



# Project Bank Accounts

A webinar on behalf of the Construction  
Industry Coronavirus (CICV) Forum

Len Bunton, Professor Rudi Klein and David Rennie

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# Introductions



**Len Bunton**



**Professor Rudi Klein**



**David Rennie**

# The CICV Forum / 1



# The CICV Forum / 2



**60**

trade organisations, government agencies, private firms,  
professional services and training organisations

**23**

full members

**37**

contributing members

**100**

individuals involved

**4**

sub-groups

**35,000**

operatives represented

**8,000**

businesses represented



# What are Project Bank Accounts?

**Professor Rudi Klein**

Barrister and CEO, Specialist Engineering Contractors' Group

# What is a PBA?

- An account with trust status.
- Monies are paid into the PBA by the client in accordance with the contract.
- Monies are paid out of the PBA to the beneficiaries – lead contractor and firms in the supply chain in accordance with the contract.





# Where are PBAs used?

- UK Government Departments/Agencies  
*“unless there are compelling reasons not to do so.”*
- Highways England – largest public sector user in England.
- Mandated in NI (over £2m), Scotland (over £2m) and Wales (over £2m).
- Used in most Australian states (mandated by legislation in Queensland for **ALL** projects over £640k as from 2022).



# The politician's view

*“This is an important milestone in the government’s commitment to improving cashflow for smaller firms. The PBA guidance translates trial programme experience into a simplified common approach with practical resources for implementation in Scottish Government projects. We urge all other organisations involved in commissioning work on Scotland’s infrastructure to use PBAs.”*

**Derek Mackay MSP**  
**Cabinet Secretary for Finance and Construction**

(On publication of Scottish Government’s Official Guidance on the Implementation of Project Bank Accounts in Construction Contracts, 23 September 2016)





# The law

- **Trust law** governs the status of the PBA assets.
- **Contract law** governs the agreement for payments to be made through the PBA, the party(s) who is (are) to be the account holder(s) and procedures regulating payments into the PBA.



# Trust law aspects / 1

- A **trust** is a legal relationship in which an asset is vested by a truster in a party (the trustee) who comes under a fiduciary obligation to (i.e. is trusted to) apply that asset solely for the benefit of another party – the beneficiary.



# Trust law aspects / 2

- **Trust law** requires the divestment of assets by the truster where he is also a trustee.
- The trustee(s) must act in the utmost good faith in achieving the purpose(s) of the trust.
- There must be clarity as to the purpose(s) which the trust asset(s) are to be used.
- The beneficiaries must be clearly identified.
- There must be certainty regarding the assets subject to the trust.



# Trust law aspects / 3

- A PBA has trust status because this is the most effective way to ring-fence assets to protect them from creditors in an insolvency – assets held in trust do not form part of the insolvent estate of the trustee.
- Assets subject to a trust can only be made available to the named beneficiaries.
- Disposal of such assets in any other way is a breach of trust for which trustees are strictly liable to make good any loss.





# Trust law aspects / 4

*“I consider it to be a settled principle of our law that trustees, in distributing the trust-estate, are bound to pay it away to the party in right to receive it.”*

Lord Kinloch in **Lamond’s Trustees v Croom** (1871)





# Trust law aspects / 5

- There must be a clear intention to create a trust over the assets which is evidenced by the drawing up of a trust deed.
- **NB 1:** In Scotland there must be a trust deed (rather than simply an intention expressed in a contract to create a trust). Furthermore it is essential that it (or an additional party agreement) is executed by the beneficiaries – this constitutes the trust in the sense that it acknowledges the assets subject to the trust and their transfer (or intended transfer) to the beneficiaries.
- **NB 2:** The trust is in respect of assets still to come into existence rather than an existing asset.



# Contract law aspects

- The parties will have agreed to a number of matters including:
  - ✓ the use of a PBA as the vehicle through which payments will be made
  - ✓ identification of beneficiaries
  - ✓ requirement(s) for executing the trust deed
  - ✓ when payments will be made into the PBA
  - ✓ the account holder(s)
  - ✓ process for payments to be made into and from the account
  - ✓ shortfalls in the PBA.
- **Scottish Government's PBA Guidance includes contract terms which enable clients to implement PBAs in main contracts and subcontracts. NEC and SBCC also have standard PBA options.**





# PBA operating models

- **Dual authority** (or joint account) model – client and lead contractor are both trustees and PBA account holders.
- **Single authority** (or sole account) model – lead contractor is sole trustee and sole account holder.



# Which is the best model?

- Dual authority/joint account model is the best option.

**NB. The Scottish Government promotes the dual authority/joint account model since this best accords with Scottish trust law.**

- If the lead contractor is both the sole trustee and sole PBA signatory he has full control over the funds; if they are misapplied (i.e. directed to his own use) they could be lost on his insolvency.





# Impact on contractual payment

- PBAs simply provide a safe repository for the cash.
- They are not intended to cut across provisions governing valuation/assessment or rights to withhold sums.
- PBAs are not a paid when paid device.
- The key change from the standard payment process is that the lead contractor must show in his application the amounts due to itself and each beneficiary and that all beneficiary payments are made simultaneously.





# The PBA bank / 1

- PBA could be selected by E or C or jointly – public sector clients already have contracts with certain banks which could provide the PBA (e.g. Scottish Government has a framework banking agreement with RBS and Northern Ireland has a banking contract with Danske).

**Where PBAs are used on projects commissioned by Scottish Government bodies the client (“commissioning body”) must select the bank.**

- Trust deed is not signed by bank but the bank should have notice of it – bank requires confirmation that PBA is the subject of a trust arrangement.



# The PBA bank / 2

- The bank should confirm that the monies will not be used to offset liabilities of account holders against beneficiaries.
- The bank mandate should make clear that the Employer and lead contractor are joint account holders with authority to sign off instructions to make payments to the specified beneficiaries.



# Supply chain firm essentials / 1

- PBA arrangements must be included in bid documentation.
- Also sub-contracts must include the PBA arrangements:
  - ✓ details of the PBA (i.e. name of bank, name of account holder(s), account number)
  - ✓ confirmation of trustees
  - ✓ confirmation of status as beneficiary
  - ✓ arrangements for facilitating payments through PBA.
- They must execute a trust deed (at the time of the award of the main contract) or additional party agreement (if appointed after the main contract has been awarded) as beneficiaries.



# Supply chain firm essentials / 2

- Should be informed of respective amounts paid into PBA and date of paying in but, (as a matter of good practice) before submitting these amounts, the lead contractor should notify beneficiaries beforehand so that any obvious errors can be rectified.
- Payment periods in lead contract and supply chain contracts subject to PBA should be aligned.

**NB1. Having prompt confirmation of the amounts paid into the PBA provides comfort that the PBA machinery is operating and enables challenges over any shortfalls to be able as early as possible.**

**NB2. Use of non-standard S/Cs are inappropriate where PBAs are used (unless the contractual enabling clauses at Annex H in the Scottish Guidance are stepped-down and are aligned with the other non-standard clauses).**





# PBA case study / 1

- Scotland's Rural College.
- First Higher Education Institution in Scotland to use PBAs.





# PBA case study / 2

- SRUC Avian Science Research Centre became the first higher education institution in Scotland to use PBAs.
- Contract Notice and tender documents stated use of PBA with links to SG's PBA Guidance.
- Nine contractors submitted bids.
- One contractor withdrew: PBA made the contract less attractive.
- One contractor inserted caveat into its bid that it was conditional on a PBA not being used – bidder disqualified.
- Contract awarded on 25 January 2018 to Interserve.
- Overall conclusion: use of PBA was a success.



# Lessons learned / 1

## PBA operation:

- Identify '**PBA Champion**' within client organisation to promote awareness and manage process.
- Ensure tender documentation includes information on operation of PBA.
- Ensure that in-house teams internalise experience of PBAs.



# Lessons learned / 2

## The bank account:

- Ensure that PBA documentation (e.g. trust deeds) and bank account arrangements are in place prior to issue of invitation to tender.
- Setting up a PBA facility with a new bank can be time-consuming for public bodies; fortunately Scottish Government has a call-off agreement with RBS (now NatWest Group).





# Lessons learned / 3

## Main contractor:

- Ensure that tender documentation includes all relevant information relating to the PBA including link to Scottish Government guidance.
- Invitation to tender should include all PBA documents requiring signature by main contractor.

**NB: Main contractor should have timescale for completing the documents (such as trust deed and bank-related documentation).**



# Lessons learned / 4

## **Main contractor:**

- Pre-contract meetings should resolve any outstanding issues relating to PBA operation.
- Meet the Buyer events should include a PBA pack or presentation.

**NB: Public bodies are now urged to cite PBA uptake in their annual procurement reports. See section 18 Procurement Reform (Scotland) Act 2014.**





# PBAs: Some problems

- Some Tier 2/3 contractors are not aware of PBAs on their projects.
- Some subcontractors/sub-subcontractors are aware but have been excluded from the PBA.
- Little operational information about PBAs passed on.
- Some Tier 1 contractors have argued that their subcontractors do not wish to be part of the PBA but have prevented verification of this.



# Supply chain documentation / 1

- The following should be inserted in all supply chain documentation:
  - *Project Bank Accounts (PBAs) are Scottish Government policy. They assure that subcontractors get paid promptly for work done and that those payments are ringfenced if the main contractor ceases trading. This is a notice to firms concerning the PBA operating on the following construction project.\**
  - *Subcontractors employed by the main contractor must join the PBA where their subcontract value is at least 1% of the value of the contract awarded to the main contractor. There are very limited potential exemptions and it is generally presumed that subcontractors will join the PBA. The main contractor and main contract award value for this project are as follows:\**
  - *Subcontractors with lower value subcontracts and any firm on this project employed by a subcontractor can ask to join the PBA by contacting the employer in the first instance. Firms who are advised against or denied their opportunity to contact the employer should immediately contact the employer, as follows:\**
  - *Employer name / Email address / Telephone number*

# Supply chain documentation / 1

- The following should be inserted in all supply chain documentation:
  - *A subcontractor or sub-subcontractor on this project must sign the additional party agreement in order to join the PBA. The additional party agreement must be provided by the main contractor to any subcontractor it wishes to employ; and by any subcontractor to any sub-subcontractor it wishes to employ. Where the additional party agreement is not provided please contact the employer.*
  - *No fees or charges in connection with joining the PBA may be levied on this project.*
  - *A subcontractor's or sub-subcontractor's work in progress on site will be valued by the firm which contracted it to work on this project. Payment will be received directly from the PBA a day or two after the employer deposits it. All participating firms, including the main contractor, will receive payment from the PBA at the same time.*

*\*to be completed by the commissioning body before sending to the main contractor*



# PBAs: Future issues

- Broadening their use.
- Cash retentions.
- Abuse:
  - ✓ Banking arrangements.
  - ✓ Definition of “beneficiaries”.
  - ✓ No communication.
- Feedback:
  - ✓ Trade associations.
  - ✓ Scottish Government PBA mailbox:  
[projectbankaccount@gov.scot](mailto:projectbankaccount@gov.scot)





# Any questions?

- There will now follow a question and answer session with your panellist.



# Question 1

- **Q:** Given that there is an aspiration to have all parties to the contract paid on the same day, i.e. Main Contractors, Sub-Contractors and Sub-Sub-Contractors all get paid on same date, please advise how the Payment Provisions of a Standard SBCC Main Contract and Sub-Contract forms of contract would be amended to accommodate this requirement?
- **A:** Amendment is not required since the standard forms do not prevent payments being made earlier; moreover the JCT/SBCC PBA Supplement enables simultaneous payments to all beneficiaries.



# Question 2

- **Q:** If changes are made to allow the same day payment for all parties, can you advise how the Payment Notice process and more importantly the Pay Less Notice would be operated with particular reference to the timing of the issue of a Pay Less Notice to a Sub-Contractor or Sub-Sub-Contractor ? Adjustments may be required following a Pay Less Notice issued to the Main Contractor which may have implications on the payment pending for a Sub-Contractor and if no adjustment made there may be insufficient funds sitting within the Project Bank Account either to pay the Sub-Contractor the previously notified amount, or result in an overpayment to the Sub-Contractor.



# Question 2

- **A:** PBAs require that tiers 1 and 2 (where there are tier 3 beneficiaries) to manage their payment and valuation processes much more efficiently than is generally the case. Any overpayments/underpayments can, of course, be addressed in the following payment cycle. To differentiate the payment periods as between the different tiers to allow time to issue (or not issue) pay less notices will mean that parties will just grab the extra time to hang on to the cash; PBAs mean that we cannot continue with our lackadaisical approach to payment performance.







# Opening and Operating Project Bank Accounts

**David Rennie**

Relationship Director, Public Sector & Higher Education, Scotland

# Context

- Scottish Government policy introduced in 2016
- [www.gov.scot/publications/construction-projects-implementing-project-bank-accounts/](http://www.gov.scot/publications/construction-projects-implementing-project-bank-accounts/)
- [projectbankaccount@gov.scot](mailto:projectbankaccount@gov.scot) for queries
- £2m for building and £5m for civil engineering
- Brief description
- Royal Bank experience across commissioning bodies and main contractors





# Opening a PBA with the Royal Bank

- Procurement documentation
- When to engage with the bank
- Trust Deed
- Completion of paperwork
- Naming convention
- Timescales



# Operating a PBA with the Royal Bank

- Bankline Profile required
  - ✓ Add to existing or create new
  - ✓ Main account
  - ✓ Charges
- Monthly Process
  - ✓ Interim Certificate
  - ✓ Supplier setup
  - ✓ Payment setup
  - ✓ 1st Authorise
  - ✓ 2nd Authorise to release





# Summary and questions

- Agree PBA usage up front
- Get in touch early
- Be clear about roles

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# Any questions?

- There will now follow a second question and answer session with your panellists.



# Question 3

- **Q:** When PBA are to be used, is it essential that all parties to the contract are paid on the same day? Could you operate a PBA with different dates for payment for Main Contractors, Sub Contractors and Sub-Sub Contractors, around each Interim Valuation, provided that these Final Dates for Payment were set in a manner which guaranteed payment within a 30-day period from application?
- **A:** One of the objectives of PBAs was to remove the need for the traditional system of sequential and cascading payments, which mean that many weeks could have elapsed before firms in the supply chain receive their monies. With PBAs everyone(including tier 3 firms) can be paid within 15 to 18 days. Staggering payments undermines this.





# Question 4

- **Q:** How long does cash paid into the PBA by the overall employer have to lie in the account before the money can be released to the various parties involved in the contract?
- **A:** It depends what electronic payment system is used, but generally no longer than five days.





# Question 5

- **Q:** Given that there is an aspiration to have all parties to the contract paid on the same day, ie Main Contractors, Sub-Contractors and Sub-Sub-Contractors all get paid on same date, can the panel advise if or how the Payment Provisions of a Standard SBCC Main Contract and Sub-Contract forms of contract would need to be amended to accommodate this requirement?
- **A:** Simply use the JCT/SBCC PBA Supplement.



# Question 6

- **Q:** If same-day payment for all parties is the default position of a PBA, can you advise how the Payment Notice process and more importantly the Pay Less Notice process would be operated, with particular reference to the timing of the issue of a Pay Less Notice to a Sub-Contractor or Sub-Sub-Contractor?
- **A:** In practice this hasn't posed a problem because those using PBAs have understood that they have to give far greater priority to managing the payment process so that they are in a position to act promptly when issuing any Pay Less Notices; payments can, of course, be adjusted in the next payment cycle.



# Question 7

- **Q:** Adjustments may be required following a Pay Less Notice issued to the Main Contractor which may have implications on the payment pending for a Sub-Contractor. If no adjustment are made, there may be insufficient funds sitting within the Project Bank Account either to pay the Sub-Contractor the previously notified amount, or result in an overpayment to the Sub-Contractor. How would such issues be dealt with?
- **A:** PBAs are not pay-when-paid arrangements; parties still have the right to pursue outstanding monies against each other.



# Question 8

- **Q:** If there are insufficient funds within the PBA to pay all the notified sums to the various parties, who would be liable to make up this shortfall?
- **A:** The arrangements differ according to the contract. NEC – contractor must make up shortfall. JCT/SBCC – shortfall in certified amount deposited in PBA, with pro rata allocation to beneficiaries; Employer certifies less than application – it agrees with contractor how monies allocated to beneficiaries.

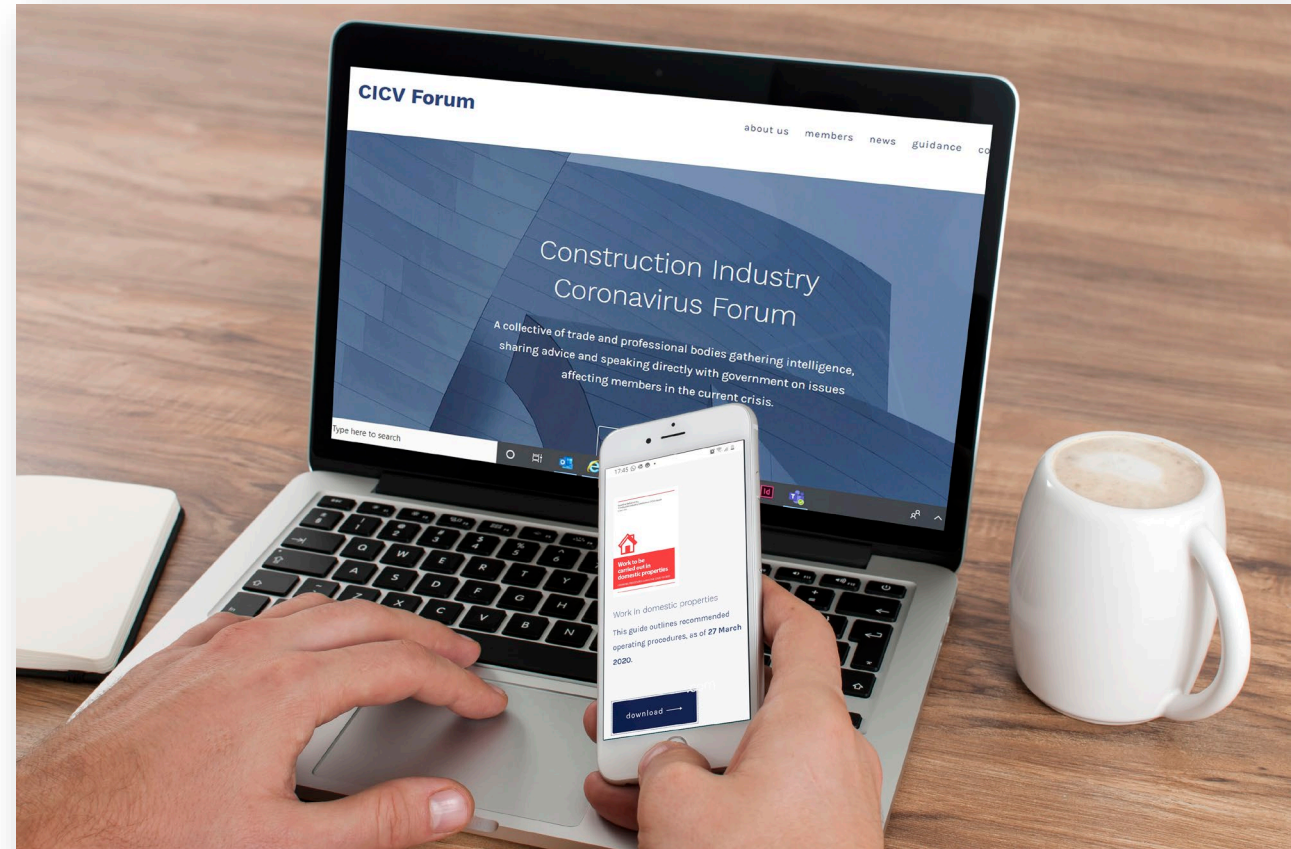




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