Project Bank Accounts: Protection for all?

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With growing uncertainty in the economic environment both in Australia and globally, regulators of the building and construction industry are focusing on introducing further measures to protect retention monies and generally the flow of money down the supply chain.

One such measure is the introduction of project bank accounts ("**PBA**"). At some stage, most participants in the construction industry will encounter a dispute about a time limit. Judges of the Queensland Courts are giving clear warnings to be wary of time restrictions, whatever their form.

WHAT ARE PBAS?

PBAs are an account where the principal makes payments directly to a head contractor and subcontractors. The PBA is opened for each project and is a trust account whereby any monies held in the account are held for the benefit of beneficiaries of the money (including subcontractors).

The use of PBAs has gained traction within the governments of Western Australia and New South Wales as well as at Federal level. Both the Western Australian and NSW governments are currently trialling PBAs across a number of government construction projects over a 2 year period and the Federal Senate Economic References Committee has recommended the use of PBAs on federally funded projects. If successful, then they may become a mandatory requirement across all construction projects.

The Queensland Department of Housing and Public Works is currently seeking submissions on the introduction of PBAs for all construction projects (not merely government projects).

HOW DOES A PBA OPERATE?

Generally, a PBA will operate as follow:

1. Tender documents will generally specify the requirements for the PBA.
2. The head contractor opens the PBA and is also responsible for its operation, which is governed by a trust deed.
3. Before the principal pays any amount identified in a payment schedule as being payable, the head contractor is to provide an authorisation to the principal setting out:

   (a) any amount due to subcontractors;

   (b) amount due to the head contractor; and

   (c) any subcontract retention amount.
4. Once the authorisation is signed by the principal, the sums identified in the authorisation are paid to the parties, and in the amounts, identified in the document.

PROS AND CONS

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Retentions will also be protected in the event that either the principal or the head contractor becomes insolvent. This will avoid the situation commonly seen whereby subcontractors are losing out on payment of cash retentions when the head contractor goes into liquidation.

RISKS

However, the use of PBAs represents a significant risk for a head contractor from a contract administration and legal perspective. This is because:

1. Principals are highly likely to insist on a provision in their construction contracts to the effect that payment pursuant to an authorisation is effective to discharge the principal from liability to pay any sum in respect of the works the subject of each authorisation.

   This can present issues where any expert determination subsequently (but before practical completion) values works of a subcontractor as more than the contractor has sought to be paid in the authorisation.

2. There is more of an administrative burden placed on head contractors in monitoring payments made to the PBA and advising subcontractors that the principal has paid money to the PBA (which is to be on the same day in the NSW model).

3. It exposes the head contractor to potential breach of trust claims from subcontractors where there is a dispute as to amounts payable to a subcontractor and no authorisation is given for payment to the subcontractor for the amount in dispute.

4. Because funds are held on trust, they do not count as funds of the head contractor which has a negative impact on cash flow.

5. Accordingly, there will be a need, particularly for head contractors, to ensure all contractual terms dealing with the PBA and authorisations under the PBA are appropriately drafted to offset some of these risk.

   Additional attention to the terms of insurance policies will be necessary to ensure they are broad enough to give protection for any breach of trust claims.

CONCLUSION

Whether or not the introduction of a PBA is a positive change is a matter of perspective depending on your position in the construction chain.

Although the focus appears largely on government projects, the outcome of the trials in Western Australian and NSW will determine whether or not PBA schemes become a more permanent fixture for all construction projects.

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