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Project Bank Accounts

Bid information and conditions of bidding

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# Introduction

From 1 July 2019, all capital works contracts entered into by the Corporation with a value of $1,350,000 (ex. GST) or greater are required to implement Project Bank Accounts (**PBA**).

This Project Bank Account Bid Information and Conditions of Bidding outline important information and key documents regarding the PBA regime.

Unless otherwise stated, defined terms in Part A have been used consistently in this Part H and the term Bidder and head contractor are used interchangeably.

If the Bidder has any questions or queries, the Corporation is happy to facilitate a meeting with the Bidder to discuss these. Bidder should contact the relevant Contract Consultant to arrange a meeting. Please note that no matters other than the PBA regime will be discussed at these meetings.

# Acknowledgement by Bidders

The Bidder acknowledges that in preparing its submission, the Bidder has reviewed and taken into account the information in this Part H.

By submitting a bid:

1. the Bidder, and any relevant third parties, are prepared to enter into all of the agreements, deeds and proposed amendments set out in this Part H, without amendment; and
2. the Bidder acknowledges and agrees that no negotiation or clarifications will be permitted to the terms of the agreement, deeds and proposed amendments set out in this Part H.

**Bidders must notify all potential Subcontractors that this project will be subject to a PBA regime and provide them a copy of this Part H.**

# What is a PBA?

A PBA is an alternative payment mechanism that facilitates direct and nearly simultaneous payment to a head contractor and its subcontractors (if the subcontract value is greater than $20,000 (inclusive of GST)).

A subcontractor with a contract value under $20,000 (inclusive of GST) and any supplier of goods or materials to the head contractor, regardless of value, can also participate in the PBA if they chose.

PBAs operate through a trust arrangement and improve security of payment, subject to certain criteria being met.

# How does this affect the Project?

The PBA regime should not greatly affect projects.

Monthly payment claims will still be made by the head contractor, and will be assessed and certified by the Superintendent or the Principal (depending on the contract model) in the usual way.

The main difference is with the payment arrangements with the head contractor. Rather than payments being made into a head contractor’s ordinary bank account by the Principal, payments will be routed through a specific trust account that is established by the head contractor for the particular project (i.e. the PBA).

The Principal pays money into the PBA and the relevant bank distributes the funds in accordance with the head contractor’s payment instructions, which are based on the head contractor’s subcontract and supply arrangements. The head contractor and all participating subcontractors and suppliers will receive payments directly and simultaneously from the PBA.

The PBA will also hold any retention moneys arising under the terms of the head contractor’s subcontracts. Retention amounts will be detailed in the payment instructions and will be released when the head contractor is obligated to return them, or entitled to access the moneys in accordance with the relevant subcontract.

Retention money is not due and payable into the PBA if the head contractor has an alternative security arrangement with its subcontractors and/or suppliers (e.g. bank guarantees).

# Who has to participate in the PBA?

**All subcontractors who have a contract with the head contractor that is valued at equal to or greater than $20,000 (inclusive of GST) will automatically become ‘beneficiaries’ and will have their payment claims paid through the PBA.**

The $20,000 monetary threshold is taken to be the combined total for works completed by the subcontractor in relation to the contract being undertaken by the head contractor.

Subcontractors performing work valued at less than this amount will have the ability to opt in by notifying the head contractor by completing an ‘Opt-in Notice’. Where the value of the works completed by a subcontractor increases to greater than $20,000 they will automatically become ‘beneficiaries’ from that point on.

Material suppliers will not automatically participate in the PBA, however they will also have the ability to opt in by notifying the head contractor by completing an ‘Opt-in Notice’ that they wish to do so.

For more detailed information of what constitutes a ‘subcontractor’, ‘supplier’ and ‘beneficiary’, refer to the defined terms and interpretation section of the PBA Trust Deed Poll, included in this Pack.

# Is there a change to documentation?

When a PBA is used on a project, the head contractor will be required to execute two additional documents in addition to an amended Contract. These are:

1. the PBA Trust Deed Poll – which is an agreement between the Principal and the head contractor that sets out how the PBA will operate; and
2. the PBA Agreement – which is an agreement between the Principal, the head contractor and the bank (that establishes the PBA) and sets out how the PBA will operate.

Where a head contractor has a bank loan from a bank or other financial institution (no matter what that loan is for) and the provider of that loan has taken general security over the head contractor’s assets, that bank or financial institution will also need to provide a signed document to release the PBA from their security, or to preserve the PBA ahead of their security.

If the Bidder is successful, the Bidder will need to download these documents, complete then and returned executed copies to the Principal.

# How does this trust arrangement work?

The head contractor makes its usual payment claims for the works, and the Principal makes its usual progress payments (being the amounts certified by the Superintendent). However, instead of progress payments being made into the head contractor’s nominated bank account, they are paid into the PBA. The PBA is also a bank account in the Contractor's name, but it is a "trust" account.

The trust is established through the PBA Trust Deed Poll which is signed by the head contractor and is also signed by the Principal. This deed poll sets the rules of the trust. The beneficiaries of the trust are the head contractor itself and the subcontractors.

For the trust structure to work, the funds in the PBA are said to be held by the head contractor for the beneficiaries on a ‘trust’ basis.

The Corporation does not have a preference as to which bank manages the PBA. However, Government of Western Australia currently uses the Commonwealth Bank of Australia for its PBA projects.

Before the Principal pays for the works each month, the head contractor will be required to submit ‘Progress Payment Instructions’ to the bank, which allocate the certified amount between the head contractor and participating subcontractors, and allocate the subcontractor retentions (which are held in the PBA until they can be released under the terms of the relevant subcontract). At the same time, the Contractor will need to provide the Principal with a Progress Payment Report (a template of this has been included as **Attachment F**).

These Progress Payment Instructions are very important and fulfil a number of functions. Provided that the Progress Payment Instructions are correct and valid, they:

1. trigger the obligation of the Principal to pay the amount certified by the Superintendent into the PBA (although the Principal retains some rights not to pay the full amount if there is good reason not to);
2. identify the relevant subcontractors, their allocation and their account details (to allow the bank to disburse funds out of the PBA);
3. specify the retention amounts (as the retention amounts between the head contractor and participating subcontractors will be held on trust in the PBA until they can be released under the terms of the relevant subcontract); and
4. are provided to the bank (that holds the trust account) and act as an irrevocable direction to the bank to pay the amounts in the PBA to the head contractor and the subcontractors (in the allocated amounts).

The Contract will acknowledge in the head contract that payment out of the PBA is a ‘good discharge’ of the payment obligation of the Principal to the head contractor.

This structure maintains the debtor/creditor relationship that exists under the Contract (and the subcontracts) and provides for a payment mechanism only. The PBA is not intended to affect turnover reporting or interfere with ordinary contractual relationships.

# Who establishes this bank account?

The head contractor is responsible for establishing the PBA. As previously noted the Government of Western Australia has pre-agreed PBA documentation with the Commonwealth Bank of Australia but does expect to make similar arrangements with other banks in due course.

The bank account will be established by virtue of the Principal, the head contractor and the bank entering into the PBA Agreement. The PBA Agreement requires the bank to acknowledge that the account is a trust account and therefore it must act on the payment instructions (as received from the head contractor) and give effect to them.

As the PBA account is a zero balance account, payments out of the PBA will effectively be made within the same day as the funds are received by the PBA account from the Principal or the head contractor. The effect of this will be to enhance certainty of payment timeframes for parties that participate in the PBA.

# What is the PBA Deed Poll?

A deed poll is a type of legal document that can be executed by one party, and which gives benefits to other parties (in this case, the beneficiaries of the trust) despite the fact that the other parties have not signed the document. The Principal will also sign the PBA Trust Deed Poll for certain limited reasons that do not affect the trust.

In the case of the deed poll used to create the PBA trust, the beneficiaries are the head contractor itself and the 'subcontractors' to that head contractor. As mentioned above, the beneficiaries can also include subcontractors whose contracts are for less than $20,000 (including GST) or 'suppliers' of goods or materials. All beneficiaries are able to enforce the terms of the deed poll in their favour, even though they are not a party to the document.

# What about the Personal Property Securities Act?

The *Personal Property Securities Act 2009* (Cth) (“PPSA”) applies to personal property and security interests. It is possible that the PPSA will apply to moneys in the PBA (both the regular progress payments for works undertaken and to any subcontractor retentions).

To ensure their interests (if any) are protected, head contractors and participating subcontractors should seek their own independent advice about the PPSA and their ability to register any interest in the PBA. It is likely that registering their interests in the PBA on the Personal Property Securities Register subcontractors will enhance their security of payment.

# What are the specific extra documents to be entered into?

Where applicable to a Request for Tender, the successful Respondent will be required to accept and enter into a number of additional documents, as a condition of the Contract.

**The Corporation will not be negotiating the terms of the documents below or the amendments to the Corporation’s Australian Standard contracts. By lodging a bid, Bidders are confirming that they are prepared to execute the below documents without amendment.**

**PBA Trust Deed**

The PBA Trust Deed Poll is contained in **Attachment A** of this Pack.

As a condition of the Contract, the PBA Trust Deed Poll must be signed by the Contractor. The Principal will also sign it. Subcontractors do not have to sign the PBA Trust Deed Poll and will automatically become beneficiaries of the trust whether or not they are known or appointed at the time of the contract award. Subcontractors whose contract for the Project is less than $20,000 (including GST) must complete an ‘Opt-in Notice’ if they wish to be included in the trust.

**PBA Agreement**

The PBA Agreement is contained in **Attachment B** of this Pack.

As a condition of the Contract, the Contractor will be required to establish a bank account (this is the trust account) which is done through entering into the PBA Agreement. This agreement governs the operation of the bank account with the bank. Currently the account (for this Project) is to be established with the Commonwealth Bank of Australia. The terms of the PBA Agreement must be in place at the same time as the PBA Trust Deed Poll comes into effect.

The Principal will be the last party to sign the PBA Agreement and it shall be supplied to the Principal duly executed by the others parties as a condition of the Contract.

**Deed of Release & Priority Deed Poll**

The Deed of Release & Priority Deed Poll is contained in **Attachment C** of this Pack.

As the PPSA may impact on the PBA arrangements above the Contractor will need to identify any financial institutions that have security interests registered over their assets pursuant to the PPSA. The trust account arrangements implemented pursuant to the PBA Trust Deed Poll and PBA Agreement will need to be recognised by the registered holder of any such security interests and rank ahead of, or sit outside, any existing registered security interests of those financial institutions.

The Contractor will need to supply a fully executed Deed of Release or Priority Deed Poll, to give effect to the payment arrangements under the Contract.

**Amendments to Australian Standard Conditions of Contract**

The Corporation’s Australian Standard contract templates will be amended to facilitate the PBA regime.

The relevant amendments to AS4000 and AS4902 templates are found in **Attachment D** of this Pack. Equivalent amendments will also be imposed for AS4905, AS4906 and AS4910 templates.

# Other matters

1. **PBA Amendments to Subcontracts**

Conditions are provided in **Attachment E** of this Pack as a suggestion to head contractors and subcontractors as to what they may choose to incorporate in subcontracts where a project bank account is to be utilised. Any decision to use these provisions is at the risk of the head contractor and subcontractor and the Corporation does not take any responsibility in respect of the head contractor’s reliance or acceptance of the terms.

1. **No reliance**

The Principal and the State Government recommend that each party seek its own legal advice on matters connected with project bank accounts and contracting generally and accepts no responsibility to any head contractor or any subcontractors for the documents referred to in (or the contents of) this Pack (including, without limitation, the contents of any Attachments).

1. **Principal’s right to vary or cancel**

Despite the contents of this Request, the Principal reserves the right in its absolute discretion (for any reason whatsoever) to:

* cancel, amend or supplement this Request, or modify the manner in which the PBA is to be implemented as part of the Contract; and/or
* make any additions, deletions or amendments to any documents contained in any Addenda to this Request, prior to execution of the Contract.

The Principal reserves the right in its absolute discretion to determine, at any time prior to the award of the Contract, whether the payments to the Contractor in relation this project will or will not occur through a Project Bank Account.