



# **BPF RESPONSE TO THE DEPARTMENT FOR BUSINESS AND TRADE CONSULTATION ON LATE PAYMENT**

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**PREPARED AND SUBMITTED BY**

Sam Bensted  
Assistant Director (Planning and  
Development  
E: [sbensted@bpf.org.uk](mailto:sbensted@bpf.org.uk)

## British Property Federation

1. The British Property Federation (BPF) represents the real estate sector – an industry which contributed more than £116bn to the economy in 2020 and supported more than 2.4 million jobs. We promote the interests of those with a stake in the UK built environment, and our membership comprises a broad range of owners, managers and developers of real estate as well as those who support them. Their investments help drive the UK's economic success; provide essential infrastructure and create great places where people can live, work and relax.
2. We welcome the opportunity to respond to the Department for Business and Trade (DBT) consultation on tackling late payment and poor payment practices. Our response has been prepared through engagement with the BPF's Construction Committee, which brings together real estate construction clients to articulate the views of this distinct part of the construction supply chain to relevant government and industry stakeholders.
3. Most of our comments focus on Measure 8 of the consultation, which relates to the use of retention in construction contracts. **The BPF does not support the legislative measures outlined in the DBT's consultation paper to prohibit the use of retention clauses in construction contracts, as we strongly believe there continues to be a need for retention as the only practical and effective mechanism available to construction clients to incentivise the delivery of defect-free buildings.** We also have a number of concerns with the alternative legislative option that any retention sums withheld should be protected, although this would be our preferred approach if the government is minded to legislate.
4. We also provide a number of comments on the broader measures proposed in the consultation relating to payment practices more generally. These comments focus on the potential unintended consequences for good actors in the supply chain and how these could undermine the government's wider objectives on regulation and growth.

### Measure 1 – Audit committees and board-level scrutiny of large company payment practices

5. BPF members are supportive of board-level scrutiny of payment practices. However, the consequence of this measure would be the introduction of new reporting requirements, additional administrative burden, and a further increase in the size of annual reports. This would do little to address genuine bad actors in the system but would certainly hamper productivity across leading UK businesses.

### Measure 2 – Maximum payment terms

6. Members generally do not object to the Government legislating to reduce payment terms to 60 days. However, a number of members have concerns about any reduction to 45 days.
7. Members would be interested to know whether the Government has carried out any international comparisons to assess how this proposal compares with similarly mature market economies in Europe,

the US, and Asia. A potential unintended consequence could be that UK businesses appear less attractive to international competitors who may not be bound by the same terms.

### Measure 3 – A deadline for disputing invoices

8. Many members felt that a 30-day deadline is far too short. These discussions can often take time, so if the Government is minded to legislate, we would suggest a minimum of 60 days. This would encourage disputes to be settled within reasonable timescales while also allowing legitimate cases to proceed properly.

### Measure 4 – Mandatory statutory interest

9. Feedback focused on the unintended consequences of this proposal, as it would likely make UK small businesses appear riskier to engage with. At a time when we are trying to attract more investment into the UK, such changes could make small businesses less appealing to work with.
10. Members would be interested to know what comparative studies the Government has undertaken with European and US counterparts. Members also noted that the statutory interest rate of 8% is extremely high.

### Measure 5 – Additional reporting on statutory interest

11. Members commented that this measure would create an additional administrative burden, with a negative impact on overall productivity.

### Measure 6 – Financial penalties for persistent late payers

12. This measure was broadly supported by members.

### Measure 7 – Additional powers for the Small Business Commissioner, including assurance of payment reporting data

13. Members support the proposal to report once a year. However, a number of members do not support the inclusion of payment practice information in the annual report. It was noted that this would only add to the ever-growing length of annual reports, making them increasingly relevant to a small handful of experts. The Financial Reporting Council is working to reverse this trend, and this proposal arguably undermines that work.

## Measure 8 – Use of retention clauses in construction contracts

14. The BPF does not support the legislative measures outlined in the DBT's consultation paper to prohibit the use of retention clauses in construction contracts. We also have a number of concerns with the alternative legislative option that any retention sums withheld should be protected, although this would be our preferred approach if Government is minded to legislate.
15. Too often, debates about the use of retention in construction contracts have become conflated with broader debates around late payment. There is, on one hand, the issue of genuine late payment, which much of DBT's consultation focused on, and on the other, the separate issue of retention use in construction contracts. Retention can then be divided into two parts: instances where a retention is genuinely late, and the many instances where a retention cannot be deemed late because building defects have not yet been addressed. In cases where the contractor has not remedied the relevant defects on a construction project, the retention payment is not yet due under the contract and therefore cannot be considered late.
16. More broadly, we would observe that many construction industry organisations and relevant government departments have historically advocated for a reform approach whereby the use of retention in construction would be reduced in tandem with greater emphasis from the supply chain on eliminating building defects. However, more recently, it appears that industry bodies and, arguably, government through this latest consultation have moved away from emphasising the importance of addressing defects and are instead pressing ahead with measures to address perceived challenges around retention in construction contracts. The BPF would support an approach that seeks to reduce the use of retentions only alongside stronger emphasis on contractors delivering higher-quality, defect free buildings.
17. The delivery of defect free buildings, however, is not the reality we currently see in sector practice. Indeed, established private sector construction clients, including those who have worked with the same contractors for over 20 years, still frequently receive substandard buildings at practical completion, with numerous defects outstanding. In such cases, the use of retention remains the only effective mechanism at a client's disposal to hold contractors accountable for the quality of their work. It is for this reason that we cannot support an outright ban on retentions.
18. Members also commented on how investors might react to an outright ban on retentions. Currently, investors have retention mechanisms in place with the developer client, and a new retention regime could therefore have wider effects on the overall supply chain. It may also affect investors' appetite to invest in the property sector more broadly, as there could be a perception that the absence of retentions increases investment risk.
19. It is also important to consider the implications for one-off, smaller, or public sector clients. In general, public sector clients tend to be more exposed to poor contractor behaviour in relation to handover of projects with defects. A reduction in the use of retentions, if implemented ineffectively, could therefore have a negative impact on the quality of public sector infrastructure.

20. Similarly, smaller or one-off clients are often more exposed to poor contractor behaviour and the delivery of substandard buildings. Larger real estate clients typically have access to effective legal and consultancy support to manage risk through their supply chains. By contrast, smaller or individual clients are at greater risk of poor contractor performance and therefore rely more heavily on the protection that a retention clause provides. While these clients may not represent a significant proportion of total contract value across the industry, they are large in number and should not be overlooked in policy design.
  
21. Regarding the second option, under which retention sums would be protected, this is noted above as our members' preferred approach over an outright ban on retentions, should the government be minded to legislate in this area. Wider comments on this option focused on the potential cost of a protection scheme - specifically the merits of such an approach in an already challenging construction market and the broader viability challenges facing development.