".
3. Notes (2):

Delete the last sentence.

Drafting Provisions – NEC

Amendments to NEC4 ECC (Main Contract)

1. Clause X16.1:

Delete: "After the Price for Work done to Date has reached the *retention free amount* an amount is retained in each amount due. Until the earlier of" and replace with: "An amount is retained as a single lump sum, subject to the remainder of this Clause X16.1, from the payment immediately following the earlier of".

After the second bullet point insert as a new line: "(such date of deduction being the 'retention deduction date').".

Delete: "the" and replace with "The".

Delete "excess of the Price for Work Done to Date above the *retention free amount*" and replace with "Prices".

At the end of X16.1 insert the following new paragraphs:

"In the event it is anticipated that:

- the payment referenced above will be insufficient to cover the amount to be retained at the retention deduction date (including due to pay less deductions if the contract includes Option Y(UK)2) and/or there will not be any payment made at the time referenced above, a proportion equivalent to such anticipated shortfall is deducted from the payment immediately preceding the earlier of (a) Completion of the whole of the *works* and (b) the date on which the *Client* takes over the whole of the *works* and/or
- the above retention shortfall payment will be insufficient to cover the amount to be retained as at the date of such payment (including due to pay less deductions if the contract includes Option Y(UK)2) a proportion equivalent to such anticipated shortfall is deducted from the payment immediately preceding that payment and from sequential prior payments in the same manner

always only to the extent necessary to ensure that as at the retention deduction date the full amount to be retained can be deducted and provided that such deductions have been included in

- the relevant application for payment and/or
- the relevant *Project Manager's* certificate and/or
- if the contract includes Option Y(UK)2, the notice of payment (including any notification of intention to pay less).

In the event that the sums taken under and in accordance with this clause amount to less than the amount to be retained, the *Client* is entitled to recover the same as a debt due on demand from the *Contractor*."

2. Clause X16.2:

Delete the first paragraph in its entirety.

In the first line of the second paragraph delete "remains at this amount until" and replace with "is released on" and in the second line delete "due to be". Delete the second sentence of the second paragraph in its entirety.

3. Insert a new Clause X16.4 as follows:

"X16.4 Amend Clause 26.3 as follows:

- in the second line of the first paragraph, after "any pricing information" insert: "(but including payment terms and retention provisions)",
- delete the first bullet point of the first paragraph,
- delete "." from the end of the second bullet point of the second paragraph and insert "or" and
- insert a third bullet point to the second paragraph as follows: "the retention provisions in the subcontract documents do not comply with this contract."

4. Insert a new Clause X16.5 as follows:

"X16.5 Add a new Clause 26.4 as follows:

"Where retention is to be withheld under any subcontract (including subcontracts of any tier):

- the provisions regarding retention under those are no more onerous than those relating to retention hereunder;
- retention is only withheld under subcontracts with a starting value greater than £50,000;
- retention is not withheld under subcontracts that relate solely to works that are exclusively temporary and/or preliminary in nature, including for example scaffolding."

5. Insert a new clause X16.6 as follows:

"X16.6 Add a new Clause 26.5 as follows:

"The *Contractor* includes in any subcontract entered into by him provisions to the effect that any retention to be withheld under that subcontract is released (subject to issue of the Defects Certificate under the subcontract), upon the *subcontract release date*."

Amendments to Contract Data - Part One (Data Provided by the *Client*)

1. For all contracts for which retention is to be withheld, in section 1 (General) Secondary Options insert "X16".

For all contracts where retention is not to be withheld, including those of an initial value of £50,000 or less and/or relating for works exclusively temporary and/or preliminary in nature, in section 1 (General) do not include X16 as a Secondary Option (i.e. do not adopt any of the amendments in this document).

2. X16: Retention (not used with Option F)

Change the title of X16 to "Retention (Not used with (i) Option F; (ii) contracts with a starting value of £50,000 or less; or (iii) contracts for works exclusively temporary and/or preliminary in nature)".

Delete: "The *retention free* amount is".

For 'The *retention percentage* is' insert: "[1.5%]"¹¹¹²

Add new option as follows:

"The *subcontract release date* is [an agreed calendar date of **[X months after]** the date of Completion of the whole of the *subcontract works*.][the *completion date* for the whole of the *works* under this contract as at the time at which the subcontract is entered into, plus the period between Completion of the whole of the *works* and the *defects date* under this contract](Delete as applicable)

¹¹ [Note – this is a maximum amount, any percentage lower than this is acceptable.]

¹² [Note – the level flowed down to subcontractors should be no more onerous than this – if for example only 0.5% is applied under the main contract, the subcontract should not be higher than this level. See note below in subcontract amendments.]

Amendments to NEC4 ECS (Subcontract)

*Note: these amendments should be used in all tiers of NEC4 Subcontract i.e. between Contractors and Subcontractors and between Subcontractors and Subsubcontractors etc.*¹³

1. Clause X16.1:

Delete: "After the Price for Work done to Date has reached the *retention free amount*, an amount is retained in each amount due. Until the earlier of" and replace with: "An amount is retained as a single lump sum, subject to the remainder of this Clause X16.1, from the payment immediately following the earlier of".

After the second bullet point insert as a new line: "(such date of deduction being the 'retention deduction date')".

Delete: "the" and replace with "The".

Delete "excess of the Price for Work Done to Date above the *retention free amount*" and replace with "Prices".

At the end of X16.1 insert the following new paragraphs:

"In the event it is anticipated that:

- the payment referenced above will be insufficient to cover the amount to be retained at the retention deduction date (including due to pay less deductions if the subcontract includes Option Y(UK)2) and/or there will not be any payment made at the time referenced above, a proportion equivalent to such anticipated shortfall is deducted from the payment immediately preceding the earlier of (a) Completion of the whole of the *subcontract works* and (b) the date on which the *Contractor* takes over the whole of the *subcontract works* and/or
- the above retention shortfall payment will be insufficient to cover the amount to be retained as at the date of such payment (including due to pay less deductions if the subcontract includes Option Y(UK)2) a proportion equivalent to such anticipated shortfall is deducted from the payment immediately preceding that payment and from sequential prior payments in the same manner

always only to the extent necessary to ensure that as at the retention deduction date the full amount to be retained can be deducted and provided that such deductions have been included in

- the relevant application for payment and/or
- the relevant *Contractor's* certificate and/or
- if the subcontract includes Option Y(UK)2, the notice of payment (including any notification of intention to pay less).

In the event that the sums taken under and in accordance with this clause amount to less than the amount to be retained, the *Contractor* is entitled to recover the same as a debt due on demand from the *Subcontractor*."

2. Clause X16.2:

Delete the first paragraph in its entirety.

¹³ [This is to ensure that the treatment of retention is equitably filtered down the supply chain.]

In the first line of the second paragraph delete "remains at this amount until" and replace with "is released on" and in the second line delete "due to be". Delete the second sentence of the second paragraph in its entirety.

3. Insert a new Clause X16.4 as follows:

"X16.4 Amend Clause 26.3 as follows:

- in the second line of the first paragraph, after "any pricing information" insert: "(but including payment terms and retention provisions)",
- delete the first bullet point of the first paragraph,
- delete "." from the end of the second bullet point of the second paragraph and insert "or" and
- insert a third bullet point to the second paragraph as follows: "the retention provisions in the subsubcontract documents do not comply with this subcontract."

4. Insert a new Clause X16.5 as follows:

"X16.5 Add a new Clause 26.4 as follows:

"Where retention is to be withheld under any subsubcontract (including subsubcontracts of any tier):

- the provisions regarding retention under those are no more onerous than those relating to retention hereunder;
- retention is only withheld under subsubcontracts with a starting value greater than £50,000;
- retention is not withheld under subsubcontracts that relate solely to works that are exclusively temporary and/or preliminary in nature, including for example scaffolding."

5. Insert a new clause X16.6 as follows:

"X16.6 Add a new Clause 26.5 as follows:

"The *Subcontractor* includes in any subsubcontract entered into by him provisions to the effect that any retention to be withheld under that subsubcontract is released (subject to issue of the Defects Certificate under the subsubcontract), upon the *subsubcontract release date*."

Amendments to Subcontract Data - Part One (Data Provided by the *Contractor*)

1. For all subcontracts for which retention is to be withheld, in section 1 (General) Secondary Options insert "X16".

For all subcontracts where retention is not to be withheld, including those of an initial value of £50,000 or less and/or relating for works exclusively temporary and/or preliminary in nature, in section 1 (General) do not include X16 as a Secondary Option (i.e. do not adopt any of the amendments in this document).

2. X16: Retention

Change the title of X16 to "Retention (Not used with (i) subcontracts with a starting value of £50,000 or less; or (ii) subcontracts for works exclusively temporary and/or preliminary in nature)".

Delete: "The *retention free* amount is".

For 'The *retention percentage* is' insert: "[1.5%]"¹⁴¹⁵

Add new option as follows:

"The *subsubcontract release date* is [an agreed calendar date of **[X months after]** the date of Completion of the whole of the *subsubcontract works*.][the *completion date* for the whole of the *subcontract works* under this subcontract as at the time at which the subsubcontract is entered into, plus the period between Completion of the whole of the *subcontract works* and the *defects date* under this subcontract](Delete as applicable)

¹⁴[Note – this is a maximum amount, any percentage lower than this is acceptable.]

¹⁵[Note – this level should be no more onerous than the Main Contract – if for example only 0.5% is applied under the Main Contract, the subcontract should not be higher than this level.]