

Project Bank Accounts (PBA) Fact Sheet

WHAT ARE PROJECT BANK ACCOUNTS AND WHAT THIS MEANS FOR YOU

What are Project Bank Accounts?

PBAs are an alternative payment mechanism that use a dedicated trust account to facilitate payments directly and nearly simultaneously from a Principal through to the Contractor, and participating subcontractors, involved in a project.

What are the benefits?

PBAs have a number of benefits, as they:

- provide a degree of insolvency protection;
- speed up the payment process for the next tier in the supply chain; and
- increase transparency and accountability in the payment process.

Do PBAs create any contractual relationship between the Principal and subcontractors?

It is important to note that PBAs do not seek to alter the existing contractual rights and responsibilities of the parties to a traditional construction contract. Likewise, they will not prevent a Contractor from experiencing financial difficulty or managing the performance of subcontractors by withholding payments when contractual obligations are not met. Importantly, they do not constrain any party from seeking adjudication under the *Construction Contracts Act 2004 (WA)*, or commencing legal proceedings in the event of a dispute.

Will PBAs prevent all subcontractors non-payment issues?

No. There are a number of reasons why subcontractors may not get paid. For example, there may be a dispute between the Contractor and subcontractor, whereby the Contractor has assessed the value of the subcontractor's claim at a lower value than the

subcontractor believes it is entitled to. PBAs will not prevent these kinds of scenarios and merely assist subcontractors to be paid amounts that are 'due and payable' on time.

If PBAs don't prevent all subcontractor payment issues, why is Main Roads implementing them?

While PBAs won't solve all subcontractor payment issues, they will help reduce the instances of late payment or non-payment in some instances. Following the release of the Fiocco Report, on 4 December 2018, the Premier [announced](#) that PBAs will be significantly expanded for WA Government contracts from 1 July 2019.

What is the Fiocco Report?

The Fiocco Report is a report prepared for the Minister for Commerce published in October 2018 titled *Security of Payment Reform in the WA Building and Construction Industry*. The [report](#) includes 44 recommendations relating to improving security of payment for subcontractors in Western Australia's building and construction industry. Recommendation 24 relates to the use of PBAs for Government contracts.

Are any other measures being taken to help protect subcontractors?

The State Government is currently considering a number of recommendations contained in the Fiocco Report that may result in future measures. Most of these recommendations will require legislative changes, so may take some time to implement.

Are PBAs a new initiative?

While PBAs will be new for Main Roads, PBAs have been used by Building Management and Works (BMW), which is a part of the Department of Finance, for a number of years. PBAs have also been utilised in

Queensland, New South Wales and the Northern Territory.

WHEN DO THEY APPLY

When are PBAs used at Main Roads?

From 1 July 2019, PBAs will be used in most construction projects managed by Main Roads that are valued at over \$1.5 million (GST inclusive), including the following forms of contract:

- AS 2124
- Design and Construct
- Alliance
- NEC
- Minor Works, where the award value is greater than \$1.5m
- State-wide Road Construction Panel Contract
- State-wide aggregate sealing panel for 2020-21 program onwards

Note that the contract does not need to be related to capital works for PBAs to apply (i.e. PBAs will also be applicable for contracts relating to road maintenance).

When will PBAs not apply?

PBAs don't apply in the following instances:

- Where the contract award value is less than \$1.5m (GST inclusive)
- ICT and goods and services contracts
- Where the contract was tendered prior to 1 July 2019 and does not include specific clauses relating to PBAs
- Existing Term Contracts (RNCs, MNC, SNC, SWEIC, Structures Panel Contract, GFF Tunnel and IRS) and packages of works delivered through these Term Contracts
- Longitudinal Road Marking Contracts and any other contracts where there are not likely to be any subcontracts with a value greater than \$20,000 and approval to not use a PBA is contained in the Procurement Plan

How does the Personal Property Securities Act impact PBAs?

The *Personal Property Securities Act 2009* (Cth) (PPSA) is a Commonwealth Law that applies to personal property and security interests. It is likely that the enhanced rights, which the PBA provides will mean the PPSA will apply to moneys in the PBA (both the regular progress payments for works undertaken by

subcontractors and to any subcontractor retentions).

By properly registering their interests in moneys in the PBA on the Personal Property Securities Register (PPSR), subcontractors will greatly enhance their security of payment. If subcontractors fail to register their interests on the PPSR, the subcontractors' interests under the PBA trust are likely to be lost in the event of Contractor insolvency. While regular progress payments through a PBA to subcontractors are made almost simultaneously with progress payments to Contractors, retention moneys remain in a PBA for a longer period of time and addressing PPSA impacts on them is therefore advisable.

To ensure their interests in moneys passing through or held in PBAs are protected, Contractors and participating subcontractors are strongly encouraged to seek their own independent legal or specialist advice about:

- the PPSA;
- the advisability of registering on the PPSR for any interest in moneys held or passing through the PBA, and
- steps to take and applicable timeframes.

HOW IT WORKS

Who is responsible for the account?

The Contractor is responsible for establishing the PBA and will be liable for any associated charges.

What money will be held in the account?

For most types of contract, payments from Main Roads will go through the PBA, but only subcontractor retentions will remain in the Retention Sub-Account for an extended period. All other amounts will be dispersed in accordance with the relevant payment instruction. Contractors will not be able to 'bank' money in the account.

The exception to this is the PBA for an Alliance contract, which allows money to remain in the General Sub-Account in order to maintain cash neutrality.

Who is entitled to any interest monies generated by the PBA?

Entitlement to interest generated by the PBA differs between forms of contract. The PBA Agreement establishes which party is entitled to the interest.

Do PBAs limit a Contractor's ability to access retentions?

No. PBAs do not alter existing contractual rights and responsibilities. A Contractor's entitlement to retentions will remain as set out and agreed in its subcontracts.

Can subcontractors view the account?

No. Other than the Contractor, only the Principal (Main Roads) and its agents have viewing rights to the account.

Is a separate PBA required for each contract?

Yes. PBAs are contract-specific accounts established for the sole purpose of directing payments and housing retentions for individual contracts.

Are all subcontractors and suppliers paid through the PBA?

Where the head contract requires a PBA to be utilised, the following payments from the Contractor are made through the PBA:

- All payments to subcontractors where the value of the subcontract is greater than \$20,000 (GST inclusive)
- All payments to a supplier where the supplier has 'opted-in' to the PBA
- All payments to a subcontractor where the value of the sub-contract is less than \$20,000 (GST inclusive) and the subcontractor has 'opted-in' to the PBA

Secondary subcontractors are not paid through the PBA.

What if not all subcontractors are known at the time of contract award?

There is no requirement to know all subcontractors at the time of contract award. Subcontractors with a contract value over \$20,000 (GST inclusive) will be automatically 'joined' to the PBA upon entering into a contract with the Contractor. Subcontractors with a contract value under \$20,000 (GST inclusive) and suppliers can sign up (opt-in) to the PBA at any stage of a contract by executing a simple opt-in notice.

Can subcontractors with contracts valued at greater than \$20,000 (GST inclusive) opt out of the PBA arrangement?

No.

Is a Contractor able to pay a subcontractor faster than the PBA payment cycle if it wishes to do so?

Yes. However, payment must still be directed through the PBA account by using a *Contractor Deposit Instruction*. The Contractor can then recoup the payment through the Contractor's allocation in the ordinary payment cycle.

Can a Contractor cancel a Progress Payment Instruction after it is issued to the Principal (Main Roads) and the Bank?

The Progress Payment Instruction is irrevocable unless a clear error has been made.

Do Contractors need to notify Main Roads and the Bank of any subcontractor retentions being retained?

Not specifically. This information will be evident from the details in the payment instruction that is provided to the Bank and Main Roads each month.

What does a Contractor do if a subcontractor has finished work but has not submitted an invoice at the time a claim is submitted to Main Roads?

The existence of a PBA does not alter a Contractor's obligations to its subcontractors or the Contractor's ability to submit a claim to Main Roads for work completed. As part of the monthly payment process, the Contractor is required to provide Main Roads with the details of any subcontractors that have completed work but failed to submit an invoice. Once the subcontractor has submitted an invoice, the Contractor will deposit the amount owed into the PBA and will instruct the Bank on how that money should be disbursed.

Will the PBA be used to pay liquidated damages?

No. The process for the payment of liquidated damages remains unchanged under a PBA arrangement.

Do PBAs alter the existing dispute resolution process between a Contractor and subcontractors?

No. PBAs are an alternative payment mechanism and do not alter existing contractual rights and

responsibilities or dispute resolution processes.

What are the taxation and accounting implications?

Department of Finance sought the views of Deloitte on taxation and accounting implications, and a [flyer](#) summarising Deloitte's response provides general information only and Contractors should seek the advice of their financial and legal advisers.

ESTABLISHING A PBA

What is required for a PBA?

The following documents, which are provided with the tender and contract documentation at time of tender, are required for a PBA:

- The PBA Trust Deed Poll, which establishes the terms of the trust and describes how the trust will operate; and
- The PBA Agreement, which outlines the duties and obligations of the bank.

In addition, if a Contractor has granted a security interest which would extend to the PBA (as identified under the PPSR), other than a registered security interest in favour of the Bank establishing the PBA, a Deed of Release or Priority Deed Poll is required.

How does a Contractor determine if a Deed of Release or Priority Deed Poll is required?

In determining whether a Deed of Release or Priority Deed Poll is necessary, at a minimum the Contractor will need to undertake a search of the PPSR to determine whether there are any:

- All present and after acquired property (AllPap) security interests; and/or
- All present and after acquired property with exceptions registrations; and/or
- Other registrations such as intangible - general intangible or currency, which are wide enough to cover the PBA.

If there are such registrations against the Contractor on the PPSR, the Contractor will need to either:

- Provide evidence that the registration does not extend to the PBA (which will usually mean that you must provide a copy of the agreement under which the security agreement is granted, so Main Roads can be satisfied that it does not extend to

the PBA); or

if you do not provide that evidence,

- Provide a Deed of Release (by which the PBA is released from the security interest) or Priority Deed Poll (by which the holder of the security interest agrees that the interest of the subcontractors under the PBA has priority).

These steps are necessary to ensure that the PBA provides subcontractors with the required protection.

The Contractor's obligation to provide a deed of release or priority deed poll when required (for example, if new security interests are granted during the term of the contract) is a continuing one for the duration of the contract.

It is strongly recommended that Contractors seek their own independent legal or specialist advice about conducting a PPSR search and addressing PPSA impacts.

Is the General Sub-Account and the Retention Sub-Account part of the PBA and what are they for?

Yes. The General Sub-Account is used to enable Main Roads to transfer monthly payments (for approved claims) directly into the PBA rather than into the Contractor's regular account. Funds are directed from the PBA to the Contractor's regular account and participating subcontractors and suppliers at the same time. The Retention Sub-Account is used for subcontractor retention moneys only.

What financial institutions (banks) offer a product suitable for a PBA?

The Commonwealth Bank of Australia (CBA) has a suitable PBA product to service Main Roads' contracts. Main Roads is also aware that ANZ and Macquarie Bank offer a similar product. Other banks may also offer suitable products and the Contractor may choose which financial institution to establish the PBA with, providing the bank agrees to terms of the PBA Agreement.

Will the Contractor include PBA administration costs in the tender?

- Tenders must include the costs of administering PBAs where the tender price submitted is more than \$1.5 million (GST inclusive).

- If the tendered price is less than \$1.5 million (GST inclusive), there is no need to build in the administration costs.

Contractors must inform subcontractors that the contract will use a PBA.

How is a PBA set up?

- Contract is awarded (Day 0)
- Within **28 calendar days** of award (or for an Alliance contract, within **5 business days** of the Effective Date), the Contractor must deliver to Main Roads:
 - PBA Trust Deed Poll executed by the Contractor;
 - PBA Agreement signed by the Contractor and the Bank; and
 - Any Deed of Release or Priority Deed Poll (if applicable).
- Within **10 business days** of the PBA Trust Deed being signed, a test payment of \$1 is made by Main Roads through the PBA to the Contractor to establish the trust and test the payment process.

When does the Contractor receive the PBA documents?

Information relating to PBAs is contained in the tender and contract documentation. This includes the various PBA documents that the Contractor is required to complete and execute upon award of the contract.