

# CONSTRUCTION CONFERENCE

3 July 2019

*How is market practice changing over retentions and project bank accounts following recent high profile insolvencies*

**Professor Rudi Klein, Barrister  
CEO, Specialist Engineering Contractors' Group  
President, NEC Users' Group  
Member of Carillion Task Force (chaired by Secretary of State  
for Business, Energy & Industrial Strategy)**

***“Money is like muck,  
not good except it be  
spread”.***

Francis Bacon, lawyer, courtier and philosopher in  
*Essays* (1625)

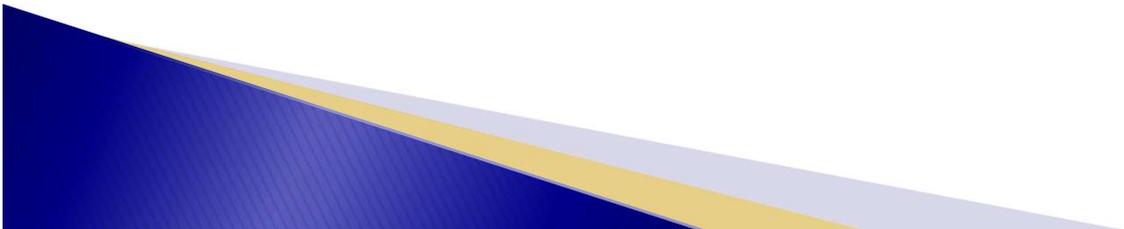
# PAYMENT IN THE CONSTRUCTION INDUSTRY

- ▶ Problem has been re-stated many times over and over many years e.g. *“Major barriers to improving construction performance [for the supply chain] – poor cashflow because of late payments”*.  
(NAO, *Modernising Construction*, 11 January 2001)
- ▶ Approximately 25 initiatives, reports, charters etc. across UK over last 10 years.

***“Payment terms within contracts (for example, retentions) can drive poor behaviours, by putting financial strain into the supply chain. For example, non-payment of invoices and consequent cash flow issues can cause subcontractors to substitute materials purely on price rather than value for money or suitability for purpose.”***

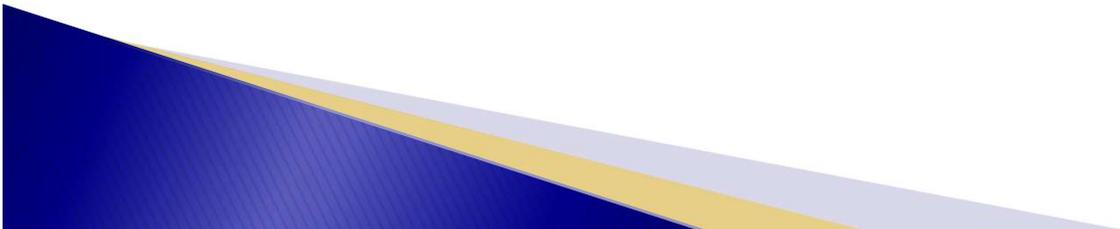
Dame Judith Hackitt’s report, May 2018. Report on Building safety.

# PROJECT BANK ACCOUNTS (PBAs)



***“It’s an exercise in adding value, looking after your supply chain. I advocate the use of PBAs on all projects.”***

Les Quinn, CEO Balfour Beatty, 18 April 2018,  
NatWest website.



# USE OF PBAs

- ▶ Mandated for UK government departments and agencies “***unless compelling reasons***” not to use them.
- ▶ Mandated for Welsh, Scottish and Northern Ireland public sectors for contracts over £2m.
- ▶ Increasing use across Australian states, Western Australia, Northern Territories and Queensland.

- ▶ Queensland's Building Industry Fairness (Security of Payment) Act 2017 mandates PBAs for public sector works over A\$1m (£550k); extended to private sector this year.
- ▶ Public Sector Supply Chains (Project Bank Accounts) Bill 2019 introduced by Debbie Abrahams MP at 1<sup>st</sup> Reading on 15 January 2019.

# WHAT IS A PBA

- ▶ A bank 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.
- ▶ The PBA is simply a safe receptacle for payments becoming due to project participants; it does not determine entitlement.

# BENEFITS OF PBAs

- ▶ Most effective solution for ensuring secure and regular payments to supply chain; monies not cascading through multiple layers of contracting.
- ▶ All project participants (i.e. the beneficiaries) are paid simultaneously.
- ▶ Highways England uses PBAs for all its works; payments are made to all beneficiaries within 18 days.

# TRUST STATUS

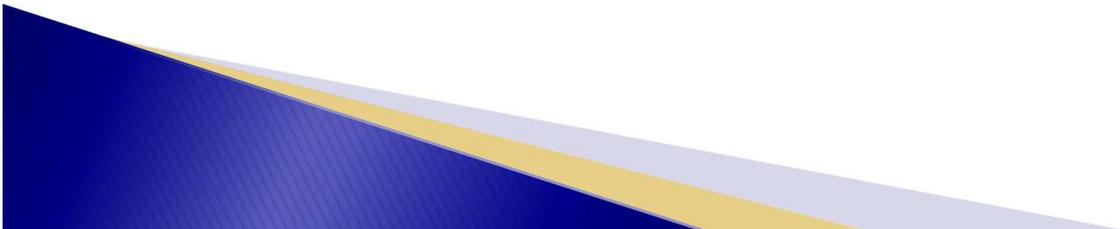
- ▶ Primary characteristic of a PBA is that the monies in the account are protected by having trust status.
- ▶ Trustees are normally client and tier 1 contractor.
- ▶ Bank account may be held by tier 1 contractor (single authority model) or by both client and tier 1 contractor (dual authority model).

- ▶ Beneficiaries may be stipulated by client and/or tier 1 contractor.
- ▶ NEC PBA option [Y(UK)1] has trust deeds/joining deeds but JCT's PBA Supplement simply declares that the PBA monies are trust monies (this is unlikely to suffice under Scots law).

# THE MARKET FOR PBAs

- ▶ The dire finances of the large tier 1 outsourcers have injected a renewed momentum in favour of PBAs.
- ▶ PBA use still mainly in public sector but there is growing private sector interest.
- ▶ Interest in PBAs has also been expressed in other sectors such as IT.
- ▶ Banks are improving their PBA service by developing IT “platforms” so that PBAs can be “downloaded” as and when they are required.

# RETENTIONS: END GAME IN SIGHT?



# NO SHORTAGE OF INITIATIVES ON CASH RETENTIONS

- ▶ Should be abolished, Banwell 1063.
- ▶ Replaced by bonds or kept in trust, Latham 1994.
- ▶ Phased out in public sector as soon as possible, *The Use of Retentions in the Construction Industry*, Trade and Industry Select Committee 2002.
- ▶ Maintain status quo or put monies in separate account or scheme, BEIS Consultation, October 2017.

***“An estimated £7.8bn [worth of cash retentions] has been unpaid across the construction sector over the last three years - £2.6bn per year.”***

Retentions in the Construction Industry, BEIS Research Paper, 17 October 2017.

# EXISTING PROTECTION

- ▶ “The Employer’s interest in the retention is fiduciary as trustee for the contractor” (clause 4.17.1, JCT 2016); contractor can request monies are moved to a separate account except where client is public body.
- ▶ JCT provide bonding option; NEC 4 has also introduced a bonding alternative in the retentions secondary option.

- ▶ JCT trust provisions are often deleted and may not be of much help if monies are not in a segregated account prior to an insolvency (e.g. **MacJordan Construction v Brookmount Erostin Ltd** [1992] S6 BLR 1 CA).
- ▶ A trust may be implied – **Qimonda Malaysia SDN BHD (in liquidation) v Sediabeng SDN BHD** BLR [2012] 2 BLR 65.

# LEGISLATION

- ▶ Non-legislative solutions to protect retention monies will always succumb to contract provisions or amendments to standard forms.
- ▶ Construction (Retention Deposit Schemes) Bill laid by Peter Aldous MP on 9 January 2015 currently in limbo following BREXIT disruption to Parliamentary timetable; supported by over 275 MPs and 80 organisations.

- ▶ Bill is facilitative; it gives power to Secretary of State for the Business Department to make regulations governing the establishment and operation of retention deposit schemes.
- ▶ The Bill amends the Construction Act to declare that contractual provisions enabling deduction of retention monies are of no effect unless they are deposited in a retention deposit scheme approved by the Secretary of State.

***“Too little trust – not enough money. A mighty machine which requires oil in its engine to drive it has grit instead.”***

Trust and Money: Interim Report of the Joint Government/Industry Review of Procurement and Contracting Arrangements in the UK Construction Industry, Sir Michael Latham, December 1993.

# CONSTRUCTION CONFERENCE

18 June 2019

*How is market practice changing over retentions and project bank accounts following recent high profile insolvencies*

**Professor Rudi Klein, Barrister  
CEO, Specialist Engineering Contractors' Group  
President, NEC Users' Group  
Member of Carillion Task Force (chaired by Secretary of State  
for Business, Energy & Industrial Strategy)**