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**CPD**

Procurement Guidance Note

**PGN 03/14**

(as amended)

# **Construction Works Procurement - Project Bank Accounts**

Reissued: 09 June 2016



## PROCUREMENT GUIDANCE NOTES

[Northern Ireland Public Procurement Policy \(NIPPP\)](#) was approved by the Northern Ireland Executive in 2002. In approving the policy, the Executive took the decision that legislation was not necessary to ensure that Departments, their Agencies, Non-Departmental Public Bodies and Public Corporations complied with the policy. Instead, it considered that compliance could be achieved by means of administrative direction.

Procurement Guidance Notes (PGNs) are the administrative means by which Departments are advised of procurement policy and best practice developments. They apply to those bodies subject to NIPPP and also provide useful guidance for other public sector bodies.

PGNs are developed by the Central Procurement Directorate (CPD), in consultation with the Centres of Procurement Expertise (CoPEs), and are subject to the approval of the Procurement Board.

Once endorsed by the Procurement Board, they are issued to the Departments for implementation and copied to CoPEs to develop, if necessary, underpinning procedures supporting the implementation of this guidance in their particular sector. PGNs are also published on the [Department of Finance \(DoF\) website](#).

**The following PGN was endorsed by the Procurement Board with effect from 9 April 2014 for use by those bodies subject to NIPPP.**

### Revision History

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### **Definition of Terminology**

In the preparation of this guide, the term **contractor/supplier** has been used to denote an organisation that contracts directly with a Department, whether it is a supplier, a service provider or a construction contractor.

The term **Department** has been used to refer to those bodies subject to Northern Ireland Public Procurement Policy including Departments, Non-Departmental Public Bodies and Public Corporations. A full list of such bodies is available in Annex A of the [Northern Ireland Public Procurement Policy \(NIPPP\)](#).

## 1 PURPOSE OF THIS GUIDANCE

- 1.1 The purpose of this guidance is to facilitate the implementation of Project Bank Accounts (PBAs) in Government construction projects.
- 1.2 PBAs are to be included in Government construction works contracts that have an estimated construction value in excess of £2 million and which contain a *significant subcontracting element* (that is first tier Subcontractors whose subcontract has a value in excess of 1% of the main contract value).

## 2 BACKGROUND

- 2.1 Poor payment practices within the Northern Ireland construction industry have been a matter of concern to the industry, Government and the wider public for some time.
- 2.2 Poor payment practices place unreasonable burdens on lower tier Subcontractors to provide finance for the work of higher tier Subcontractors and the Main Contractor. Subcontractors are also exposed to risks of default or insolvency of the Main Contractor. Insolvency of a Main Contractor often leads to a domino effect in the supply chain where, upon entering administration, its Subcontractors become exposed to the risk of insolvency.
- 2.3 Most of the work in publicly funded construction projects is undertaken by Subcontractors. Subcontractors also account for the vast majority of the workforce within the construction industry and are vital to its economic health. Consequently, it is important that publicly funded bodies (Contracting Authorities) ensure that Subcontractors employed on their construction projects obtain the benefits of prompt payment.
- 2.4 To ensure prompt payment to Subcontractors, most of which are small or micro businesses, Government has introduced a range of measures in its construction contracts. One of these measures is the use of PBAs.

### **3 WHAT IS A PROJECT BANK ACCOUNT (PBA)?**

A PBA is a ring fenced bank account from which payments are made directly and simultaneously to a Main Contractor and members of its supply chain.

A PBA must have trust status which means that the monies held in the account can only be paid to the beneficiaries (that is, the Main Contractor and supply chain members). The account is held in the names of trustees who are normally the Contracting Authority, the Main Contractor and the Named Suppliers.

#### **3.1 Key benefits of the use of a PBA to a Contracting Authority include:**

- ease of compliance with Fair Payment Charter principles;
- effective mitigation of the risk of payment delay and the costs associated with it;
- reduction in the risk of supply chain failure, by improvement of cash flow;
- transparency of supply chain spend and payment flow; and
- easier measurement of payment timescales across supply chain.

#### **3.2 A PBA:**

- is simple and cost effective to set up and operate for all parties;
- is linked to a Trust Deed, and provides insolvency protection for the supply chain payments held within the PBA;
- provides visibility for supply chain over timing/amounts of payments;
- is easily auditable by Contracting Authorities; and
- supports the principle of collaborative working and allows suppliers to focus on delivery.

### 3.3 A PBA does not:

- involve Contracting Authority prefunding;
- cut across contractual provisions governing the preparation and submission of interim applications or the valuation, authorisation or certification of interim payments;
- take away the Main Contractor's responsibility for managing and selecting the supply chain so that the work is performed in accordance with the contract. The Contracting Authority's role, as a trustee of the PBA, is merely to authorise payment transfers from the account;
- remove statutory obligations for VAT, taxation accounting liabilities, etc from the Main Contractor, Subcontractors or Contracting Authority; or
- add significant cost to the project, as interest can be used to offset banking fees where such fees are charged.

## **4 ON WHAT TYPE OF CONTRACT SHOULD A PBA BE APPLIED?**

- 4.1 PBAs should be included in the contract conditions for Government construction works contracts, where such contracts have an estimated construction value in excess of £2 million and which contain a *significant subcontracting element*.
- 4.2 The decision as to which contracts contain a significant subcontracting element requires the professional judgement of each CoPE. This decision should be based upon the CoPE's knowledge of the sector, the contract and the number and/or value of the subcontracts contained within the contract.
- 4.3 Where a PBA is required in a project all first tier Subcontractors whose subcontract is expected to have a value in excess of 1% of the main contract value should be included in the PBA.
- 4.4 There may be cases where the policy cannot be applied to all Subcontractors who fall within it; for example, where the subcontractor requires more onerous payment terms such as payment in advance. However, it is expected that these cases will be rare.
- 4.5 Application of the PBA policy to some maintenance contracts will not be appropriate as these require individual payments per work order leading to multiple small value payments each month.



## **5 OPERATION OF A PBA**

The operation of a PBA requires three main decisions to be taken. The decisions taken are set out below along with the rationale for each decision:

### **5.1 Who will be the trustees of the PBA?**

The trustees control the money within the PBA and may direct its use as they wish. To protect the funds in the PBA from inappropriate use, there will be a trustee from the Contracting Authority and a trustee from the Main Contractor.

### **5.2 Who will authorise payments?**

To protect the funds in the PBA, payments made from the PBA will require authorisation from both the Contracting Authority's representatives and the Main Contractor's representatives.

### **5.3 Who will set up the PBA?**

Opening a PBA can require additional time if the agreement for a facility has not already been arranged. To avoid delays, the PBA facility provision should be agreed by the Contracting Authority prior to completion of the tender process.

## **6 PBA CONSTRUCTION CONTRACT REQUIREMENTS**

- 6.1 Any contractor considering applying for inclusion on a tender list should be aware of the potential use of a PBA on the project. Wording suitable for inclusion in PQQ documents is attached at Annex B.
- 6.2 PBA contract clauses, for use with the NEC3 ECC form of construction contract, have been developed. These are suitable for use by CoPEs.
- 6.3 A Z clause for use with the post April 2013 version of the NEC3 ECC contract is attached at Annex B. A version for use with the pre April 2013 NEC3 ECC contract version may be obtained from CPD upon request.

## 7 PBA PROCESSES

7.1 To ensure a consistent approach to the application of the PBA policy, Step by Step Process Guides have been developed by CPD.

7.2 Separate processes have been developed for:

- **Central Government Projects:** that is, those undertaken by Contracting Authorities that use the Northern Ireland Civil Service (NICS) Banking Services Contract. These are mainly departments and their NDPBs; and
- **Non Central Government Projects:** that is, those undertaken by organisations that do not have access to the NICS Banking Services Contract. These are mainly public and private bodies in receipt of grant funding.

7.3 The PBA Policy Step by Step Process Guides refer to template documents and forms which have been prepared by CPD to assist Contracting Authorities, Contractors and their supply chain comply efficiently with the PBA processes.

- The PBA process for Central Government Projects, along with the appropriate template forms, is available to download (as **The Suite of Forms for Central Government Projects**) from the [webpage for this PGN](#); and is as set out below:
  - Project Bank Accounts Process – Step by Step Guide (Form CG0)
  - Request to Open a Project Bank Account (Form CG1)
  - Project Bank Account - Trust Deed (Form CG2)
  - Project Bank Account - Bank Mandate (Form CG3)
  - Project Bank Account - Joining Deed (Form CG4)
  - Project Bank Account - Authorisation (Form CG5)

- The PBA process for Non Central Government Projects, along with the appropriate template forms, is available to download (as **The Suite of Forms for Non Central Government Projects**) from the [webpage for this PGN](#); and is as set out below:
  - Project Bank Accounts Process – Step by Step Guide (Form NCG0)
  - Request to Open a Project Bank Account (Form NCG1)
  - Project Bank Account - Trust Deed (Form NCG2)
  - Project Bank Account - Bank Mandate (Form NCG3)
  - Project Bank Account - Joining Deed (Form NCG4)
  - Project Bank Account - Authorisation (Form NCG5)
  - Project Bank Account – PBA Facility Specification (Form NCG6)

## **8 OPENING A PBA FACILITY**

- 8.1 The NICS Banking Services Contract provides those public bodies, which are covered by it, with the right to open bank accounts in accordance with its contract terms. A working arrangement for PBAs agreed with the NICS Banking Services Contract provider includes the provision of bank accounts without bank fees, transaction charges or interest. The working arrangement facilitates the opening of accounts within 5 working days and operation of the accounts through instructions that are signed, scanned and emailed to the bank. It also facilitates confirmation of signed, scanned and emailed instructions by telephone call from the bank, as well as automatic generation of emails or text messages upon lodgement or withdrawal of funds from the account.
- 8.2 To facilitate the prompt opening of PBAs, it has been agreed to provide the holder of the NICS Banking Services Contract with sample signatures of officials from each CoPE. The officials whose sample signatures are provided on the appropriate form can, in turn, confirm that the official requesting the opening of a PBA is authorised to do so by the relevant CoPE. The appropriate form is the PBA Process Form for CoPE use which is attached at Annex C.
- 8.3 Where a Contracting Authority does not have access to the NICS Banking Services Contract, the Contracting Authority will have to arrange its own PBA Facility. To assist in this task, a PBA Facility Specification is included in the template documents for Non Central Government projects.

8.4 The Project Manager (PM) will be responsible for monitoring the PBA. This means that the PM will be required to:

- monitor the PBA to check lodgements and payments occur as authorised;
- identify charges and interest for PBAs not provided through the NICS Banking Services contract;
- ensure that charges and interest are appropriately passed on to the Employer and recorded in the Employer's accounts; and
- close the PBA on completion of the project.

## **9 PBA OPERATIONAL ISSUES**

### **9.1 Implementation within Public Bodies not party to the NICS Banking Services Contract**

The use of a PBA may require Contracting Authorities to procure additional banking services or change their current procedures. The time required to undertake these actions, and any staff training that is required, should be considered at the outset. These should also be taken into account by each CoPE as part of its implementation plan for the introduction of PBAs in its construction contracts.

### **9.2 Financial effects on Main Contractors**

The use of a PBA on a construction contract may have a significant effect on the cash flow of the Main Contractor. It is, therefore, essential that the Main Contractor is aware as to whether a PBA will be used or not on a contract prior to tendering for it.

### **9.3 Potential for dispute**

PBAs remove many of the payment worries for Subcontractors and allow them to concentrate on completing the project successfully. This significantly reduces the likelihood of disputes between the Main Contractor and Subcontractors. To avoid an increase in the likelihood of disputes between the Contracting Authority and Main Contractors, the PM should not become involved in disputes between a Main Contractor and its Subcontractors. The PM must not give rulings on, or get involved in, payment or other disputes between the Main Contractor and its Subcontractors. CoPE training and guidance on PBAs for PMs should warn against this.

The PM should consider whether the sum the Main Contractor is proposing to pay to the Subcontractor (in light of the work completed by the Subcontractor and the subcontract terms and conditions) is, in broad terms, unreasonably low. If, in the PM's opinion it is unreasonably low, then the PM should raise

the issue formally with the Main Contractor and the Subcontractor involved and encourage dialogue between both parties so that an agreement can be reached. If adequate explanation is not forthcoming and, in the PM's opinion, the Main Contractor has unreasonably withheld payment, the PM can instigate the Protocol for Managing Poor Contractor Performance (see Annex E of [PGN 01/12: Contract Management Procedures and Principles](#)).

## **10 FREQUENTLY ASKED QUESTIONS**

Frequently Asked Questions that arise regarding PBAs are attached at Annex A.



## 11 DEFINITIONS

**Main Contractor:** A firm contracting directly with a Contracting Authority to undertake a construction project.

**Subcontractor (also known as Named Supplier):** A firm contracting with a Main Contractor to undertake part of a publicly funded construction project.

**Contracting Authority (also known as Client or Employer):** Organisations including: Northern Ireland Government departments; Non-Departmental Public Bodies; Public Corporations; and private bodies in receipt of grant funding where a condition of the funding is that the organisation complies with Northern Ireland Public Procurement Policy. The term Employer is used in the template documents to match the terminology used in the NEC3 form of contract.

**Central Government Project:** Project undertaken by a Northern Ireland Government Department or a Non-Departmental Public Body that has access to the NICS Banking Services Contract.

**Non Central Government Project:** Project subject to a requirement to use a PBA which is not undertaken by a body that has access to the NICS Bankings Service Contract.

## 12 FURTHER INFORMATION

Any queries on this guide should be addressed to:

Construction Procurement Policy Branch

Central Procurement Directorate

2<sup>nd</sup> Floor East

Clare House

303 Airport Road West

Belfast, BT3 9ED

Phone: 028 9081 6871

Email: [ConstructionProcurementPolicy@finance-ni.gov.uk](mailto:ConstructionProcurementPolicy@finance-ni.gov.uk)

## **ANNEX A: FREQUENTLY ASKED QUESTIONS**

### **1. Why are different arrangements in place for Central Government projects and Non Central Government projects?**

Central Government and some other public bodies have access to and use the NICS Banking Services Contract. This provides them with several advantages including:

- provision of bank accounts that have no fees;
- enabling operation of bank accounts without the use of 'online banking systems' that cannot be operated from within the Government secure computer network;
- enabling authorisation of payment instructions through email of scanned signed documents, requiring only telephone confirmation of such authorisations; and
- enabling prompt opening of bank accounts with limited identity requirements.

The NICS Banking Services Contract is not available to non NICS bodies. Therefore, grant aided bodies or other public bodies that cannot access the NICS Banking Services Contract are required to arrange their own bank account provider. PBAs procured by non Central Government bodies must conform to the PBA Bank Account Specification to ensure consistency as well as effective and efficient operation.

### **2. Why are only first tier subcontracts covered by PBAs?**

The Main Contractor has a direct contractual relationship with its first tier subcontractor(s) and, consequently, the Main Contractor can influence the first tier contract requirements. Second and subsequent tier subcontracts are not directly influenced by the Main Contractor and, consequently, are more difficult for the Main Contractor to control. Despite the potentially

large value of some second tier subcontracts, it is not considered feasible, at present, to extend the mandatory use of PBAs to them. However, the Main Contractor and first tier Subcontractors may agree to the voluntary use of PBAs for subsequent tiers of Subcontractors if they wish.

**3. Why are only subcontracts with a value over 1% of the main contract value covered by PBAs?**

A large construction contract may have hundreds of first tier Subcontractors. These range from subcontracts which are a large percentage of the main contract value and last for a large percentage of the project duration to small value contracts of very limited duration. To require all first tier subcontracts to be included in a PBA would substantially increase the administrative burden on the Main Contractor and Subcontractor with limited benefit.

**4. Why were all first tier subcontracts with a value exceeding 1% of the main contract value not included in the initial construction contracts which used PBAs?**

The introduction of PBAs can have a significant effect on the cash flow of main contractors. To allow main contractors to adjust to the effect on their cash flow, the first contracts that include PBAs restricted the use of the PBA to the mechanical and electrical subcontractors. It is intended that future contracts will require that all subcontracts with a value in excess of 1% of the main contract value will be included in the PBA.

**5. Who determines the division of payments within the PBA process?**

It is the Main Contractor's role to advise the PM what payments (paid through the PBA) are due to each Subcontractor. The role of the PM, representing the Contracting Authority, is to check that the Main Contractor is complying with the prompt payment conditions within the main contract. Where the PM has reason to believe that the Main

Contractor has not met its contractual requirements, such as prompt payment of its Subcontractors, the PM may apply the poor performance protocol within the contract. The poor performance protocol provisions within Government contracts are applied separately to the PBA provisions and can be triggered by failure to comply with the contract requirements.

**6. Does each project require a separate PBA?**

Yes.

**7. Can the Main Contractor cancel payments after they have been authorised?**

Yes. The PBA Bank will contact the Main Contractor by telephone immediately prior to transferring the money out of the PBA to confirm the payment authorisation received from the PM. If the Main Contractor refuses to confirm the validity of the payment authorisation, the PBA Bank may block all payments on that authorisation. In such instances the PM will be notified and a new payment authorisation will be required from the PM to release any payments held in the PBA.

**8. In the event of the insolvency of a Main Contractor can monies be removed from the PBA?**

In the event of the insolvency of a Main Contractor, the Main Contractor cannot remove any monies from the PBA except those authorised to be paid to it by the PM. An administrator, receiver or liquidator of a Main Contractor may be able to delay payment of monies within the PBA to Subcontractors but will not be able to remove such monies.

**9. Are non UK contractors covered by PBAs?**

Yes. The location of the Main Contractor or Subcontractors is incidental to the operation of the PBA as the PBA must be provided in Northern Ireland.

**10. Can payments from the PBA be made in Euros?**

All payments will be made in the currency of the NEC contract (that is, pounds sterling). However, there is nothing to prevent a Main Contractor paying a subcontractor an amount of money in sterling that is financially equivalent to the sum in Euros at a particular date (for example, the assessment date).

**11. Will the CoPEs continue to monitor payment of Subcontractors?**

Yes. The introduction of PBAs does not remove the requirement on Main Contractors to report all payments to first tier subcontracts with a value that exceed 1% of the main contract value and for CoPEs to monitor such payments. Obviously this will be easier to monitor where a PBA is used.

**12. What happens where there are insufficient monies within the PBA to discharge all of the payments due to the Subcontractors?**

The Main Contractor is responsible for payment of its Subcontractors and is obliged to discharge payment to the Subcontractor even if it has not received payment, or sufficient payment, from the Contracting Authority. Where there is insufficient money within the PBA to pay a subcontractor, the Main Contractor will have to make such payment directly to the Subcontractor outside of the PBA.

**13. How are balances within the PBA accounted for at financial year end?**

The money within the PBA is the Main Contractor's money, held in trust for payment to its Subcontractors. Any balances within the PBA, at the financial year end, are therefore, considered in the same way as balances within the Main Contractor's normal bank accounts.

**14. Not all Subcontractors hold HM Revenue & Customs, Construction Industry Scheme (CIS) Gross Status. How will this affect payments through a PBA?**

It is the Main Contractor's duty to establish the correct payment to each subcontractor, taking account of its CIS status and VAT position. This remains unchanged when payments are made through a PBA. It is, however, noted that the Main Contractor will have to provide assessments for both CIS and VAT as this information will be needed to inform payments to each subcontractor. It is recognised that at present these issues are generally only considered after the Main Contractor has received payment, but there is no reason why they cannot be considered earlier.

**15. Will the Contracting Authority be able to determine the Main Contractor's profit margin?**

No. As all payments are not made through the PBA (that is, subcontracts with a value below 1% of the main contract value), it will not be possible for the Contracting Authority to determine the Main Contractor's profit margin.

## **ANNEX B: STANDARD WORDING FOR PQQS AND CONTRACT DOCUMENTS**

### **STANDARD WORDING FOR PQQS**

#### **- Project Bank Accounts**

*'The Contractor should note that the Contract Conditions may include a requirement to utilise a Project Bank Account (PBA). The Contractor may be required to execute a trust deed for the operation of the PBA.*

*The PBA will be provided by the Employer and is to be used to make payments by the Employer to the Contractor and to the first tier Subcontractors.*

*The Contractor will be required to make payments to all subcontractors named in the PQQ and any other subcontractors specified in the contract documents, through the PBA.*

*Further details of the PBA operation will be included in the invitation to tender documents.'*

### **CONTRACTUAL REQUIREMENTS FOR PBAs**

#### **- Z Clause for inclusion in NEC3 contracts (post April 2013)**

(Note: Replace ? with next sequential Z clause number.)

Z? Option Y (UK) 1

Z?.1 DELETE the words "and the Contractor" in clause Y1.1 (3), line 2.

Z?.2 DELETE the word "Contractor" and INSERT word "Employer" in clause Y1.2, line 1.

Z?.3 DELETE the word "Contractor" and INSERT word "Employer" in clause Y1.3, line 1.

Z?.4 OMIT clause Y1.4

Z?.5 OMIT the last word "and" of the first bullet point and all of the second bullet point of Y1.8



## ANNEX C: PBA PROCESS FORM FOR COPE USE

### CoPEs Signatories (Form CG6)

#### NICS Centre of Procurement Expertise Authorised Signatories

The Centre of Procurement Expertise (CoPE) official at Section 1, who is a member of the Senior Civil Service (Grade 5 or above), is authorised to nominate the CoPE officials identified at Section 2

The CoPE officials identified at Section 2 are in turn authorised to confirm that a representative nominated by the Employer is authorised to sign a 'request to open a PBA'.

#### Section 1

Name of CoPE: \_\_\_\_\_

I confirm that the following officials are authorised to sign a 'Request to open a Project Bank Account' to confirm that the person signing on behalf of the Employer is authorised to do so.

Name: \_\_\_\_\_ Position: \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

#### Section 2

[The signatures must be in black pen and be kept within the box.]

Name of first signatory

\_\_\_\_\_

Name of second signatory

\_\_\_\_\_

Name of third signatory

\_\_\_\_\_

Name of fourth signatory

\_\_\_\_\_

Name of fifth signatory

\_\_\_\_\_

Name of sixth signatory

\_\_\_\_\_