

Protecting the supply chain

'Project Bank Accounts' - the silver bullet to security of payments in the Irish construction industry?

October 2018



1. Background

- 1.1 The collapse of Carillion in January has had knock on effects not only for the construction industry in the UK but also in Ireland and has highlighted the vulnerability of sub-contractors within the sector. In June the Kildare based Sammon Construction Group went into liquidation, leaving many disgruntled sub-contractors behind. As a result there have been calls for the Irish government to encourage the use of Project Bank Accounts ("**PBA**") in construction contracts.
- 1.2 A PBA is a ring-fenced project specific bank account to which the employer under the construction contract makes payments of the contract sum. From the PBA payments are made directly and simultaneously to all parties. PBAs would normally have trust status which secures the funds in it and can only be paid to the beneficiaries named in the account. The account is held in the names of trustees; likely to be the employer and lead contractor (but could also be members of the supply chain). The idea behind PBAs are that they should speed up payment and reduce cash-flow problems as the payment to subcontractors does not have to trickle down through the contractor, rather all parties are paid at the same time from a single account. As a result, the sub-contractors should be insulated from the risk of the main contractor becoming insolvent.

2. PBA trends in England

- 2.1 In England, the use of PBAs has been gaining ground since the early 2000s. One of the first public sector bodies reported to be to experimenting with PBAs was Defence Estates with various other public sector bodies following suit. In 2013 the UK Office of Government Commerce issued a guide "Guide to Best Fair Payment Practices"¹ which recommended the use of PBAs in order to achieve fair payments between contractors

and sub-contractors. PBAs have continued to gain popularity, with the UK government announcing that it had exceeded its target of awarding £34 billion worth of contracts using PBAs by the end of 2014. The current UK government policy is to use PBAs 'unless there are compelling reasons not to do so'.

- 2.2 However, following the Carillion collapse which left an estimated £2 billion of unpaid debts to suppliers, there has been concern that small business and SMEs within the industry which take part in procurement processes are not yet adequately protected from contractor insolvencies. Accordingly, the UK Government has been urged to further extend the use of PBAs to all major contracts. On the 24 July 2018, the UK Public Accounts Committee issued a report in which it recommended that the government support SMEs and small businesses through increased use of PBAs².

3. PBA trends in Northern Ireland

- 3.1 Use of PBAs has also been progressively increasing in Northern Ireland. In 2014, Government Construction Clients under the leadership of the Central Procurement Directorate adopted the use of PBAs for all construction projects with a value above £1 million³. Since this time, the use of PBAs in Northern Ireland has been extended and they are now to be included in all government construction works contracts that have an estimated value of an excess of £2 million and which contain a "significant subcontracting element".
- 3.2 On the 25 May 2018 the Department of Finance in Northern Ireland issued a procurement guidance note on "Construction Works Procurement – Project Bank Accounts" (the "**Guidance Note**"). According to the Guidance Note, most of the work undertaken during the course of publicly funded construction projects

¹ Office of Government Commerce "Guide to Best 'Fair Payment' Practices".

² UK Public Accounts Committee, 'Government must be more assertive in forming market for procurement'.

³ InterTrade Ireland, 'Competitive Analysis of the Construction Materials Sector on the Island of Ireland - an Update' November 2015.

is performed by sub-contractors who become exposed when the main contractor enters administration. To combat this problem and to ensure prompt payment of sub-contractors, the government has introduced a range of measures to its construction contracts including the use of PBAs.

4. PBA trends in the Republic of Ireland

4.1 While England and Northern Ireland have been making progressive developments on the PBA front, there has been little development in the Republic of Ireland. A range of security payment options were considered for inclusion in the Construction Contracts Bill 2013, however PBAs were not included under the final version of the Construction Contracts Bill 2013. Very little mention has been made of PBAs since, even in the wake of the Carillion collapse.

5. PBA trends in Australia

5.1 In Western Australia, PBAs are being introduced in two phases, firstly, for public sector projects between AUS\$1 million and AUS\$10 million which applied from January 2018 and for certain private sector projects from January 2019. The penalties for non-compliance include financial and possible criminal sanctions.

6. Conclusion

6.1 PBA use has been gaining ground in England, Northern Ireland and Australia and is likely to continue to in the wake of the Carillion collapse. Whilst the introduction of the Construction Contracts Act 2013 had the intention of freeing up cash-flow in the construction sector and protecting sub-contractors, in particular, the practical effectiveness of its provisions has come into question in light of recent events. As a result it may be timely for the use of PBAs to be considered further in this jurisdiction as an additional means of ensuring fair payment practices in the construction industry.

For more information, please contact:



Angelyn Rowan

Partner, Construction & Projects

+353 1 6644 270

angelynrowan@eversheds-sutherland.ie



eversheds-sutherland.ie

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