

Guide to Best 'Fair Payment' Practices

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Introduction

1. Poor payment practices in the construction industry give rise to substantial additional financing and transaction costs. More importantly certainty over how much and when payment is made builds trust between supply team members and underpins collaborative working to achieve value for money projects for clients.
2. This document recommends best “fair payment” principles and practices for adoption in the public sector. These have been endorsed by the Public Sector Construction Clients’ Forum (PSCCF).

Definition of “Fair Payment”

3. Payment is remuneration for work or services properly carried out. “Fair payment” is concerned with whether the contractual terms relating to the discharge of the payment obligation and the payment process are fair and adhered to. The process and payment periods should minimise transaction costs and financing charges across projects.

The case for change

4. Fair payment issues arise from commercial pressures, “custom and practice”, lack of industry sophistication and maturity, as well as deliberate manipulation. Although the problem is often characterised as being one between the lead contractor and sub-contractors, issues can and do occur throughout the supply chain from clients paying late, to material suppliers invoicing inefficiently.
5. Extended payment periods and delayed payment do not just incur short-term finance costs. Poor payers may experience higher tenders, with surcharges being imposed by both lead contractors and their supply chains that place a very high value on ‘payment certainty’.
6. The aim of the recommended improvements is to provide greater certainty on payment to everyone in the supply chain and to optimise payment periods to minimise financing charges. As part of a consultancy study for the working group, typical existing payment regimes were mapped against a best practice process. Based on analysis (see Annex A) corroborated by interviews with contractors and the supply chain, public sector clients could expect to save up to 2.5% on construction costs from the introduction of better payment processes. These savings could rise over time if the supply chain were able to reduce overheads relating to debt chasing and administration. The additional knock-on benefits of greater productivity and a reduction in construction disputes are difficult to quantify but they are likely to be substantial.
7. It is estimated that widespread adoption of the principles and fair payment practices set out in this guide would save the public sector some £200M rising to over £750M as the processes become embedded and the confidence in the system increases.

Principles and characteristics of an exemplary “Fair Payment” process

8. The PSCCF recommend that all public sector clients and their principal contractors (or supply chain members) should formally adopt principles similar to those below as the basis for reviewing their procurement strategy and procedures with regard to payment practices:
 - a) Companies have the right to receive correct full payment as and when due. Deliberate late payment or unjustifiable withholding of payment is ethically unacceptable.
 - b) “Fair payment” should apply equally between the client and lead contractor and throughout the supply chain.
 - c) The process should be transparent; for example companies in the supply chain should have access to information on the certification procedures, payment procedures and payment times, issued on the clients’ behalf, relevant to their work packages, in order that they have certainty of how much and when they will be paid.
 - d) The correct payment should represent the work properly carried out, or products supplied, in accordance with the contract. Any withholding of payment due to defects or non-delivery should be proportionate and justified.
 - e) Contractual payment times should be designed to optimise finance charges across the whole supply chain recognising the lower financing charges on Government borrowing compared to the high short-term marginal rates available to small businesses.
 - f) The process needs to be practicable and efficient for all participants, reducing unnecessary transaction costs and without the need for additional regulatory and auditing activities.
 - g) A range of tools and models is applicable depending on the nature of the client’s work (e.g. occasional clients vs. multi-project programmes), the project size and the different levels of sophistication of companies in the construction sector.
 - h) The process should seek to provide protection to the client and all supply chain members in event of a company becoming insolvent.
 - i) The process should be seen as part of a wider agenda to achieve better collaborative working, thereby decreasing disputes and providing a good value for money project outcome.

Putting these principles into practice

9. Dealing with payment issues is part of the wider agenda by the PSCCF to improve cooperation and communication in the construction industry. Early engagement of extended supply chains allows projects to benefit from the specialist knowledge and skills of the whole supply chain. Integrated team working is essential to this process and needs to be supported by fair and transparent payment processes and appropriate supporting mechanisms or tools.

“Fair Payment” Charter

10. To underpin the change, it is recommended that there should be a “Fair Payment” Charter, based on the model set out below, which would be agreed and signed by the client and the main supply chain members working on a project or a framework of projects.

Model “Fair Payment” Charter¹

Fair and transparent payment practices are an essential underpinning to achieving successful integrated working on construction projects. In working with each other in good faith and in a spirit of mutual trust and respect, we agree that by 1st January 2008² we will meet the “Fair Payment” commitments set out below:

- Companies have the right to receive correct full payment as and when due. Deliberate late payment or unjustifiable withholding of payment is ethically not acceptable.
- “Fair payment” will apply equally between the client and lead contractor and throughout the supply chain³.
- The process will be transparent in order that members of the supply chain have certainty of how much and when they will be paid.
- Companies will consider, where appropriate, operating relevant contracts on an open book basis.
- The correct payment will represent the work properly carried out, or products supplied, in accordance with the contract. Any client arrangements for retention will be replicated on the same contract terms throughout the supply chain. Any withholding of payment due to defects or non-delivery will be proportionate and demonstrably justified in line with arrangements made at the time of contract.
- To ensure effective and equitable cashflow for all those involved, all contracts will provide for regular payments and have payment periods not exceeding 30 days.
- In order to avoid payment delays, the client and all supply chain members will agree payment procedures at the outset of their contracts. Payment will be through electronic BACS transfer and will apply throughout the supply chain.
- Monitoring and auditing and problem resolution procedures will be agreed between the parties.

We the undersigned agree that this Charter is not intended to be a legally binding document and not used in construing any contractual commitment.

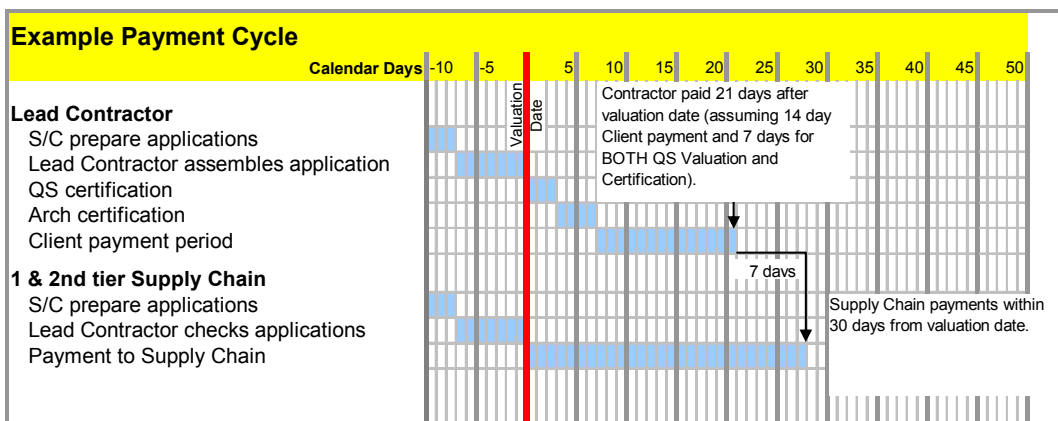
1 The Charter sets out the values and arrangements relating to payment practices consistent with integrated working. The Model Charter is flexible to allow for adaptation and can either be a standalone document or part of a wider partnership charter. In either case it is not intended to be legally binding.

2 An introduction period is to allow time for clients and contractors to modify their business systems and procedures.

3 The client would sign The Charter at the outset. Contractors and suppliers subsequently engaged would be expected to sign the Charter before appointment.

Best practice fair payment process

11. Achieving fair and efficient payment to all parties requires a significant time commitment at the outset of contracts to agree and harmonise payment procedures and cycle in order to achieve the commitments in the Charter such as the maximum 30-day payment period. The chart below illustrates an example payment cycle for client, lead contractor and the 1st and 2nd tier supply chain.



12. Use of BACS transfer is widespread in the sector and it is recommended that it should be the normal form of payment throughout the supply chain (see Model “Fair Payment” Charter).
13. Public sector clients may wish to consider more frequent interim measures, shorter guaranteed payment periods and advanced certification⁴ or equivalent in cases when contractors and suppliers are able to offer substantial discounts (clients have reported discounts of up to 10% in some cases).

Contractor relationships and selection

14. Evidence of good and current performance on “fair payment” should be a key pre-qualifying criterion for selection of lead contractors and through the “Fair Payment” Charter or contractual arrangements to further tiers of the supply chain.
15. The benefits of early involvement of specialist contractors and suppliers in the design and planning stage, where appropriate paying for their time on a fee basis, are now generally recognised through such approaches as two-stage contracting and multi-contract supply arrangements. During the planning stage, opportunities arise to reduce inefficiencies in the payment processes and gain benefit from greater cash flow certainty. For example, clients may wish to consider paying (but not necessarily employing) major sub-contractors and suppliers directly upon authorisation from the lead contractor that the work has been properly carried out.

⁴ See case study in Annex B on the Highways Agency M42 ATM project

Simplification of interim measurement

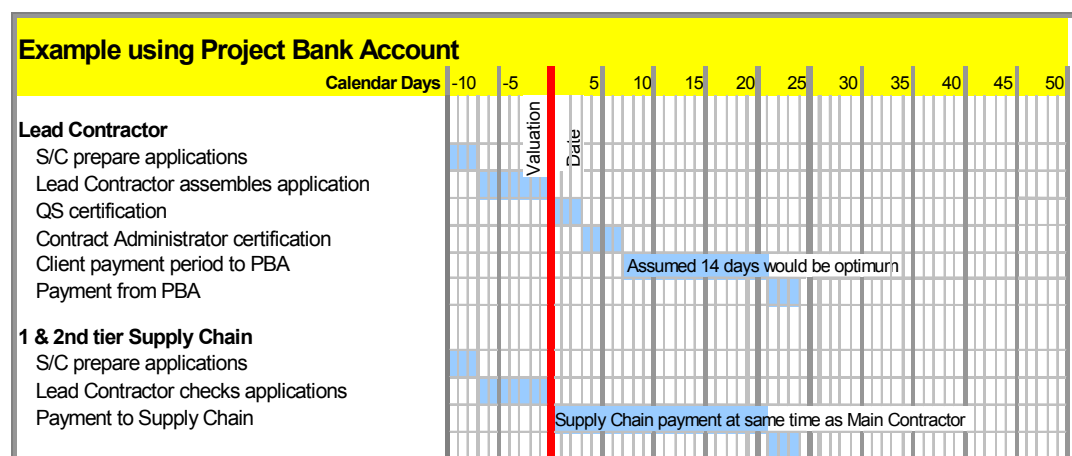
16. Payment delays and additional costs arise through traditional measurement and certification systems. It is recommended that there should be greater use of well-defined milestone payments and payment schedules to simplify the process. This would lead to greater certainty of payment, lower financing charges and reduced transaction costs. Variations would be dealt with separately.

Retentions

17. Unfair withholding of retentions has an adverse impact on cashflow and is detrimental to relationships on site. Public sector clients are recommended to monitor the implementation of the proposed Charter commitments on fair contract terms and fair withholding of payment. Collaborative working and industry commitment to and delivery of improved quality should obviate the need for retentions over time.

Project Bank Accounts

18. There is very good alignment between the mechanism of Project Bank Accounts⁵ (PBA) and the principles of fair payment, and it is recommended that public sector clients should progressively specify use of Project Bank accounts where practicable and cost effective. Where they are used, clients should give a written commitment to a payment period linked to a PBA. Their use generates the confidence in both the supply chain and the lead contractor, reducing their risks and prices by providing real surety of cash flow for all parties. A good practice process as shown in the example below would reduce the payment cycle by at least 18 days compared to current arrangements:



⁵ Project Bank Accounts are commended in the NAO Report "Improving Public Services through better construction" and are included in the 2012 Construction Commitments.

19. A guide for their use is attached (see Annex C). Initially it is expected that clients will specify their use on larger open book projects but as confidence in their operation builds this can be extended more widely and to other forms of projects. To support their introduction, an illustrative trust deed has been included in Appendix A based on discussions with major banks.
20. On PBAs, interim payments are agreed in the normal way including an analysis of the payments to each member of the project supply chain (down to a pre-agreed level), which is then forwarded to the bankers operating the PBA. The client deposits money directly into the PBA, which then distributes it, by BACS, to the contractor and supply chain in accordance with the breakdown analysis.
21. PBAs have a number of benefits including transparent management of cash flow, a reduction of financing charges across the supply chain, less opportunity for payment abuse and reduced impact of insolvency of a supply chain member. The time upfront in setting up the PBA reinforces integrated working.

Performance Monitoring

22. Clients should monitor their own and the supply chain's compliance with the Fair Payment Charter (FPC). Compliance with the Charter should be a significant factor in the future selection of project teams and incentives or rewards under framework agreements e.g. increased workload. For larger projects compliance with the FPC should be checked as part of the OGC Gateway Review process⁶ (Gateway 5).
23. Any national measurement of performance on payment practices needs to balance the costs/benefits of such a system against the reliability of the data. OGC intend collecting data on payment performance through an annual survey of Central Government clients and the supply chain (through the main construction umbrella bodies). Three questions are proposed:
 - What % (by value) of Central Government construction projects⁷ do not have a signed "Fair Payment" Charter in place?
 - What % (by value) of Central Government contract interim payments are not paid/received within 30 days?
 - What is the value of projects⁷ (£M) for which a Project Bank Account is in place?
24. A baseline survey is planned for the autumn of 2007 and annually thereafter with results being reported to the PSCCF.
25. OGC plans an overall review of the progress on implementation of the Fair Payment Charter and these recommendations two years after full implementation (i.e. in January 2010).

⁶ See description at [OGC - OGC Gateway Review for Programmes & Projects](#)

⁷ Started during the current financial year

Cost of Implementation

26. The thrust of these recommendations is to standardise and simplify payment processes based on current best practice. There will be start up and training costs for implementation of Project Bank Accounts, which will vary in accordance with project size and complexity. Costs of implementation are expected to be between £5,000 and £10,000 (i.e. less than 0.1% of a typical project). Much of this cost is one-off and does not need to be expended in full follow-on contracts. Bank charges for project bank accounts are likely to be modest and for larger projects more than offset by interest generated while interim payments are on deposit.

Summary of recommendations

27. The following is a summary of the recommended best “fair payment” principles and practices for adoption in the public sector as endorsed by the PSCCF:

Recommendations

- | | | |
|-----------|---|-----------|
| 1 | Formally adopt principles of “fair payment” | (Para 8) |
| 2 | Require “Fair Payment” Charters to be signed for contracts/frameworks (Full implementation by 1 st January 2008). | (Para 10) |
| 3 | Introduce best practice payment processes targeted at achieving payments to the supply chain within 30 days. | (Para 11) |
| 4 | Consider more frequent interim measures, shorter guaranteed payment periods and advanced certification (not payment) in cases when contractors and suppliers are able to offer substantial discounts. | (Para 13) |
| 5 | Use evidence of good and current performance on “fair payment” as a key pre-qualifying criterion for selection of lead contractors. | (Para 14) |
| 6 | Consider paying (but not necessarily employing) major sub-contractors and suppliers directly. | (Para 15) |
| 7 | Make greater use of milestone payments and payment schedules to simplify the interim measurement process. | (Para 16) |
| 8 | Monitor Charter commitments regarding fair contract terms and fair withholding of payment. | (Para 17) |
| 9 | Progressively specify use of Project Bank accounts where practicable and cost effective. | (Para 18) |
| 10 | Monitor compliance with the “Fair Payment” Charter. | (Para 22) |

Mapping of recommendations to “Fair Payment” principles

The table below shows how each recommendation maps to the agreed principles.

(Tick (✓) indicates which practice closely corresponds with each principle)

Principles:	A	B	C	D	E	F	G	H	I
Recommendations:	Right to fair payment	Applies to all	Transparent process	Payment completeness	Optimised payment	Efficiency	Appropriateness	Insolvency protection	Collaborative working
2. “Fair Payment” Charters	✓	✓	✓	✓	✓				✓
3. Best practice process	✓	✓	✓		✓	✓			
4. Advanced certification					✓				
5. Lead contractor selection	✓								✓
6. Direct payment			✓	✓		✓			
7. Simplified measurement						✓			
8. Retentions	✓	✓							
9. Project Bank Accounts	✓		✓	✓	✓	✓	✓	✓	✓
10. FPC compliance	✓	✓	✓	✓	✓				

Annexes

- Annex A [Business Case for “Fair Payment”](#)
- Annex B [Case Study: M42 ATM Project](#)
- Annex C [Project Bank Accounts – A Client’s Guide](#)

ANNEX A: BUSINESS CASE⁸ FOR “FAIR PAYMENT”

Introduction

28. Fair payment issues arise from commercial pressures, “custom and practice”, lack of sophistication and maturity, as well as deliberate manipulation. Although the problem is often characterised as being one between the lead contractor and sub-contractors, issues occur throughout the supply chain from clients paying late to sub-contractors not invoicing for the work they have carried out.
29. This Annex seeks to quantify the benefits of adopting a fairer and more efficient payment process. It is based on an analysis of typical contracts supported by interviews⁹ and surveys¹⁰ with supply chain members.

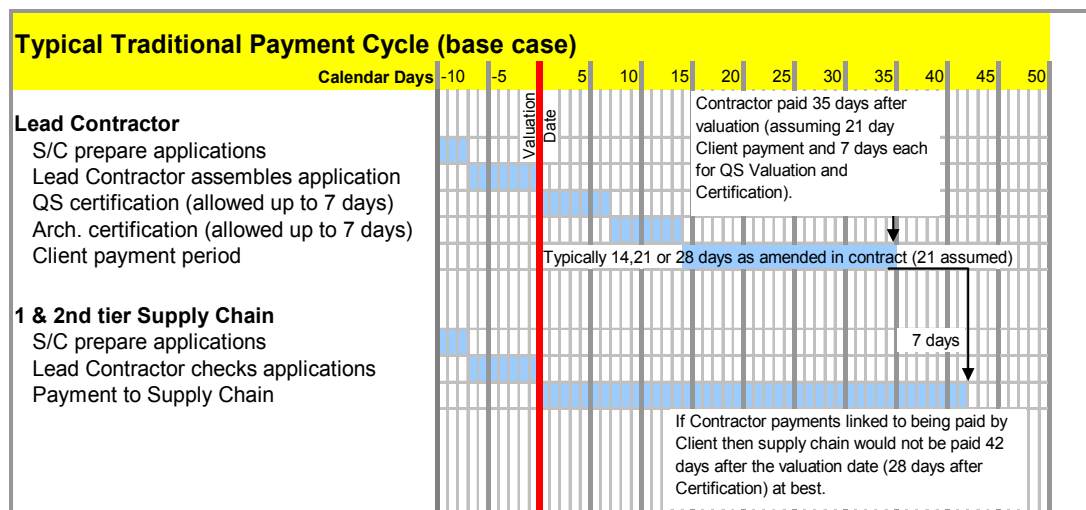
⁸ Abridged version of consultancy study by Bucknall Austin.

⁹ In-depth interviews were held with senior management personnel (generally MD/FD/Commercial Directors) in a cross section of contractors, sub-contractors, suppliers and consultants. These interviews enabled detailed discussions to be undertaken to ascertain their experience of both good and poor payment, examine reasons for instances of poor payments and explore identify risks and concerns and identify views of all parties on the benefits of adopting fairer and more efficient payment processes.

¹⁰ This Annex also draws on the results of surveys of their membership undertaken by the Specialist Engineering Contractors’ Group (SECG) and the Association for Consultancy & Engineering (ACE).

Existing situation

30. The following figure shows the payment cycle for a typical traditional contract based on JCT98 suite of contracts. This is considered as the base case in this business case analysis.



31. Allowing the normal contractual times for certification by the quantity surveyor and architect and assuming a 21 day client payment period experience suggests that the main contractor will often not get paid until 35 days after the valuation date.
32. Although the Construction Act prohibits “pay when paid” clauses, in practice many sub-contractors carry out work before formal contracts are in place and, in any case, lead contractors will wish to provide for contractual arrangements such that they have a reasonable expectation of being paid by the client before he pays his supply chain. This means that sub-contractors and suppliers are not paid until 42 days after the valuation date at best.
33. In practice, wrongly presented applications, inefficient administration, mismatches between systems usually greatly increase this period. Some lead contractors’ business models generally also assume retention of cash for a period to enhance profitability. The lead contractor will of course incur costs from his own in-house resources, labour-only sub-contracts and some suppliers before he receives payment.
34. Extended payment periods and delaying payments does not just incur short-term finance costs. Poor payers will experience higher tenders, with surcharges being imposed by both contractors and their supply chains that value ‘payment certainty’ above all.
35. Virtually all those interviewed, during the consultancy study, had first hand experience of payment delays – up to 90 days. 60-day payments from clients were common. Supply chain respondents stated that the ‘delays in lead contractors receiving monies from client’ was the most common cause of delays in payments to them and accounted for more than 20% of payment delays. Most of those

interviewed also dealt with this by either refusing to work with the client or imposing a surcharge on any tender.

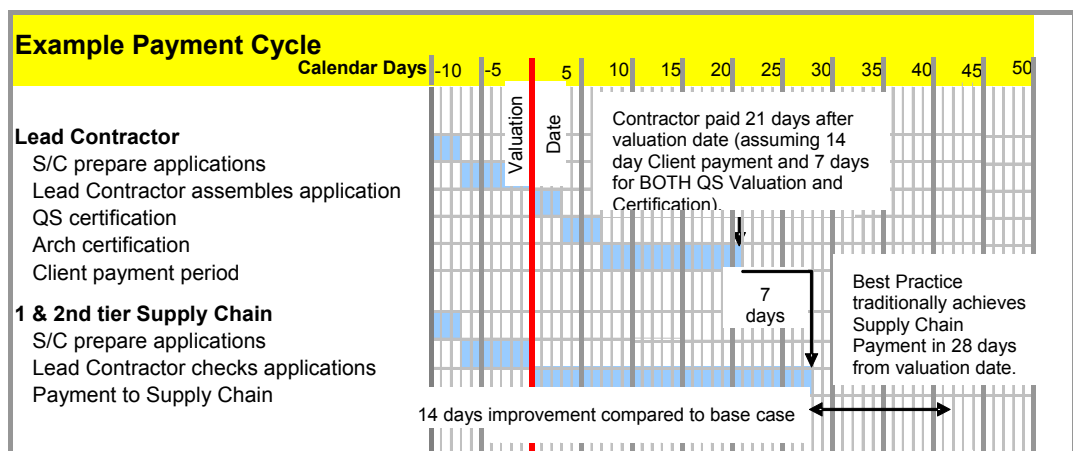
36. Where surcharges were allowed, they were significantly more than short-term financing costs. For example, one contractor included a standard uplift factor of 5% for poor payments for bids where 60 day payment terms were the norm, despite finance costs for the delay equating to approximately 1%. In other cases, some clients report that they have been able to negotiate 5% to 10% discounts with their suppliers and sub-contractors where they have been able to guarantee a reliable and speedy cashflow.
37. The ACE survey found that payment delays were less frequent in public sector than private sector. Within the public sector, 25% of members had witnessed delays in more than 25% of projects, in the private sector, this increased to nearly 40% of members.

Options for improving the payment process

38. The aim of any improvements is to provide greater certainty on payment to everyone in the supply chain and to optimise the payment process to minimise financing and transaction charges. Two options are considered: (A) "Fair Payment" Charter linked to improved "fair payment" process and (B) Use of Project Bank Accounts.

Option A: “Fair Payment” Charter linked to improved fair payment process

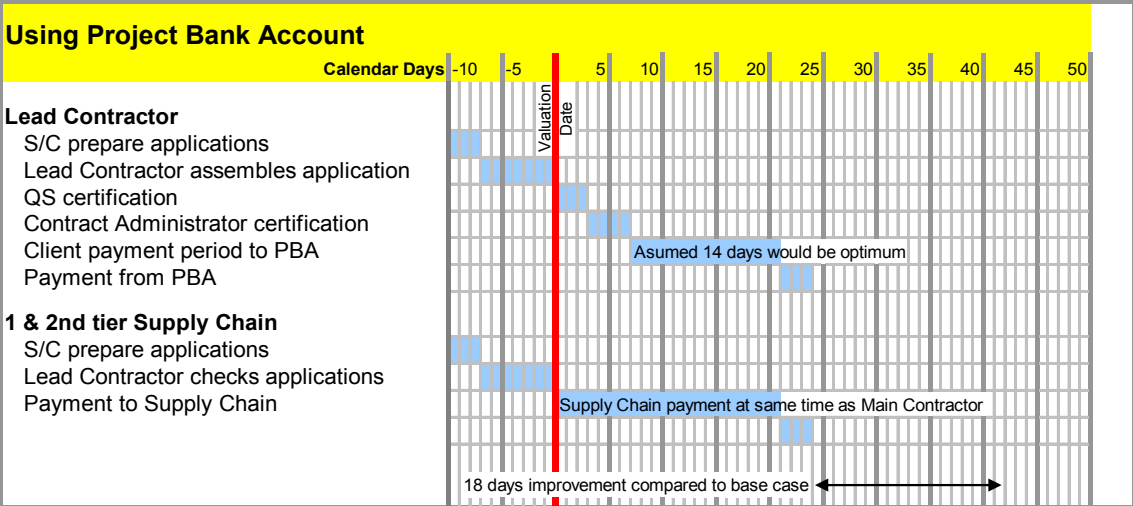
39. Under this option, clients, lead contractors and their supply chains would commit themselves to a “Fair Payment” Charter. This would include greater transparency, equitable retention arrangements, more efficient payment procedures and payment periods not exceeding 30 days. An example of such a process between client, lead contractor and the 1st and 2nd tier supply chain is shown below:



40. In this option, the lead contractor would be paid 21 days after the valuation date (allowing 7 days for certification and 14 days for client payment) with the supply chain getting payment 28 days after the valuation date. This is a 14 day improvement compared to the typical traditional payment cycle (base case).

Option B: Use of Project Bank accounts

41. Under this option, in addition to the Fair Payment Charter, clients would give a written commitment to a payment period linked to a Project Bank Account. This would generate the confidence in both supply chain and the contractor to reduce risks and prices by providing real surety of cash flow for all parties. A typical Project Bank Account process is shown below:



42. A good practice process would provide surety of payment and a reduction of the payment cycle by 18 days compared to the typical traditional payment cycle (base case).

Benefit Analysis

43. The analysis was based on a typical £10M 52 week project with 16 sub contracts, which have been averaged at £0.5M each and identified the following average savings compared to the base case:

	Savings compared to base case:	
	Option A: Improved "Fair Payment" Process	Option B: Using Project Bank Account ¹¹
Sub-contract (total of all sub-contracts)		
Reduction for Cash Collection	-0.1%	-0.1%
Reduction for Cash Flow Risk Certainty	-0.8%	-2.1%
Reduction for Trade Indemnity Insurance	0%.	-0.2%
Lead Contract		
Reduction for Cash Collection	-0.1%	-0.2%
Reduction for Cash Flow Risk Certainty	-0.5%	-0.8%
Increased Profit to offset loss of cash flow benefit	+0.5%	+1%
Total Impact on Project	-1%	-2.5%

¹¹ Project Bank Account option based on average of cases with client payment periods of 14 and 21 days.

44. The above savings assume no change to the payment dates for the sub-sub-contractors; however, in practice the adoption of earlier payments will also lead to earlier payments by sub-contractors to their principal suppliers and sub-contractors who may see further benefits.
45. These overall savings were corroborated by the surveys and interviews. There was a strong consensus in the answers to the question “*How much would your tender reduce if a Government Approved Project Bank Account Process is put in place*”. Over 90% of contractors and supply chain answered that this would save between 0% to 5%. The final benefit will depend on how well the contractors are currently treating their supply chains; those that already adopt best practice payment terms will realise lower savings. The average saving and the most frequently quoted figure was an overall saving on the project of 2.5%.
46. Although accounting methods and overhead structures vary substantially between companies, this saving was attributed to two main elements with payment surety being the single most important issue quoted by the majority of those interviewed:
 - Finance Charges – approximately 0.5%
 - Surety of Cash flow – approximately 2%
47. Respondents felt that further longer term client savings would arise if the public sector adopted fair payments and Project Bank Accounts universally, as they would be able to reduce their overheads relating to debt chasing, financing and supply chain insolvency insurance.
48. Although headline profit figure at tender may increase, few of the contractors interviewed believed that they would need to increase overall tender prices to cover loss of cash flow benefits that they currently have.
49. Debt chasing and supply chain insolvency insurance were generally built into overheads. The costs for these varied between companies but represented approximately 0.5% of turnover. It will inevitably take time for contractors and supply chain to realise the full benefits of efficient payment regimes and reduce overhead allowances.

Additional Benefits

50. The use of best practice fair payment practices and Project Bank Accounts could become a key part of collaborative projects and will help to improve trust and confidence throughout the supply chain. As overall confidence in the system increases the incidence of claims due to poor payment should be substantially reduced.
51. Improved payment terms will be a real incentive for new entrants from other sectors (e.g. good logistics organisations) who have steered clear of the construction sector in the past because of its poor reputation for payment.

Risks

52. There are a number of key risks to be considered when implementing fair payment strategies:

Client Risks:

- a) *Failure to achieve payment periods* – The key to realising reduced overall tender costs is confidence in achieving payment certainty. If agreed payment periods are not achieved then reductions in direct and indirect costs will not be fully realised. Clients need to ensure that their payment departments are capable of achieving the pre-agreed payment periods consistently on each and every contract.
- b) *Contractors fail to open project bank account* – Where it is agreed that a project bank account will be operated, there needs to be a contractual requirement for the contractor to do so. The client should require details of the contractors' sub-contract conditions at tender committing to use of the project bank.
- c) *Open book payments under lump sum contracts* – At the time of placing a lump sum tender, the successful contractor may not have firm quotations for all of the sub-contracts, but may still offer a lump sum tender by accepting the risk on the non-firm elements of works. His tender may also include milestones based on the anticipated sub-contract values. When certifying milestone completion and interim valuations, the values will be assessed based on tender, not on actual sub-contract values that may have been placed at higher or lower costs to tender allowances. On lump sum contracts, client visibility of Project Bank payments needs to be by agreement with the contractor. Greater transparency has the benefit of building trust between the project team members.
- d) *Cost of implementation* – There will be start up costs and training costs for implementation of project bank accounts which will vary in accordance with project size and complexity. Costs for implementation are anticipated to be between £5,000 to £10,000 i.e. less than 0.1% of typical £10M project. Much of this cost is one-off and does not need to be expended in full on follow-on contracts. It is recommended that specialist technical and legal advisors are appointed centrally to advise public sector clients and project teams, ensuring a common message.

Lead contractor risks:

- e) *Loss of cash flow benefits* - Existing cash flow benefits vary from contractor to contractor. Implementation of a project bank account will mean the lead contractor forgoes cash flow benefit on payments to supply chain. The benefit analysis assumes that lead contractors will reflect the loss of flow benefits through increased headline profit levels, although a number of contractors interviewed have said that they would not vary their profit levels.

In some cases, contractors may try to increase profit excessively to compensate for a perceived loss of the lever of cashflow control over their supply chains.

- f) *Due diligence* – a common misconception of contractors is that their ability to undertake their normal due diligence on sub-contract applications is diminished by Project Bank Accounts. This is not the case; contractors

undertake their normal process of vetting and agreement of interim and final valuation amounts with their sub-contractors.

Conclusion

53. Based on public sector spend of £33.5bn¹², and assuming the best practice fair payment practices with improved payment times could apply initially to just 25% of the projects, and Project Bank Accounts could apply to a further 15% of projects, initial saving could be as follows:

Total projected savings on public sector projects

	% of Public Sector Projects	Value of Projects £M	Saving %	Saving £M
Payment Charter – Best Practice Payments	25%	8,375	1.00%	84
Project Bank Account	15%	5,025	2.50%	126
Total Saving				£210M

54. Over time, as confidence in the system increases, the use of Fair Payment Charters and Project Bank Accounts will become more widespread and further overhead and risk savings could be realised, increasing savings to over £750M.

Key Quotations

55. The following quotations are taken from the in-depth interviews:

“It’s payment certainty that the supply chain and ourselves want”. If clients commit to definitive payment periods, it enables contractors and supply chain to reduce in-built risks and costs in their tender.

“The Project Bank Accounts work at its best as part of a joined-up collaborative approach”. The Project Bank Account can work with any procurement route, but is at its best within a collaborative and open book process where it represents a major commitment from all parties and helps to generate ‘trust’.

“Public Sector clients should declare what payment periods they do achieve in practice”. Making actual payment periods visible as KPIs

¹² NAO Report ‘Improving Public Services through Better Construction – March 2005

fosters reliance in the supply chain and contractors and will enable them to review and reduce overheads.

“Public sector clients provide a wide range of payments terms. One is paying us twice a month on 15 day payment terms; others are all monthly with actual payments taking up to 60 days”. Clearly there needs to be a common standard adopted by public sector clients. Achieving shorter payment periods can result in direct savings in construction costs.

“In one Government sector, 60 day payments are the norm – we add a standard 5% mark up to reflect this”. Existing poor performers have the most to gain by adopting Project Bank Accounts and shortened payment periods – but they also have to change internal working practices to achieve this.

“The real danger is that ‘lowest price wins all’ may still predominate and will undermine the new Fair Payment systems”. It is essential that the contractor tender evaluation process establishes whether the contractor is fully committed to the fair payment system and that there is contractual redress if they do not.

“Bad payers are not an industry wide problem”. There are many examples of best practice in both contractors and public sector.

“The Project Bank Account would need to be a proven product before we use it”. There is a need to have trials on several projects to help build confidence in the system.

“We do not work in the public sector because they are such poor payers”. Adopting and publicising fair payment regimes is likely to attract contractors who have steered away from public sector projects in the past.

ANNEX B: CASE STUDY - M42 ATM PROJECT

Background

56. Active Traffic Management (ATM) is a pilot project on a section of the M42 between junctions 3a and 7. It will be introduced to tackle congestion, by making best use of existing road space while minimising environmental disruption. Equipment such as monitoring loops within the road surface and cameras will constantly monitor road conditions and enable the Highways Agency (HA) to get road users better information on current road traffic conditions.
57. The M42 project trialled the use of existing and emerging technologies and involved, the development of new equipment systems and procedures. The monitoring allowed a comprehensive evaluation of the impact of the OR, technologies, systems and procedures and will enable the Business Case for the M42 ATM project to be established. The monitoring and evaluation assisted in the development of guidance and standards for any subsequent rollout of ATM on the English motorway network.
58. The project used an ECC Target Cost contract.

Project team

Client	Highways Agency
Main Contractor	Mouchel Parkman
Civils Specialist Contractor	Birse Construction
Specialist Contractor	SEA Transport Systems
Technology Consultants	Cambridge Consultants Ltd
Consulting Engineers	WSP Group (Bristol)

Advanced certification of works linked to early payments

59. In order to resolve concerns over the traditional funding of construction projects by main and sub-contractors, with payments for works typically being received 4 to 8 weeks after execution, a modified payment procedure was suggested by the contractor and subsequently adopted.
60. The modified procedure provides a direct benefit to the HA through discounting of the sub-contractor's payments. The key features of this proposal are:
 - Monies are certified in advance of the works being carried out to improve main/sub-contractor cash flow. In return discounts are offered on the value of sub-contractor works to be done, giving a direct benefit (lower cost) to the HA.

- Twice monthly valuations.
61. On receipt of payment, 28 days after certification, the forecast works will have been carried out. There is no 'advance' payment (barring possible under spend or over forecast) but rather payment is made following execution of the works.
 62. The process was introduced on the ATM scheme following agreements made at a meeting attended by the parties to the contract. Although only three sub-contractors offered a discount for advance certification, it was agreed at the meeting that advance certification should apply to all the works on those project orders where some discount was forthcoming.
 63. Work done to date is assessed in the normal way and appropriate amounts are certified.
 64. Forecasts for each cost element are made for works to be carried out within the following 28-day period. Forecasts are based on:
 - Agreed sub-contractor cashflow
 - Assessments based on forecast workload
 - Assessment based on historical spend profiles
 65. These forecast values are recorded separately for each cost element. This clearly identifies the amounts of forecast payments. No allowances are made in the forecast values for materials off site due to potential vesting difficulties.
 66. Payments agreed between the main contractor and sub-contractor may differ from the forecast. Details of actual payments are to be forwarded when certified by the main contractor. In order to avoid the risk of over certification, forecast payments are not included in the penultimate applications of the relevant cost element.
 67. On the ATM scheme three sub-contractors have offered a discount in return for the improved cash flow arising from advance certification. In these cases the contractor, immediately prior to the subcontract payment date, reviews forecast monies certified and pays an appropriate amount to the sub-contractor.
 68. It has however been agreed on the ATM scheme that the advance certification should include all elements of work in instances where discount is only offered by a limited number of sub-contractors. In instances where no discount is offered the contractor retains the forecast monies and only pays as the existing subcontract terms. Advance payments and the application of discounts will be in accordance with the individual sub-contractor agreements.
 69. The sub-contractor payment terms allow 35 days from sub-contractor application (15th of month) to payment. It therefore follows that payment against the previous amount certified for a sub-contractor has not been made when the following main contractor payment certificate is being prepared. However sub-contractor payment certificates should be issued within the 28 days thereby allowing the following main contractor payment certificate to be amended as necessary.
 70. As the M42 ATM scheme is a pilot scheme it is considered there is sufficient flexibility within the contractual arrangements to trial this payment process.

71. The key features of the process to be adopted are:
- A forecast with the application for payment of works to be done/costs to be incurred within 28 days from the date of application.
 - Forecast costs are based on estimates of the potential expenditure within the 28-day period and therefore an accrued cost element or liability would be included in the application and certificate.
 - Payment will be discharged to the main contractor in accordance with the payment terms of the Contract within 28 days of the application.
 - The main contractor will discharge payment, for work completed, to his sub-contractors within 35 days of the same date again in accordance with the requirements of the Contract.
72. This should not be considered as an advanced payment. As money would only be discharged for works completed or costs incurred no advanced payment is made and hence the process is within the HA and HM Treasury guidelines.

Benefits – financial and non-financial

Benefits to the Highways Agency

- There is a clear financial saving to the Highways Agency. A discount is offered by the sub-contractors for the introduction of this process.
- The process assists cashflow within the supply chain, which is an Agency objective.
- The whole delivery process is made more efficient.
- HA have no additional risk from this process as they are only releasing money for works actually completed.
- Because payment is made against an agreed Projection of works to be completed there is greater predictive certainty of turnover in the month, which helps in the Contractual financial reporting.

Benefits to sub-contractor

- Cash flow neutral situation.
- Saving on financing charges.

Benefits to contractor

- Slightly earlier payment of fee.
- Improved KPI for cost saving against project budget.

Benefits for the consultant

- Greater predictive certainty for cash flow purposes, know how much is being paid one month in advance.
- Improved KPI for cost saving against budget.
- Greater visibility and involvement in contractors' cost and cash forecasting.
- Greater proximity to the supply chain.

ANNEX C: PROJECT BANK ACCOUNTS – A CLIENT’S GUIDE

Introduction

73. This guide is intended to help clients who propose to set up a Project Bank Account (PBA) or Accounts for the first time. It does not only cover how to set up and operate a Project Bank Account itself but also all the associated issues that a client team need to consider.
74. These include awareness training both within the client’s organisation and for the selected contractor and his supply chain and any appointed consultants. It covers changes to the procurement documents for the team to introduce the PBA arrangements to all tenderers. It also deals with suggested amendments to contractor appointment terms and conditions to formalise the operation and use of the account.
75. The guide follows the various stages in a typical project lifecycle and defines the actions that need to be taken at each point, these include:
 - Early familiarisation training
 - During early planning and pre-procurement
 - During the procurement of the contracting team
 - Following appointment
76. National Audit Office in their recent report “Improving Public Services through Better Construction” stated (Para 3.33):

“Departments need to provide specialist small and medium sized suppliers with greater certainty that they will be paid on time to reinforce the trust that should exist between all parties for collaborative working to operate effectively. If this does not exist in the supply chain then specialist suppliers, who can significantly influence the value for money obtained on a project, will have little incentive to innovate. Considerable losses can also be incurred over payment disputes, which will ultimately feed their way back into the costs for the client. The use of a single project account is one way to provide greater certainty of payment to specialist contractors and suppliers further down the supply chain from the main contractor”.
77. The flow chart on the following page illustrates the structure and content of this guide:



Early Familiarisation Training

What is a Project Bank Account and how does it operate?

78. A concern for many clients is how to ensure that a contractor's supply chain receives timely payment of monies due to them.
79. The Project Bank Account is in effect a 'fair payment for all system', which ensures that the contractor and his supply chain receives promptly monies rightfully due through certified interim payments. PBA is the medium, through which payments are made, but it is not a Contractors account, it is set up in trust for the whole supply chain.

Transaction Security

80. To ensure security is maintained all notifications of payment and other instructions to the Project Bank Account can only be made by pre registered contractor/client representatives. Normally all such instructions would require two signatures, one client and one contractor representative. Payments from the account can only be made in accordance with such instructions and only by the bank.

Payment process

81. The process of preparing and certifying monthly valuations or milestones is unaltered by the PBA arrangement. There is a misconception that a Project Bank Account undermines the contractor's responsibility to check and approve applications from his supply chain. This is not the case.
82. The client's role where joint signatures or joint authorisation of transactions are adopted, is merely to confirm payments transfers from the account it is not a check on the quantum of these payments. This is particularly relevant where PBAs are used on lump sum contracts. On such contracts it is quite normal for the amount rightfully due to a contractor for a particular package of work to be different to that that he is contracted to pay the sub contractor who undertook the work.

Visibility and auditability

83. For the supply chain to have trust in Project Bank Account process, it needs to provide them with a level of visibility over the timing and amounts of payments they rarely normally achieve. They need confidence when a payment is to be deposited in the project bank and when in turn they will receive payment. The account also needs to be transparent and open to scrutiny and audit. This is probably the most important issue when it comes to securing the support and trust of all parties.
84. As part of the process of authorising payment transactions the contractor will also notify the supply chain of the date they will receive payment from the PBA.

Trust Status

85. The Trust Status of the account is essential in order to avoid potential problems if the contractor goes into receivership. The account in effect is held in trust on behalf of the whole supply chain, in a similar way to how a solicitor operates a client account. This prevents a receiver seizing the proceeds of the account.

86. Each Project Bank Account will require a Trust Deed, which is signed by the participating parties. An illustrative Trust Deed is included in Appendix A.

Define suitable projects

87. In principle PBAs can be applied to any size of project whether one off schemes or part of an ongoing programme of work. However, as the use of PBAs will involve clients in cost, time and effort in:
- setting up the account
 - training staff and contracting teams
 - adapting contract terms and conditions
- their use would provide better value for money if linked to a programme of work or larger one-off projects.
88. PBAs can be applied both to traditional lump sum and open book contract arrangements. The joint authorisation arrangements however will be different as the degree of visibility afforded a client in respect of supply chain payments on lump sum contracts will be much less.
89. It is recommended that clients apply a PBA for the first time to a reasonably straightforward scheme of medium duration and value. It is also recommended that for the initial project or projects, the parties involved in the PBA process is limited to the larger, more significant members of the contractors supply chain.
90. As with any new system or process, it takes time for organisations and individuals to become familiar and accept the benefits of its use. For this reason, it is not considered practical to involve the smaller supply chain members (in terms of package value) in initial projects. The effort is likely to be disproportionate to the value of their package. Indeed experience has shown that smaller supply chain members can be put off by non standard payment terms as the cost of legal opinion, attending training workshops and so forth can significantly erode their margin on a project.
91. The adoption of a PBA arrangement by a client will generally provide best value if applied to a series of projects or a programme of works. This will enable the set up costs to spread across a much larger value of construction work

Early Planning and Pre Procurement

Training the client's team

92. Training of the client's team in the operation of the account and the benefits of its use for the whole supply chain is key to its successful implementation. The client's team are in effect the ambassadors for the system and it will be their drive and enthusiasm that will sell it to the contractor and supply chain. This process needs to start before the tendering/procurement process for works projects commences. The training will include:
- the working of the account

- the process to set a PBA up for a new project
 - roles and responsibilities of key contacts at the selected bank
 - the rationale for its use
 - the benefits for the whole supply chain
 - the role as trainer and facilitator for educating the supply chain
 - informing the supply chain during the tendering process for a project
93. It is essential to identify the client team members that require training. This should embrace anyone that will work on the project directly. This should include client consultants and any other appropriate stakeholders including other government agency representatives. The training should not take more than half a day, and is generally aimed at technical staff that will manage the project. A standard agenda is included as Appendix B to this guide. The training should be allowable as Continuing Professional Development (CPD).

Selecting and appointing a bank

94. In preparing this client guide we have assumed that Project Bank Account products will be developed by a number of high street banks. Public sector clients will select the most appropriate model for their requirements.
95. Each product will comprise:
- pre agreed terms and conditions
 - a set up and operation protocol
 - mandate form
 - details of the dedicated bank team
 - trust deed
 - scale of charges.
96. The selection of the correct PBA will be dependent on the type and value of project or programme of works, for example:
- Single Project applications
97. For single project applications a specific account will be set up with a selected bank in accordance with the agreed protocol.
- Multi project applications
98. For framework contracts and programmes of work a call off arrangement needs to be established with a selected bank in accordance with the agreed protocol.
99. The longer-term aim for clients after initial trials should be to establish a call off arrangement with a selected bank for their forward work programme.

Changes to the tender invitation and contract documentation

100. Client's standard tender documentation will need to be modified to accommodate payments being made via a Project Bank Account. These changes will include:
- Amendments to the Terms and Conditions to mandate the use of a PBA and define the payment process and notice of payment provisions required for its operation.
 - Definition of the procedures by which a contractor sets up and implements a PBA.
 - Bank mandate details, operation protocol, terms and conditions and scale of charges
 - Details of any tenderer awareness training during the tender process.
 - Details of any track record experience of PBAs required from tenderers
 - Any amendments required to the marking regime
 - Details of post award training for the appointed contractor and supply chain

Arrangements for supply chain members outside the PBA

101. It is not likely to be feasible to bring all levels of a contractor's supply chain into the PBA regime on a single project. This needs to be a measured process over a series of projects. Certainly, for trial or initial projects it is recommended that clients restrict those on the PBA to larger contracts. Organisations with small individual project roles are likely to be unwilling to invest time and cost in attending training for a one off scheme.
102. Over time, especially where clients adopt PBAs on framework contracts and whole programmes of work, it will be possible to involve most levels of the supply chain. This potentially includes the smaller supply chain organisations especially where they have an ongoing role on a number of projects or framework.
103. There are likely to be many projects, which are too small or for other reasons may not suit a Project Bank Account arrangement. Similarly on projects, which do adopt PBA arrangements, there are still likely to be levels of a contractor's supply chain that are not paid via the PBA.
104. For example, some sub-contractors particularly labour only teams and other small organisations on weekly or fortnightly wage structures are unlikely to be embraced within the PBA structure. However, these organisations only represent approximately 5% of the overall works value. The payment arrangements for these small organisations are likely to remain as existing, often on cash based terms.
105. Fair payment best practice still needs to be applied irrespective of whether PBA arrangements are adopted or not.
106. In these circumstances, payment certainty will be underpinned by the parties committing to the Fair Payment Charter.

During The Procurement of The Contracting Team

Briefing tenderers

107. It is recommended that this guide is used as a structure to brief the tenderers on PBAs. Tenderers need to be appraised of the requirements for PBAs within the terms and conditions of contract. The process they have to follow to set up and operate the account and details of the key contacts within the selected bank. How charges and interest on the account are to be dealt with. The requirement for the contractor to issue notices of forthcoming payments to be issued to all supply chain members participating in the account. The operation of any payment KPIs established.
108. We recommend this briefing is provided via:
- tender open days
 - bilateral meetings with each tenderer during the tender period to allow the discussion of any PBA issues.
 - structured query (question and answer) sheets to facilitate questions outside the bi-lateral meetings
109. The standard agenda in Appendix B may be used as a structure for the briefing.

Following Appointment

Train successful contractor and supply chain

110. For many in the supply chain, project bank accounts will be a new way of working and there is likely to be a natural scepticism and a reluctance to change. Contractors are likely to have considerable concern that PBAs are a means of attacking their margin, as they will not be able to benefit from short-term use of their supply chains payments. Equally the supply chain is likely to be receptive but sceptical - can they really believe that they will be paid on time for properly completed work.
111. The training regime needs to be structured to meet the training needs at various levels within the participating organisations. This is likely to be an interactive process and will take time, in order to secure the buy in and trust of all relevant stakeholders. This investment is essential however, if the benefits of fair payments, reduced tender prices and greater collaboration and co-operation are to be secured.
112. This process will involve:
- meetings to secure buy in from all organisations at the highest level (Managing Director or Chief Executive level)
 - specialist focus groups for key people such as commercial directors and their teams responsible for implementation
 - meetings if appropriate with the bank team
 - supply chain workshops

- a progressive programme for bringing all levels of the supply chain into the project bank account regime.
113. It is recommended that a team of legal, technical and banking specialists are appointed by OGC to offer a programme of training to public sector clients and their appointed contractors (inc supply chain) adopting PBAs for the first time. It is very important, as both the PBA product and process are new, that the training is consistent in content and delivery and the process is centrally controlled and managed. This will ensure that a continuous improvement loop is created, with any amendments, enhancements and best practice ideas generated, being captured, evaluated and applied to the PBA model.
114. As the use of PBAs becomes more established within client and contractor organisations, key individuals can be identified and developed to undertake cascade training. Ongoing training will be required for new staff joining the project. The standard Agenda in Appendix B may be used as a training structure.

Finalise payment arrangements

115. Although the operation of a PBA is standardised, the detail of the payment arrangements may change from client to client and project to project.
116. Some projects may operate monthly valuations, on others payments may be triggered by the completion of a milestone event; others may operate open book arrangements with authorised actual costs paid.
117. Similarly the arrangements for authorised signatures may change from client to client. For example some clients may be happy for two authorised signatures to be named, with only one from the client and contractor side being actually required to sign off a payment. Some clients may require a counter signature arrangement for both parties. On larger contracts, for example with national coverage, more authorised signatures may be required. Further delegation levels may be imposed which require different signatures dependant on value of the milestone.
118. Authorisation arrangements will also vary depending whether the contract is open book or lump sum.
119. These details are obviously bespoke to a project or client and will need to be confirmed in the account mandate when completed. It is recommended, however, that authorisation arrangements are kept as simple as possible to avoid unnecessary bureaucracy. It should be remembered that clients would have the right to audit every PBA.

Activation of the account

120. At the appropriate time the PBA is activated for a particular project or framework. Again the timing and arrangements for this may vary from client to client or project to project.
121. Some clients may set in place arrangements for their appointed contractors to complete the standard PBA mandate and open the account on their behalf. Others may prefer to establish the accounts themselves.

122. Again these details are bespoke to a project or client and will need to be confirmed in discussion with the selected bank and in the completed account mandate.

Operation of the Account

123. An interim payment is agreed in the normal way, including the review and evaluation of the payments due to each member of the project supply chain by the contractor. The agreed interim payment is authorised by the client team and the money is transferred directly into the Project Bank Account by the client's bill paying department via BACS or CHAPS. The client and main contractor jointly authorise the payment transactions to the supply chain via the electronic access procedures operated by the selected bank.

124. To ensure security is maintained all notifications of payment and other instructions to the Project Bank Account can only be made by pre registered contractor or client representatives. Payments from the account can only be made in accordance with such instructions and all must take place simultaneously for each milestone.

125. All members of the supply chain on the PBA will be notified by the contractor or client representatives of the date they will receive payment at the same time as the payments are authorised. This gives the supply chain greater clarity and certainty of when they will receive monies due and in turn generates confidence in the process. This open and transparent approach to Project Banking also entitles a client to undertake an audit of deposits and withdrawals at any time.

126. The process map at Appendix C illustrates the payment process for a typical interim payment.

Appendixes

- Appendix A [Illustrative Trust Deed](#)
- Appendix B [Standard Training Agenda](#)
- Appendix C [Typical Payment Process](#)

APPENDIX A: ILLUSTRATIVE TRUST DEED

THIS DEED is made the _____ day of _____ 2007

BETWEEN: -

- (1) **The Client** (as detailed in Schedule 2 to this Deed);
- (2) **The Contractor** (as detailed in Schedule 2 to this Deed); and
- (3) **The Sub-Contractors** (as detailed in Schedule 2 to this Deed).
Collectively referred to in this Deed as “the Parties”.

Background

- A. The Client has engaged the Contractor to carry out the Project (as defined below).
- B. To assist in the development and performance of the Project, the Contractor has engaged the Sub-Contractors to carry out certain parts of the work required in respect of the Project as set out in more detail in the Sub-Contracts (as defined below).
- C. The Parties wish to adopt a payment mechanism which will (i) ensure the fair payment of both the Contractor and the Sub-Contractors; and (ii) that the Sub-Contractors receive payment at the same time as the Contractor. To achieve this objective, the Parties have agreed to operate a bank account in accordance with the terms of this Deed.

1.0 Definitions

1.1. In this Deed, the following words have the following meanings:

“Account Holders”	means the Client and the Contractor;
“Bank”	means the bank where the Bank Account will be held as set out in Schedule 2 to this Deed;
“Bank Account”	means a bank account opened with the Bank which has no overdraft facility into which all monies due under the Contract will be paid by the Client in accordance with this Deed;
“Bank Mandate”	means the instructions as to the operation of the Bank Account as agreed between the Account Holders and the Bank as set out in Schedule 3 to this Deed;
“Contract”	means the contract between the Client and the Contractor in respect of the Project as detailed in Schedule 2 to this Deed;
“Project”	means the project defined in Schedule 2 to this Deed;
“Sub-Contract”	means a sub-contract agreement between a Sub-Contractor and the Contractor in respect of the Project; and
“Term”	means from the date of this Deed until such time as all monies due to the Contractor and the Sub-Contractors under the Contract and/or the Sub-Contracts have been paid in full.

2.0 Bank Account

- 2.1. The Account Holders undertake to open a new interest bearing deposit bank account with the Bank, such account to be opened and held in the names of the Account Holders.
- 2.2. The Client undertakes to pay all monies due to the Contractor and/or the Sub-Contractors under the Contract and the Sub-Contracts into the Bank Account as and when such monies become due for payment in accordance with the terms of the Contract.

- 2.3. The Parties agree that any monies paid into the Bank Account shall, as from the date on which such monies are paid into the Bank Account, be kept separate and distinct and clearly identifiable and shall be held on trust for each of the Contractor and the Sub-Contractors in the amounts owing to them as set out in the Account Holder's instructions to the Bank for the payment of monies to the Contractor and the Sub-Contractors. The Contractor and the Sub-Contractors acknowledge that they have no rights and/or interest in the monies held in the Bank Account other than as a beneficiary of the monies owing to them.
- 2.4. If for any reason the total amount of monies deposited by the Client in the Bank Account is less than the total amount of monies which has been authorised by the Account Holders for payment to the Sub-Contractors and the Contractor, the monies held in the Bank Account shall be allocated to and held on trust for each of the Sub-Contractors and the Contractor in the same proportions that the monies owed to them forms of the total amount of monies owed at that time to the Sub-Contractors and the Contractor collectively.
- 2.5. The Client acknowledges that, as and when monies are paid by it into the Bank Account in accordance with the Contract, it will cease to have any further rights and/or interest in such monies.
- 2.6. The Account Holders accept that, irrespective of any disputes, which may arise in respect of work performed by the Contractor and/or the Sub-Contractors, the Account Holders may not withdraw any monies from the Bank Account (other than in the case of the Contractor where it may withdraw monies owned by it).

3.0 Operation of the Bank Account

- 3.1. The Account Holders each agree that:
 - 3.1.1. they will sign the Bank Mandate as soon as reasonably practicable following execution of this Deed and, in any event, within 21 days of the date of this Deed;
 - 3.1.2. they will operate the Bank Account at all times in accordance with the Bank Mandate, this Deed and the Contract. If there is any conflict between the Bank Mandate, this Deed and/or the Contract, the documents shall take precedence in the following order:
 - 3.1.2.1. this Deed;
 - 3.1.2.2. the Bank Mandate; and
 - 3.1.2.3. the Contract.
 - 3.1.3. the Bank Account shall not become overdrawn;
 - 3.1.4. they will keep accurate, complete and up to date books of account and records of all transactions relating to the Bank Account, including but not limited to details of all payments out of the Bank Account authorised by the Account Holders and any bank charges payable;
 - 3.1.5. if the Account Holders have the ability to authorise transactions in respect of the Bank Account via an electronic facility operated by the Bank, each Account Holder shall ensure that its access details for such

facility are only made available to those of its employees and/or representatives which need to know such information and that such employees and/or representatives are aware of the confidential nature of the access details, the Bank Account details and the Bank Account transactions;

- 3.1.6. they are each responsible for the acts and/or omissions of their own employees and/or other representatives as if they were its own acts and/or omissions;
 - 3.1.7. they are each liable for their own acts and/or omissions under this Deed and have no liability for the acts and/or omissions of the other Account Holder;
 - 3.1.8. they hold all monies in the Bank Account on trust for the full and exclusive benefit of the Contractor and the Sub-Contractors in accordance with clauses 2.3 and 2.4 above.
- 3.2. As and when payment milestones set out in the Contract have been achieved, the Account Holders shall identify any payments due under the Contract and the Sub-Contracts and:
- 3.2.1. the Client shall promptly pay the monies due under the Contract into the Bank Account;
 - 3.2.2. as and when the monies have cleared, the Account Holders shall promptly authorise the Bank to make any payments due pursuant to the Contract and/or Sub-Contract to the Sub-Contractors and/or the Contractor from the Bank Account.
- 3.3. The Contractor agrees to inform each of the Sub-Contractors of the amounts which are to be paid to them from the Bank Account and the date on which the Sub-Contractor can expect to receive such payment on the same day as the Account Holders authorise the payments out of the Bank Account.
- 3.4. All payments to the Sub-Contractors and the Contractor shall be made by bank transfer. The Sub-Contractors and the Contractor must inform the Account Holders of their relevant bank account details and keep them up to date at all times. The Sub-Contractors and the Contractor accept that failure to do so may result in monies not being paid to them and that the Account Holders have no liability for such failure.
- 3.5. Any interest paid by the Bank in respect of the monies held in the Bank Account shall belong to the Contractor and may be withdrawn by it on conclusion of the works under the Contract.
- 3.6. Any bank charges, money transmission costs and other disbursements incurred in the establishment and operation of the Bank Account shall be borne by the Contractor.

4.0 New Sub-Contractors

- 4.1. If the Contractor appoints a new sub-contractor in respect of the Contract after the date of this Deed and agrees with that new sub-contractor that it shall be paid via

the Bank Account, the Account Holders shall arrange for the new sub-contractor to sign a deed of adherence in the form set out in Schedule 1 to this Deed.

- 4.2. The Parties agree that, in signing the deed of adherence, the Account Holders are signing on behalf of themselves and as agent for each of the Sub-Contractors. Each Sub-Contractor agrees to be bound by the terms of any deed of adherence validly executed by the Account Holders on behalf of all the Parties.

5.0 Removal of Sub-Contractor

- 5.1. If prior to the expiry of the Term a Sub-Contractor ceases to be involved in the Project for whatever reason (including but not limited to the termination of its Sub-Contract), the Account Holders shall arrange for the payment out of the Bank Account to the Sub-Contractor of any monies held on trust for the benefit of that Sub-Contractor.
- 5.2. On payment of all the monies due to it from the Bank Account in accordance with clause 5.1 above the Sub-Contractor shall cease to have any further rights and/or interests in the Bank Account.

6.0 Confidentiality

- 6.1. No party shall use and/or disclose any confidential information, which is acquired by it about another party's business and/or given to it by another party to this Deed except in the proper performance of this Deed.

7.0 Termination

- 7.1. This Deed shall continue for the Term, subject to early termination in accordance with clause 7.2 below.
- 7.2. This Deed shall immediately terminate if:
 - 7.2.1. the parties agree in writing that the Deed should terminate; and/or
 - 7.2.2. the Contract terminates and all monies have paid out from the Bank Account.
- 7.3. On termination of this Deed the Account Holders undertake to ensure all monies held on trust for the benefit of the Contractor and/or the Sub-Contractors and held in the Bank Account are promptly paid to the relevant parties (less any outstanding bank charges and expenses).

8.0 General

- 8.1. This Deed contains the whole agreement between the Parties and it supersedes any prior written or oral agreement between them and is not affected by any other promise, representation, warranty, usage, custom or course of dealing. The parties confirm that they have not entered into this Agreement on the basis of any representation that is not expressly incorporated into this Agreement. Nothing in this Deed shall exclude liability for any fraudulent statement or act made prior to the date of this Deed.

- 8.2. No waiver by any Party of any breach of this Agreement shall be considered as a waiver of any subsequent breach of the same provision or any other provision.
- 8.3. The invalidity, illegality or unenforceability of any of the provisions of this Deed shall not affect the validity, legality or enforceability of the remaining provisions of this Deed.
- 8.4. No Party shall be liable for any delay or failure in performing its obligations under this Deed as a result of reasons beyond its reasonable control, including but not limited to acts of God, war, flood, fire, labour disputes, sub-contractor delays, strikes, lock-outs, riots, civil commotion, malicious damage, explosion, governmental actions and any other similar events. Failure to make payment due to insufficient funds in the Bank Account is not a force majeure event.
- 8.5. The Sub-Contractors are only liable for their own acts and/or omissions under this Deed and not the acts and/or omissions of any of the other Sub-Contractors. The Sub-Contractors are not jointly and severally liable under this Deed.
- 8.6. No party may assign its interest in this Deed (or any part) without the written consent of the other parties, such consent not to be unreasonably withheld or delayed.
- 8.7. None of the terms and conditions of this Deed shall be enforceable by any person who is not a party to it.
- 8.8. This Deed is governed by and interpreted in accordance with English law and the parties agree to submit to the exclusive jurisdiction of the English courts.

IN WITNESS OF THE ABOVE the parties execute this document as a Deed on the date written above.

Schedule 1: Deed of Adherence

THIS DEED OF ADHERENCE is dated the day of 2006

BETWEEN: -

- (1) **THE CURRENT PARTIES** (as defined below); and
- (2) **[INSERT NAME OF NEW SUB-CONTRACTOR]** (company number: {}) whose registered office is at {} (“New Party”).

Background

- A. The Current Parties have entered into a deed dated {} which governs the operation of a project bank account into which all monies due under the Contract (as defined below) are paid.
- B. The New Party is a sub-contractor of [insert name of contractor]. It has been agreed by [the Client and] the Contractor that the New Party will be paid for its work using the Project Bank Account (as defined below).
- C. This Deed of Adherence constitutes the terms upon which the New Party agrees to be paid for the work it performs for the Contractor via the Project Bank Account and sets out the New Party’s rights and interests in the monies contained within the Project Bank Account.

1.0 Definitions

1.1. In this Deed the following words have the following meanings:

“Admission Date”	means [insert date];
“Client”	means [insert name of client];
“Contract”	means the contract between the Client and the Contractor dated {} for [insert details of the project];
“Contractor”	means [insert name of contractor];
“Current Parties”	means the persons/organisations whose names are set out in Annex 1 to this Deed of Adherence being the current parties to the Deed;
“Deed”	means the Deed between the Current Parties dated {} which sets out the basis on which the Project Bank Account is to be operated; and
“Project Bank Account”	means the bank account held in the name of the Client and the Contractor at [Barclays Bank Plc] account number {} into which all monies due in respect of the Contract are to be paid.

2.0 Admission

- 2.1. The New Party will be added as a party to the Deed on the Admission Date.
- 2.2. The New Party agrees to be bound by the Deed in relation to the Current Parties as from the Admission Date as if the New Party was an original party to the Deed.
- 2.3. The Current Parties agree to be bound by the Deed in relation to the New Party as from the Admission Date as if the New Party was an original party to the Deed.

3.0 General

- 3.1. The Client and the Contractor are authorised by the remaining Current Parties to enter into and execute this Deed on behalf of all the Current Parties as their agent.
- 3.2. This Deed of Adherence is governed by English law and the parties agree to submit to the non-exclusive jurisdiction of the English Courts.

IN WITNESS OF THE ABOVE the parties execute this document as a Deed on the date written above.

ANNEX 1: THE CURRENT PARTIES

[insert details of the current parties to the Deed]

EXECUTED and DELIVERED as a DEED

by [INSERT NAME OF CLIENT]

acting by:

.....
Director

.....
Director/Secretary

EXECUTED and DELIVERED as a DEED

by [INSERT NAME OF CONTRACTOR]

acting by:

.....
Director

.....
Director/Secretary

EXECUTED and DELIVERED as a DEED

by [INSERT NAME OF NEW PARTY]

acting by:

.....
Director

.....
Director/Secretary

Schedule 2: Details

Client:	[insert name, address and company number of the Client].
Contractor:	[insert name, address and company number of the Client].
Sub-Contractors:	[insert names, addresses and company numbers for each sub-contractor who will be a party to this Deed].
Bank:	[insert details of the bank which will operate the project bank account].
Contract:	Contract between (1) the Client and (2) the Contractor in respect of the Project and dated [insert date] (contract reference number: {}).
Project:	[insert description of the purpose of the Contract and the works to be performed under it].

Schedule 3: Bank Mandate

EXECUTED and DELIVERED as a DEED

by [INSERT NAME OF CLIENT]

acting by:

.....

Director

.....

Director/Secretary

EXECUTED and DELIVERED as a DEED

by [INSERT NAME OF CONTRACTOR]

acting by:

.....

Director

.....

Director/Secretary

EXECUTED and DELIVERED as a DEED

by [INSERT NAME OF SUB-CONTRACTOR]

acting by:

.....

Director

.....

Director/Secretary

Use the following execution wording if dealing with an individual:

SIGNED and DELIVERED as a DEED

by [INSERT NAME]

in the presence of:

Witness signature:

Witness name:

Witness address:

.....

Witness occupation:

APPENDIX B: STANDARD TRAINING AGENDA

- Introduction, aims and rules
- What is a Project Bank Account (PBA)?
- Where has it been done before?
- How do we set up a PBA?
- How do we operate a PBA?
- Roles and Responsibilities
- Which projects are appropriate?
- Which members of the supply chain should be included?
- Lessons learnt from previous experience
- Summary/Final Questions

APPENDIX C: TYPICAL PAYMENT PROCESS



ACKNOWLEDGEMENTS

OGC would like to acknowledge various people and organisations of the Public Sector Construction Client's Forum Fair Payment Working Group:

- Chair - Archie Robertson (Highways Agency)
- Secretariat - Frank Wells (OGC)
- Civil Engineering Contractors Association
- Specialist Engineering Contractors' (SEC) Group
- The Association of Consulting Engineers
- Constructing Excellence - Local Government Task Force
- Highways Agency
- Department for Business, Enterprise and Regulatory Reform
- Balfour Beatty Civil Engineering
- Tesco Stores Ltd
- National Specialist Contractors Council
- Defence Estates
- Construction Products Association
- Constructing Excellence



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