

27 July 2023

Mr Paul Martyn
Director-General
Department of Energy and Public Works
Email: EPWDG@epw.qld.gov.au

Dear Paul

Security held pursuant to building contracts

As you would be aware, it is typically a requirement of building contracts, including Queensland Government building contracts, that the contractor provide security or retention to the principal or higher contractor.

We have received feedback from members that it is becoming increasingly difficult and expensive to obtain security.

The Master Builders Construction Committee recently considered this matter, and we raised the below issues with Graham Atkins, Janelle Mehrten and Ainslie Barron at a meeting on 23 June 2023. This correspondence is to follow-up that discussion.

Background

It is currently common practice for principals to require 5 per cent of the total contract value as non-cash security (often referred to as a guarantee) on commencement of a project. Financial institutions providing guarantees are increasingly requiring the full, or greater portions of the amount of the guarantee to be held in an account to secure the guarantee, which is difficult for building contractors where multiple securities are required to be provided contemporaneously.

In addition, surety products are becoming increasingly difficult to obtain, due to the onerous terms of building contracts in relation to the ability of the principal to access security, and the requirement for unconditional terms of the security.

Options for consideration

We would appreciate the Department considering the following potential solutions to the issues being experienced by industry:

- Queensland Government to request less security on government projects, for example 2.5 per cent rather than the full 5 per cent. With set-off rights and stringent security of payment and minimum financial requirements laws, 2.5 per cent is considered an adequate amount for each project.

- Queensland Government to require non-cash security later in the project. If it were cash retention being withheld, 5 per cent would not be held on commencement but rather progressively until the project is approximately halfway through. For non-cash security it could be appropriate to allow a contractor the ability to provide security in instalments.
- Consideration be given to payment of an early site mobilisation payment on government building projects. The cost of providing security is increasing, and contractors are running projects from a position of negative cashflow. An early payment, for example to be invoiced within 7 days of commencement to cover up front costs and site establishment, would assist with cashflow.
- Queensland Government to consider permitting conditional security, for example to require endorsement by an independent qualified third party (in a similar vein to the requirement for subcontractors' charges) of reasonable basis to draw down a guarantee. While there is no assertion of vexatious actions in drawing down guarantees by the Queensland Government, we believe if Government were to take the lead in permitting conditional guarantees they could become widely used on private sector projects and become an industry norm. Failing that, a process of independent verification could be legislated.
- Consideration be given to legislative amendment to provide parties (including the head contractor) to a construction contract the right to replace non-cash security with cash security, and vice versa.

We would welcome the opportunity to discuss these further.

Yours Sincerely

Paul Bidwell
CEO