

# **Building Industry Fairness Reforms: Project Bank Accounts**

## **Head Contractors Guidelines**

December 2019

# Table of Contents

|  |           |
|--|-----------|
| <b>Table of Contents</b> .....   | <b>2</b>  |
| <b>Introduction</b> .....  | <b>3</b>  |
| <b>Key terms</b> .....   | <b>3</b>  |
| <b>Overview of project bank accounts</b> .....   | <b>3</b>  |
| <b>When is a project bank account required</b> .....   | <b>4</b>  |
| <b>PBA threshold self-assessment tests</b> .....   | <b>4</b>  |
| Threshold test 1: Is it a contract for ‘building work’? .....  | 4         |
| Threshold test 2: Is the total value of the contract price between \$1 million and \$10 million? ..... | 5         |
| Threshold test 3: Will Subcontractors be engaged under the contract? .....                             | 5         |
| <b>Variations and amendments during a building contract</b> .....                                      | <b>6</b>  |
| <b>Related entities</b> .....  | <b>7</b>  |
| <b>How do project bank accounts work?</b> .....  | <b>7</b>  |
| <b>Entering into the first subcontract</b> .....   | <b>8</b>  |
| <b>Establishing a PBA—what you need to know and do</b> .....   | <b>9</b>  |
| When and how you must set up the PBA .....   | 9         |
| Principal’s viewing and oversight of a PBA.....  | 9         |
| Features of project bank account .....   | 9         |
| What a PBA cannot be used for .....  | 10        |
| When can the PBA account be closed? .....  | 10        |
| <b>How payments will work using a PBA</b> .....  | <b>11</b> |
| <b>Payment Instruction (PI) and making payments from a PBA</b> .....                                   | <b>11</b> |
| <b>What you must do with retention amounts</b> .....   | <b>12</b> |
| <b>Liability to pay an amount to a subcontractor</b> .....   | <b>13</b> |
| <b>Disputes over progress payments</b> .....   | <b>13</b> |
| What is a payment dispute? .....   | 13        |
| What you must do with disputed amounts .....   | 14        |
| <b>Termination or insolvency of Head Contractor</b> .....  | <b>15</b> |
| <b>Reporting and record keeping</b> .....  | <b>16</b> |
| <b>Notices required under the BIF Act</b> .....  | <b>16</b> |
| <b>Record keeping</b> .....  | <b>17</b> |
| <b>Employment of agents and delegation of responsibilities</b> .....                                   | <b>17</b> |
| <b>Next steps</b> .....  | <b>17</b> |
| <b>Attachment 1: Decision tree – when is a PBA required?</b> .....                                     | <b>18</b> |
| <b>Attachment 2: PBA establishment and payment process flowchart</b> .....                             | <b>19</b> |
| <b>Attachment 3: Head Contractor’s PBA checklist</b> .....   | <b>20</b> |

## Introduction

The objective of the *Building Industry Fairness (Security of Payment) Act 2017* (the BIF Act) is to improve security of payment in the building and construction industry by providing for effective, efficient and fair processes for securing payment. One of the ways the Act will achieve this is through the introduction of project bank accounts for certain State Government building and construction projects. Other key reform measures in the BIF Act, including streamlined and modernised processes for progress payments, adjudication and subcontractor's charges, will also lead to faster and fairer processes for securing payment, and are expected to commence in the coming months.

This guideline is produced by the Department of Housing and Public Works (HPW) to explain the requirements for project bank accounts (PBAs) on certain Queensland Government building projects.

This guideline should be read by building contractors seeking to work on government building projects.

There are additional separate guidelines for Subcontractors seeking to work on government building projects and Queensland Government officers (or their agents) involved in the procurement and management of building projects.

### Key terms



## Overview of project bank accounts

The Queensland Government has introduced the project bank account requirement to improve the security of payment for Subcontractors in the building and construction industry. From 1 March 2018, a PBA will be required for certain Queensland Government building projects. It is important that all persons involved in building and construction projects are aware of their obligations set out in:

- chapter 2 of the *Building Industry Fairness (Security of Payment) Act 2017* (the BIF Act)
- the *Building Industry Fairness (Security of Payment) Regulation 2018* (BIF Regulation)

A project bank account is comprised of three bank accounts that operate as a trust for building contracts, where the Head Contractor is the 'trustee', and the Head Contractor and first-tier Subcontractors are 'beneficiaries' to that account. Progress payments, retention monies and disputed amounts are held in the PBA trust accounts.

It is important to note the Head Contractor is the party contracted to carry out the building work as identified in the building contract.

The Principal (the State Government in Phase 1) makes progress payments into the PBA general trust account, instead of the Head Contractor's regular bank account. Through a payment instrument, the Head Contractor instructs the financial institution to pay itself and the subcontractor as beneficiaries and/or transfer amounts into the other two PBA trust accounts.

## When is a project bank account required

The PBA requirements will only apply to certain 'building work' projects tendered after 1 March 2018 where the 'Principal' is the State of Queensland (or a statutory authority if it has elected to require a PBA). Project bank accounts are only required for first-tier subcontracts. Second and third-tier subcontracts (sub-sub-contracts) do not require project bank accounts to be established (unless the first-tier Subcontractor is a related entity of the Head Contractor, in which case a project bank account is also required for the second-tier subcontract).

There are three 'threshold tests' that need to be considered to determine if a project bank account is or will be required for a contract. When ALL THREE thresholds are met, a PBA is required. While it is the responsibility of the Head Contractor to determine whether a PBA is, or will be, required, the Principal (or Principal's agent) may provide general advice to support this determination and guide contractors through the PBA tender documentation.

A decision tree is included in Attachment 1 to guide Head Contractors through the threshold assessment process.

If specific advice about the contract or PBA applicability is required, Head Contractors may need to seek independent legal advice.

Note that for the first phase of PBA implementation, the Principal can only be the State Government or a State Government authority which has opted in.

### PBA threshold self-assessment tests

#### Threshold test 1: Is it a contract for 'building work'?

A project bank account may be required if the building contract is for the carrying out of activities defined under the BIF Act as '**building work**', and when **more than 50 per cent** of the contract price is for that type of 'building work'.

'**Building work**', for the purposes of requiring a PBA, includes the following activities:

- erection or construction of (and any related site work for) a building
- the renovation, alteration, extension, improvement or repair of (and any related site work for) a building
- the provision of (and any related site work for) lighting, heating, ventilation, scaffolding, air-conditioning, water supply, sewerage or drainage for or in connection with a building
- the preparation of plans or specifications (including work performed by architects, engineers and licenced surveyors) and the carrying out of completed building inspections for the building work
- carrying out of fire protection, termite inspections and investigations, contract administration, building certification or the assessment of energy efficiency of or for a building.

For Chapter 2 of the BIF Act, a '**building**' means a fixed structure that is wholly or partly enclosed by walls or is roofed.

'Building work' does not include civil, engineering and infrastructure projects such as bridges, roads, tunnels and ports; public transport infrastructure such as busways, railways and associated bus/rail stations; or an authorised activity under a resource authority. These types of projects DO NOT require a PBA.

Often civil, infrastructure or transport projects will include activities which are covered under the definition of 'building work'. In these cases, the 'more than 50 per cent of contract price' test should guide decision making on whether a PBA is required.

‘Building work’ also does not include activities which are made exempt under Part 2, Division 2 of Chapter 2 of the BIF Act (**exempt building work**) including:

- Contracts for **residential construction work** (except for residential construction contracts for three or more living units where the Department of Housing and Public Work is the Principal). For example, exempt building work includes:
  - construction of a duplex, with each unit containing two bedrooms by the Department of Housing and Public Works
  - Queensland Police Service residential accommodation where the Public Safety Business Agency is the Principal.
- Contracts for **maintenance work** where maintenance work includes ongoing restoration, repair or replacement of a building or part of a building (and excluding building refurbishment and capital improvements). For example:
  - service agreement for water treatment management.
- Government contracts advertised or tendered before 1 March 2018.

Contracts covering only these types of exempt building activities DO NOT require a PBA. However, if a contract was for both included building work and exempt building work (for example, a project for the installation of new elevator and disability access facilities at a town hall and the ongoing maintenance and servicing for the lift), the ‘more than 50 per cent of contract price’ test should guide decision-making on whether a PBA is required.

| Examples of building work   | Examples of work that is not building work   |
|---|--|
| <ul style="list-style-type: none"> <li>• Refurbishment of a high school home economics block</li> <li>• Public amenity building renewals</li> <li>• Administrative offices roof replacement</li> <li>• Early education centre chilled water air-conditioning upgrade</li> <li>• Alterations to a courthouse</li> <li>• Construction of a sports clubhouse.</li> </ul> | <ul style="list-style-type: none"> <li>• Extension of a public shared pathway</li> <li>• Dam upgrades</li> <li>• Supply and laying of kerb and channel services</li> <li>• Wharf fender upgrade</li> <li>• Construction of sewer overflow management works</li> <li>• Weir repair and sluice gates upgrade</li> <li>• Car park upgrade</li> <li>• Pavement marking services</li> <li>• Demolition only of a building.</li> </ul> |

**Threshold test 2: Is the total value of the contract price between \$1 million and \$10 million?**

A contract for building work where the accepted contract price is between \$1 million and \$10 million (inclusive of GST) is a ‘PBA Contract’ and may require that a PBA be established if threshold test 3 is also satisfied.

**Threshold test 3: Will Subcontractors be engaged under the contract?**

A contract for ‘building work’ with a contract price between \$1 million and \$10 million (inclusive of GST) is a PBA contract only if the Head Contractor has or will engage at least one Subcontractor, other than a supplier, in relation to the work under the building contract.

However, a project bank account will not be required if the Head Contractor can prove there is less than 90 days between the date a PBA is required and the Date for Practical Completion for that project. Refer to Section 23 (8) of the BIF Act for more information.

A Subcontractor for a building contract means a Subcontractor for a first-tier subcontract. Generally, a ‘**supplier**’ (if under the subcontract they are only supplying goods or services without also carrying out building work and do not require a relevant licence to lawfully supply those goods and services), **is NOT considered** a Subcontractor for the purposes of requiring a PBA.

Only Subcontractors and Head Contractors can be paid as beneficiaries from a project bank account. Suppliers cannot be directly paid from the PBA. A Head Contractor is still, however, obligated to pay suppliers in accordance with existing contract and industry laws.

| Example of PBA contracts (all values incl. GST)  | Examples of contracts that are not PBA contracts (all values incl. GST)   |
|--|---|
| <ul style="list-style-type: none"> <li>• Busway lift modernisation works plus ongoing service and maintenance by Department of Transport and Main Roads with a contract price of \$1.8 million and the lift modernisation works' component is \$1.2 million (more than 50 per cent of the contract price). Note, the PBA will not be required for the ongoing service and maintenance after the modernisation work is complete.</li> <li>• Construction of 18, 2-bedroom apartments by the Department of Housing and Public Works with a contract price of \$3 million.</li> </ul> | <ul style="list-style-type: none"> <li>• Upgrade of an ambulance station by Queensland Ambulance Services where the accepted contract price is \$800,000.</li> <li>• Redevelopment of a surgical outpatient unit by a Hospital and Health Service that has not elected to require a PBA*.</li> <li>• New primary school construction by Department of Education and Training with a contract price of \$36 million.</li> <li>• Courthouse upgrade by Department of Justice and Attorney-General with a contract price of \$11 million.</li> </ul> <p><i>*If the HHS had decided to opt-in, then this project could be a PBA Contract subject to other thresholds being met.</i></p> |

### Variations and amendments during a building contract

The BIF Act provides for the inclusion of building contracts after amendment or variation. If there is a variation to the building contract, Head Contractors will need to consider whether these amendments cause the contract to become a 'PBA Contract'.

If a building contract did not require a project bank account be established at the outset, but the contract is amended in such a way that it then meets the conditions making it a 'PBA Contract', a project bank account will be required to be established from the point of the agreed amendment or variation.

An amendment or variation can include a change in scope of building work (e.g. adding an additional dwelling unit to a residential construction project or additional design work) or a variation to the contract value.

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*For example, a contract for building work (where Subcontractors are engaged) with an original value of \$900,000 is amended eight months into the contract period, with the variation increasing the contract value to \$1.25 million. The Head Contractor would need to establish a PBA within 20 business days after the variation was agreed and then ensure compliance with the BIF Act from that point onwards. (Note, the Act does not require retrospective compliance if a PBA is established because of contract variation or amendment).*

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Note however for an increase in the contract price that increases the total value over \$1 million (inclusive of GST), a PBA is only required where the accumulative price increase is 30 per cent or more of the original accepted contract price.

If a PBA has already been established and a contract amendment or variation then affects the thresholds, the PBA must remain in use. For example, if a variation increases the value of a PBA building contract from \$9.2 million to \$11 million (inclusive of GST), the requirement for a PBA continues irrespective of the increased contract price being greater than the upper price threshold of \$10 million.

## Related entities

The purpose of the related entity provisions is to ensure Head Contractors cannot use a corporate structure (e.g. subcontracting to a family member) to avoid paying actual Subcontractors through the PBA. The Act imposes particular obligations if parties to a contract and subcontract are 'related entities'. A person is a 'related entity' if:

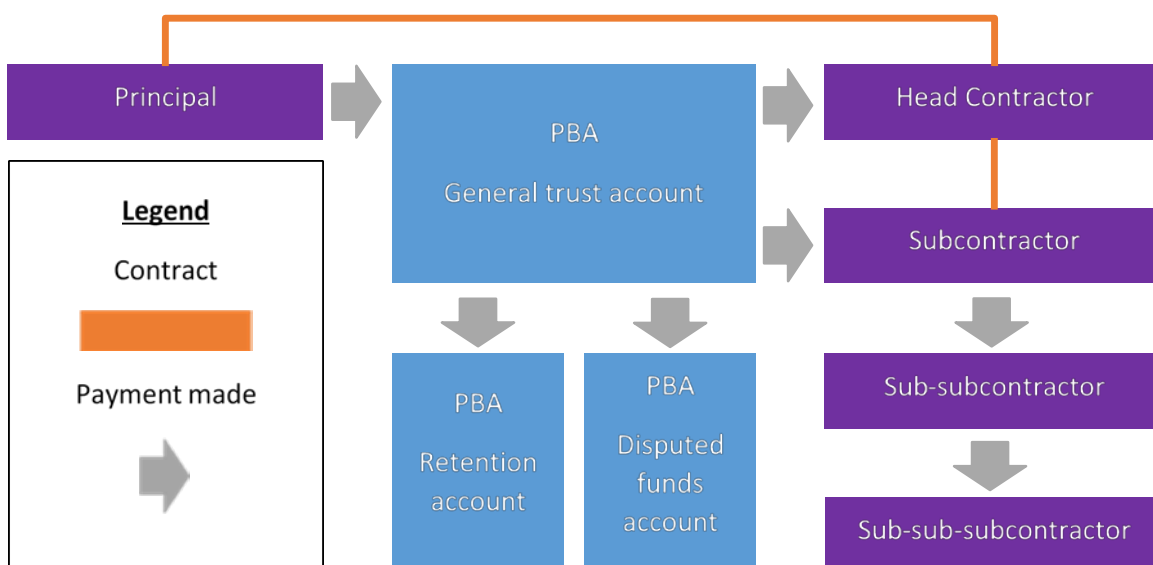
- for individuals, they are members of the same family (including the individual's spouse and a relation's spouse, parent or grandparent, child or grandchild, brother, sister, aunt, uncle, nephew or niece either by birth or marriage)
- for an individual and a corporation, the person is a majority shareholder, director or secretary of the corporation or its related body corporate, or the person has an interest of 50 per cent or more in the corporation
- for corporations, they are related bodies corporate.

Where a Head Contractor enters into a subcontract with a related entity, the Head Contractor must advise the Principal and the QBCC Commissioner using the approved form within 5 business days after entering into the subcontract.

Upon receipt of this notice, or after otherwise becoming aware that a Subcontractor is a related entity to the Head Contractor, the Principal must also advise the QBCC Commissioner that a related entity has been engaged under the subcontract.

If a related entity relationship exists, certain additional obligations will apply; refer to s19-s21 of the BIF Act.

## How do project bank accounts work?



Project bank accounts are trust accounts established with a financial institution operating in Queensland.

As defined in the BIF Act, each 'project bank account' comprises three trust accounts, being:

- **general trust account**—the account into which the Principal pays the certified (or scheduled) amount owing to the Head Contractor under the building contract
- **retention trust account**—the account which holds Subcontractor retentions until the retentions are to be returned to the Subcontractor or to be used by the Head Contractor under the subcontract



- **disputed funds trust account**—where amounts the subject of payment disputes are to be held. This account relates to the amount which is the difference between the amount the Head Contractor has scheduled to pay a Subcontractor and the amount instructed to be paid to the Subcontractor via the payment instruction (or the difference between the claimed amount and the amount instructed to be paid where the Head Contractor did not issue a payment schedule).

Amounts held in the retention and disputed funds trust accounts are to be identifiable as being held on behalf of a Subcontractor, or as being held in relation to a dispute with a Subcontractor.

## Entering into the first subcontract

The point at which the Head Contractor enters into the first subcontract under the building contract is the trigger for the requirement to establish a project bank account.

**Before** entering into a subcontract, the Head Contractor must advise the Subcontractor (using an approved form) that a PBA will be used for making payments and provide the Subcontractor with details of the financial institution at which the trust accounts are to be held.

*Note, if, due to a contract variation, a PBA is later required to be established, the Head Contractor must provide the Subcontractor with information about the project bank account within 10 business days of the contract amendment.*

**After** entering into a subcontract, the Head Contractor must provide to the Principal information about the subcontract including:

- name of the Subcontractor (i.e. registered business name and/or trading name)
- name of the Subcontractor's financial institution
- bank account name (i.e. the name of the account holder which could be the business name or private individuals/business owners)
- bank account details including BSB and account number.

This information must be provided using the approved form within:

- 5 business days of entering the subcontract, or
- if the Head Contractor entered into a subcontract before a project bank account is required to be established, within 5 business days after the project bank account is required to be established.

A separate form is required for each Subcontractor. Please note, it is the Head Contractor's responsibility to ensure that all Subcontractor information provided to the Principal is true, accurate and current, including assuring itself that the banking information is not false or fraudulent.

**During** the contract, if there is a change to the Subcontractor information, the Head Contractor must advise the Principal of the updated/changed information using the approved form within 5 business days of becoming aware of the changes.

*Note: In accordance with clauses 9.2.1 and 9.2.6 of the Special Conditions of Contract, a Head Contractor must not subcontract any of the work or allow a Subcontractor to assign or subcontract any of the work under the contract without the prior written approval of the Superintendent. Head Contractors must submit the required 'Request for approval to subcontract form' to the superintendent **before** engaging Subcontractors. This is a contractual obligation and does not relate or affect in any way the Head Contractor's obligations under the BIF Act.*



## Establishing a PBA—what you need to know and do

It is the responsibility of the Head Contractor to determine if a project bank account is required under the building contract, and then to also ensure the project bank account is established and used in accordance with the law. Significant financial penalties, and in some circumstances imprisonment, apply for failing to comply with the requirements for project bank accounts under the BIF Act.

### When and how you must set up the PBA

If a building contract provides for a date by which the project bank account must be established by the Head Contractor, then the project bank account must be established by that date. Otherwise, the project bank account must be established within 20 business days after entering into the first sub-contract.

Note: State Government standard contracts provide for the establishment of a PBA within 20 business days from acceptance of tender.

After opening a project bank account, the Head Contractor must give the Principal notice (using an approved form) stating the name of the trust account/s, name of the financial institution where the trust account is held, and the BSB and account number for the account/s of the PBA. This notice must be given within 5 business days. Notice must also be provided to the Principal (using an approved form) within 5 business days if there is a change to the name of a PBA trust account.

### Principal's viewing and oversight of a PBA

Head contractors must ensure the Principal (for Phase 1, is only employees and/or agents of State Government departments and statutory authorities) is provided with the information to enable electronic viewing access of the project bank account including:

- deposits of amounts to, and withdrawals from the trust accounts of the PBA and the descriptions of those transactions
- information relevant to the payment instructions given to the financial institution about the project bank account
- account payment reports.

The Principal will advise the Head Contractor of the officer/s to be given electronic viewing access. It is possible for the financial institution to provide electronic viewing access for more than one officer and to change and/or add officers viewing access as required.

### Features of project bank account

Head Contractors must ensure that the project bank account:

- consists of a general trust account, retention trust account and disputed funds trust account
- include the word 'trust' in the description of each of the accounts
- be set up for a specific contract only
- allow for the electronic uploading of the payment instructions (e.g. an ABA file).

When using a project bank account, the Head Contractor must ensure:

- deposits into the trust account are only made using electronic transfers
- withdrawals from the trust accounts and transfers between the trust accounts are only made using a payment instruction given to the financial institution
- payments from a Principal to the Head Contractor (and any other payment or deposit made by the Head Contractor) are deposited by electronic transfer into the accounts of the PBA
- any amount not paid into the general account for the PBA is deposited/transferred into the correct account as soon as possible after being received.

## What a PBA cannot be used for

The Head Contractor must also ensure:

- amounts and payments for any purpose other than paying the Head Contractor and/or a Subcontractor, paying amounts held as retention or the subject of a payment dispute, or paying an amount resulting from an adjudication, are not deposited into the project bank account
- amounts and payments are not withdrawn from the trust account for any purpose other than to pay an amount due to a Subcontractor beneficiary (including a payment made because of an adjudication), or for paying themselves a contracted amount; and that any amount withdrawn in error is returned as soon as possible to the trust account
- it does not withdraw an amount from a trust account to pay itself in excess of monies that they are themselves due (that is, excluding all monies for subcontractor work)
- it does not withdraw an amount from a trust account to pay itself unless there will be sufficient available funds after the withdrawal to pay all amounts due to Subcontractors at the time of the withdrawal (noting that an amount owing to a Subcontractor becomes 'due' when the payment schedule is issued, irrespective of the date the amount is payable in accordance with the subcontract)
- amounts paid or required to be paid into a trust account are not used for payment of Head Contractors' debts or taken in execution under a court order for the benefit of a Head Contractor's creditors
- amounts held in a trust account for the PBA are not invested (this does not apply to interest earned on an amount held in the trust account)
- no entitlement to a Subcontractor's charge exists to the extent it relates to money held in trust under the project bank account.

The Head Contractor is not entitled to reimbursement or payment from the project bank account for fees or costs incurred in administering the project bank account. However, the Head Contractor is entitled to any interest earned on amounts held in a trust account; and may withdraw an amount equal to the interest earned once every 12 months or on the authorised closure of the PBA.

Significant financial penalties, and in some circumstances imprisonment, apply for failing to comply with the requirements for project bank accounts under the BIF Act.

## When can the PBA account be closed?

The Head Contractor may 'dissolve' the project bank account only when:

- there are no longer any Subcontractor beneficiaries for the project bank account (i.e. when all amounts the Head Contractor is liable to pay the Subcontractor have been paid in connection with the subcontract, including retention amounts and disputed amounts), OR
- if the only remaining work to be carried out under the contract is for maintenance (where maintenance work does not include any work for which a retention amount has been withheld in connection with a subcontract).

There are significant penalties for dissolving a project bank account while it is still required for a building contract.

**Before dissolving** the project bank account, the Head Contractor must provide written notice of its intent to dissolve the PBA at least 5 business days before the three accounts are closed. The Head Contractor must also provide to the Principal evidence that demonstrates the PBA is being dissolved in accordance with the BIF Act (i.e. a printed copy of the balance sheet showing the balances in each of the PBA's three trust accounts).

The project bank account is 'dissolved' by closing the three PBA trust accounts. **After closing** the accounts of the PBA, the Head Contractor must within 5 business days give notice to the Principal, via the approved form, that the PBA trust account/s have been closed.

When dissolving the project bank account, the Head Contractor may pay itself any interest earned on the account to which the Head Contractor is entitled under s 44, and any remaining balance in the account which is not otherwise owing to another person.

When closing a PBA, the Head Contractor should be aware that it has an obligation under the BIF Act to ensure written records of all the PBA transactions are retained for a minimum of seven years.

## How payments will work using a PBA

The Head Contractor will be entitled to make progress claims to the Principal in accordance with the building contract and other building legislation. Importantly, there is not any notable change to the way claims for progress payments both between the Principal and the Head Contractor, and between the Head Contractor and Subcontractors, are made.

The difference for Head Contractors is that amounts to which they are entitled under the contract will be received via the project bank account; and amounts owed to Subcontractors and Head Contractor will be paid from the project bank account. The diagram at Attachment 3 shows the process for claims and payments.

### Payment Instruction (PI) and making payments from a PBA

The payment instruction is a direction to the bank to pay Subcontractors and the Head Contractor amounts due from the amount held in the project bank account and/or transfer amounts between the accounts of the PBA. Payment instructions, which are used by banks to allow for batch transactions, can be generated using most accounting software packages or the online customer platforms of the financial institutions.

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*Note: Depending on the financial institution, payment instructions can be known as ABA files, Cemtext files, BECS files, payment files, direct entry (DE) files or pay anyone files. These files allow for batch processing of multiple payments. Most banking platforms provide the option of manually creating payment file using a multiple pay anyone function.*

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As soon as practicable after uploading a payment instruction to the financial institution, the Head Contractor must ensure a copy of the following information contained in the payment instruction is given to the Principal:

- name of each payee or person (e.g. Subcontractor, Head Contractor)
- name of the payee's or person's account
- bank account details (name of financial institution, BSB and account number)
- amount to be paid to the person or an account (including amounts paid to retention or disputed funds trust accounts)
- date the payment has been or is to be paid.

If the payment instruction includes a payment to a Subcontractor, the Head Contractor must also provide the Subcontractor beneficiary with a copy of the instruction information including:

- amount to be paid to the Subcontractor (including amounts paid to retention or disputed funds trust accounts for or on behalf of the Subcontractor, if any)
- name of the account into which the amount has been paid
- bank account details (name of financial institution, BSB and account number)
- date the payment has been or is to be paid.

Head Contractors should be aware that the Principal is required to review the copy of the instruction information against information about Subcontractors previously advised under the *Section 50 Notice of Subcontractors*. The Principal must report any discrepancies to the QBCC Commissioner, who may then investigate the matter further.

When making payments from the trust account, the Head Contractor must be aware of the following obligations:

- if there will be insufficient funds available in the PBA trust accounts to pay an amount due to a Subcontractor, the Head Contractor is required to immediately top-up the trust account with an amount equal to any shortfall
- if there are insufficient funds available in a trust account, the Head Contractor must not pay itself or make a prescribed payment until the Subcontractor's amount is paid in full (except where it is to make a payment ordered by a court or for an adjudication)
- if there are two or more Subcontractor beneficiaries due to be paid an amount from the trust account at the same time **AND** there are insufficient funds available to pay each in full **AND** the Head Contractor is unable to top-up the account to cover the shortfall, the Subcontractors should be paid a pro-rata amount (i.e. reduce the amounts due by an equal proportion).

*Note that in this circumstance, the Head Contractor may be in breach of its legal and contractual obligations to pay Subcontractors amounts owed when due, and Subcontractors may be able to lodge a complaint with the QBCC and/or commence legal action to recover unpaid amounts.*

## What you must do with retention amounts

Where a subcontract provides for retention money to be withheld from progress payments, the Head Contractor will retain a percentage of each payment otherwise due to the Subcontractor as retention money (security for performance). The Head Contractor must ensure these retention amounts are held only in the PBA retention trust account.

The Head Contractor must direct, via a payment instruction, the retention amount into the retention trust account of the PBA (at the same time the progress payment is directed to the Subcontractor) and ensure that amount is **identifiable** as being held for the Subcontractor beneficiary entitled to that amount. A copy of the payment instruction information will also be provided to the Principal and the Subcontractor.

In the event that a PBA is not established until after a retention amount is withheld from a Subcontractor, the Head Contractor must ensure that all retention amounts still withheld must be paid into the PBA's retention trust account within 5 business days of the PBA being established. The Head Contractor must give written notice of the deposit to the Subcontractor from whom the money is withheld as soon as practicable and state the amount and date of the deposit.

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*Note: What is meant by making an amount 'identifiable'?*

*Amounts held in the retention trust account and disputed funds trust account of the PBA are required to be 'identifiable' as being held for the Subcontractor beneficiary entitled to that amount or as being held in relation to a dispute with a Subcontractor. The 'reference' or 'description' against the amount in the payment instruction (and against the transaction history in the account) must make reference to a Subcontractor (e.g. Include 'Retention - Subcontractor Name' or a suitable abbreviation e.g. 'Retn – Subcontractor initials' in the transaction description).*

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The following example sets out how retention amounts will be allocated to the retention trust account:

*Example:*

- A subcontract has a subcontract price of \$100,000.
- Under the subcontract, there is a cash retention of 10 per cent of each progress payment until 5 per cent of the total contract value is held.
- The first progress payment due to the Subcontractor is \$10,000.
- In respect of that first progress payment, the Head Contractor will direct payment to the Subcontractor out of the general trust account (via payment instruction) of \$9,000 and will direct payment to the retention trust account (via the payment instruction), in the name of that Subcontractor, of \$1,000.

Amounts held in the retention trust account of the PBA must not be withdrawn except in accordance with the subcontract or for any of the following reasons:

- to pay the Subcontractor an amount withheld in connection with the subcontract
- after the end of the defects liability period for the subcontract, to pay for the correction of defects or to secure the performance of a Subcontractor
- to pay another Subcontractor engaged by the Head Contractor to correct defects or omissions in the subcontracted work if the payment is also made in accordance with the related subcontract
- to make a payment ordered by a court.

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*Note: Withdrawals, transfers and payments of retention amounts*

*As outlined above all withdrawals/payment from, and transfers between, the PBA trust accounts may only be made using a payment instruction, and all payment instructions must be notified (by way of a copy of the payment instruction information) to the Principal and relevant Subcontractor beneficiary as soon as practicable after it is given to the financial institution.*

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## Liability to pay an amount to a subcontractor

Under the BIF Act, the Head Contractor for a PBA is liable to pay an amount to a Subcontractor beneficiary if any of the following apply in connection with a subcontract between the Head Contractor and the Subcontractor beneficiary:

- the amount is due to be paid to the Subcontractor in connection with the subcontract
- the amount is certified, or otherwise assessed, as payable to the Subcontractor under the subcontract
- the Head Contractor gives the Subcontractor a payment schedule for the amount
- under section 77 of the BIF Act, the Head Contractor is liable to pay the amount to the Subcontractor
- the Head Contractor must pay the amount to the Subcontractor because of an adjudication under chapter 3, part 4 of the BIF Act, of a disputed progress payment relating to the subcontract
- the Head Contractor must pay the amount to the Subcontractor because of a final and binding dispute resolution process
- a court or tribunal orders the Head Contractor to pay the amount to the Subcontractor.

## Disputes over progress payments

### What is a payment dispute?

Under the BIF Act, a **'payment dispute'**, for the purposes of the disputed funds trust account, occurs:

- after the Subcontractor makes a valid payment claim and the Head Contractor provides a payment schedule, if there is a difference between the amount that the Head Contractor scheduled to pay the Subcontractor beneficiary and the amount that the Head Contractor pays the Subcontractor beneficiary through the payment instruction. In this case, the **'disputed amount'** that must be transferred to the disputed funds trust account is the difference between the scheduled amount and the amount paid to the Subcontractor beneficiary (or the full amount the Head Contractor is 'liable' to pay if no payment instruction is made).



- After the Subcontractor makes a valid payment claim, and the Head Contractor does not provide a payment schedule to the Subcontractor beneficiary and does not pay the full amount claimed by the Subcontractor beneficiary (see note below). In this instance, the **'disputed amount'** that must be transferred to the disputed funds trust account by the Head Contractor is the difference between the amount claimed by the Subcontractor and the amount paid to the Subcontractor beneficiary (or the full amount the Head Contractor is **'liable'** to pay if no payment instruction is made).

*Note: in accordance with s 77(2) of the BIF Act, when a Head Contractor fails to serve a payment schedule on the claimant within the required time requirements, the Head Contractor becomes **'liable'** to pay the claimed amount to the claimant on the due date for the progress claim to which the payment claim relates.*

## What you must do with disputed amounts

The 'disputed amount' described above must be transferred either at the same time the Head Contractor prepares a payment instruction for a payment to the Subcontractor for the scheduled/claimed amount; or (if no payment instruction is made) when the Head Contractor becomes 'liable' to pay an amount to the Subcontractor (i.e. in accordance with payment terms provided for in the subcontract or in the BIF Act.

However, the Head Contractor does not need to transfer an amount to the disputed funds trust account if the amount to be transferred (the 'disputed amount') is more than the **'contract price'** for the subcontract. The contract price is the amount the Subcontractor is entitled, or reasonably entitled, to be paid in connection with the subcontract.

Amounts held in the disputed funds trust account must be **identifiable** as being held for the Subcontractor beneficiary that may be entitled to be paid the amount. A copy of the payment instruction information must also be provided to the Principal and the Subcontractor.

For example, if the Head Contractor issues a payment schedule to a Subcontractor for \$10,000 but proposes to claim a set-off and only pay \$6,000 to the Subcontractor, the Head Contractor must direct \$4,000 to be paid into the disputed funds trust account, and \$6,000 to be paid to the Subcontractor (assuming there is no retention amount to be paid into the retention trust account). The amount of \$4,000, now held in the disputed funds trust account, becomes the 'disputed amount'.

The Subcontractor beneficiary must also be notified of any payments made against their name into the disputed funds trust account. Providing a copy of the payment instruction information to the Subcontractor satisfies this obligation.

If, after the **'relevant day'**, any part of the disputed amount is still being held in the disputed funds trust account and is no longer the subject of an ongoing **dispute resolution process**, the Head Contractor must return the amount to the general trust account (or retention trust account if applicable), or return the amount to itself (if the Head Contractor deposited the amount in the disputed funds trust account). In this context, the **relevant day** means:

- The end of the **dispute resolution process** where the outcome cannot be appealed, or
- Where a **dispute resolution process** outcome can be appealed:
  - the last day by which the appeal may be commenced, or
  - if an appeal is commenced the day the appeal is decided, or
- if there is no **dispute resolution process** outcome, 60 days after the notice of transfer was given to the Subcontractor.

A **'dispute resolution process'** includes an adjudication by a court or tribunal, an adjudication of a payment claim as provided for under the BIF Act or arbitration as required for and conducted in accordance with a subcontract.

The Head Contractor must also ensure that the amount transferred into the disputed funds trust account is not paid to any person other than the Subcontractor beneficiary or to the Head Contractor in accordance with the outcome of a dispute resolution process. For a payment to the Head Contractor, if the outcome of a dispute resolution process may be appealed, the withdrawal must not be made until the conclusion of the period within which the appeal may be commenced or the conclusion of the appeal if one was commenced.

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*Note: Withdrawals, transfers and payments of disputed amounts*

*As outlined above, all withdrawals/payment from, and transfers between, the PBA trust accounts may only be made using a payment instruction, and all payment instructions must be notified (by way of a copy of the payment instruction information) to the Principal and relevant Subcontractor beneficiary immediately after it is given to the financial institution.*

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## Termination or insolvency of Head Contractor

If the Head Contractor is terminated for any reason or the Head Contractor enters into insolvency, the Principal *may* step into the role of trustee. A QBCC S54 Notice of Principal as Trustee form must be provided to the Head Contractor, the effect of which is to discharge the Head Contractor as trustee, appoint the Principal as trustee and divest the amounts held in trust under the PBA to the Principal as the appointed trustee.

Upon receipt of this notice, the Head Contractor should/must:

- inform the relevant financial institution that the Principal will act as trustee
- give the Principal the information required to act as trustee including details of the relevant financial institution, bank account details and contact information for each Subcontractor beneficiary
- give the Principal a copy of the written records of all transactions involving amounts held in the trust accounts of the project bank account as required to be kept under section 45(1) of the BIF Act.

After it is appointed as trustee, the Principal is required to open a Principal's general trust account, a Principal's retention trust account, and a Principal's disputed funds trust account (the **Principal's PBA**). The financial institution where the project bank account is held must transfer all amounts held in the Head Contractor's project bank account to the relevant accounts of the Principal's project bank account, ensuring where relevant amounts remain 'identifiable' in accordance with the BIF Act.

While the Head Contractor remains liable for any act or omission concerning the PBA and must continue to comply with its obligations under the Act, the Principal as trustee of the Principal's PBA must ensure it complies with Chapter 2 of the BIF Act when undertaking any requirement with regard to its PBA trust accounts (e.g. the Principal may make a payment instruction to pay amounts owing to Subcontractor beneficiaries or the Head Contractor (as a beneficiary) as required under the BIF Act).

The Head Contractor continues to be entitled to an amount of interest earned on the accounts of the project bank account up until the point of divestment. The Head Contractor is not relieved of their obligations to continue to comply with the BIF Act.



## Reporting and record keeping

### Notices required under the BIF Act

The table below summarises the notices that a Head Contractor must provide under the Act:

| Name of notice (including hyperlink to where it can be found)                                | Details  |
|--|--|
| <a href="#">S21 - Notices about related entities</a>   | Approved form<br>Provided to the Principal and QBCC<br>5 business days after entering into the subcontract   |
| <a href="#">S26 – Notice of trust account’s opening, closing or name change</a>              | Approved form<br>Provided to Principal<br>5 business days of a trust accounts opening, closing or name change  |
| <b>S36 – Payment of amount into disputed funds trust account</b>                             | Written notice<br>Provided to Subcontractor<br>Immediately upon transfer of funds  |
| <b>S37 – Notice of intent to dissolve PBA</b>  | Written notice<br>Provided to Principal<br>5 business days in advance of the accounts’ closure   |
| <a href="#">S42 – Appointment of Head Contractor’s delegate</a>                              | Approved form<br>Provided to Principal and Subcontractors  |
| <a href="#">S49 – notice of PBA before entering subcontract</a>                              | Approved form<br>Provided to Subcontractor<br>Before entering into a subcontract (or within 10 business days of the start date, where a PBA is required due to contract variation/amendment) |
| <a href="#">S50 – information about Subcontractor/ change of Subcontractor’s information</a> | Approved form<br>Provided to Principal<br>5 business days after entering into a subcontract and/or after becoming aware of change of Subcontractor's information                             |
| <b>Payment instruction information</b>   | Written notice<br>Provided to Principal (and relevant Subcontractor)<br>As soon as practicable after providing the payment instruction to the financial institution                          |

## Record keeping

The Head Contractor must keep written records for a period of no less than seven years of all transactions involving amounts held in a trust account for a PBA that will:

- explain transactions (using only English language to explain transactions)
- provide the true position in relation to the outcome of the transactions
- enable accurate accounts to be prepared from time to time
- enable convenient and proper audit of transactions.

The Head Contractor should also note that the project bank account is not a separate legal entity for tax purposes. Head Contractors may want to obtain assistance from a tax agent about any additional record keeping or reporting is necessary to meet tax law and other accounting standards.

## Employment of agents and delegation of responsibilities

The Head Contractor may employ or engage an agent to do any act relating to the PBA on behalf of the Head Contractor. However, the Head Contractor is liable for the acts or defaults of this agent, and any costs associated with the employment or engagement of the agent are not recoverable from the PBA or its beneficiaries.

A Head Contractor may also, using the approved form, delegate to a person resident in the state any powers of the contractor in relation to a PBA (other than the power to delegate). The delegation takes effect if the person accepts the delegation, and during the periods stated in the approved form. A copy of the approved form must be provided to the Principal and the Subcontractor. The delegation does not remove liability from the Head Contractor for the acts or defaults of its delegate, and any costs associated with the delegation are not recoverable from the PBA or its beneficiaries.

## Next steps

The introduction of project bank accounts does not change how the Queensland Government tenders for and awards building contracts. This guide should be read alongside the existing building and construction industry contract, payments and legal framework.

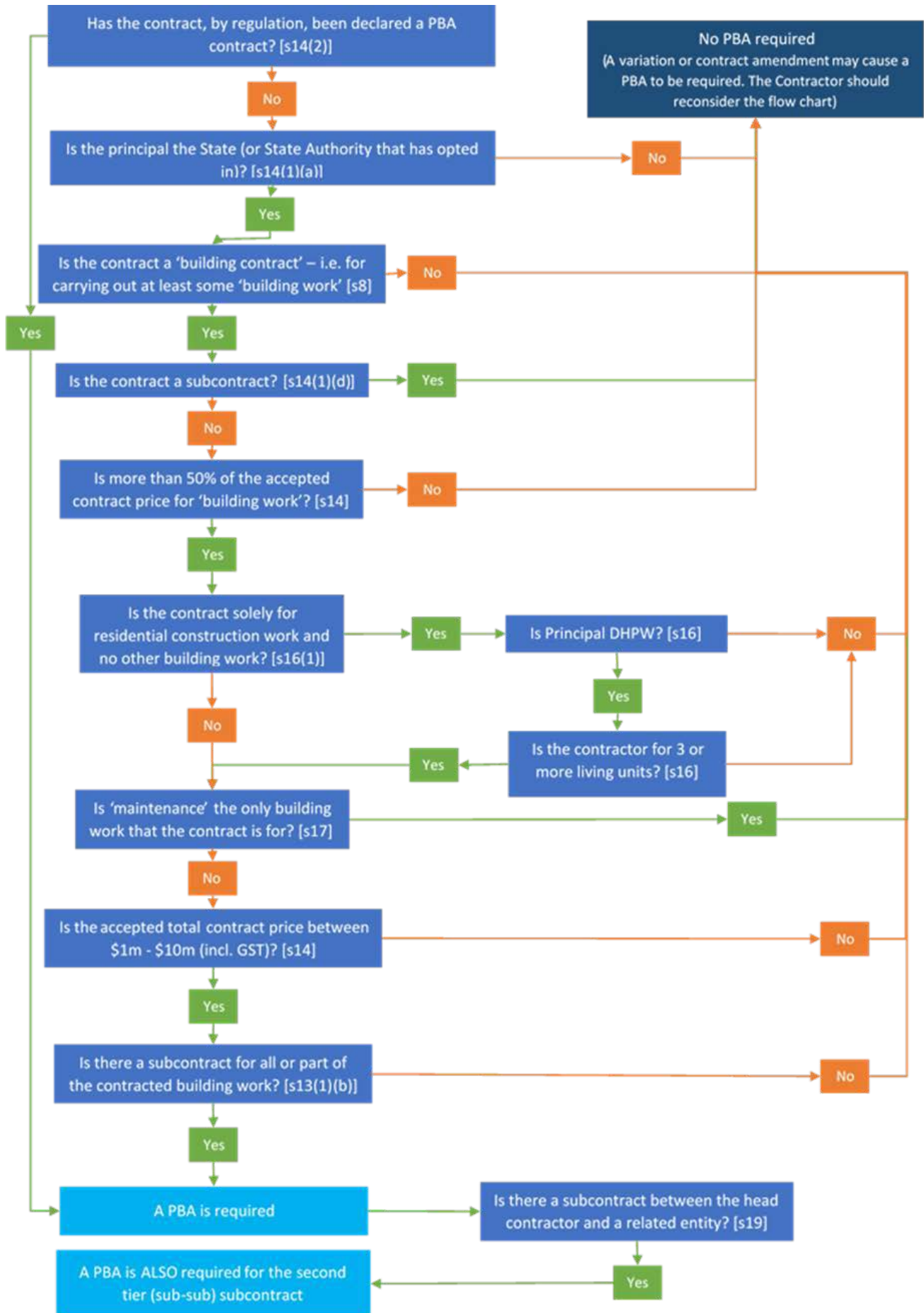
A suite of industry guides, frequently asked questions, checklists and other tools to help building and construction contractors understand and comply with the PBA requirements are available on the HPW and QBCC websites.

When engaging Subcontractors, Head Contractors may wish to provide a copy of the '*Security of Payment Reforms: Project Bank Account – Subcontractor Guidelines*' or direct them to the HPW and QBCC websites for further information.

If you have questions or need further information about the requirements for project bank accounts, please contact HPW Contract Services. Your industry association and the QBCC can also provide advice.

*Disclaimer: the content of these guidelines is intended to provide general advice only. Nothing in these guidelines constitutes legal advice. Tendering and/or contracting parties should gain independent legal advice specific to their circumstances.*

**Attachment 1: Decision tree – when is a PBA required?**



## Attachment 2: PBA establishment and payment process flowchart



### Attachment 3: Head Contractor's PBA checklist

To be used where it has been determined at the point of tender or at acceptance of tender that the building contract is a PBA contract requiring a PBA to be established.

| #   | Checklist   |
|---|---|
| 1   | Returnable tender schedule returned with tender documentation (contractual) (or returnable offer schedule for consultancy contracts).   |
| 2   | Project Bank Account established within the timeframe required by contract, or otherwise 20 business days after entering the first subcontract. <ul style="list-style-type: none"> <li>• General trust account established</li> <li>• Retention trust account established</li> <li>• Disputed Funds trust account established</li> </ul>  |
| 3   | S26 notice confirming PBA established provided to the Principal within 5 business days of the accounts' establishment.  |
| 4   | Principal (and/or agents or delegated officers) provided with electronic viewing access and advised of details required to access the PBA accounts (i.e. username and login in information)   |
| 5   | Approval to Subcontract (and/or sub-sub contract) form provided to the Superintendent before entering into a subcontract (Contractual)  |
| 6   | S49 notice of PBA provided to Subcontractor/s before entering into the subcontract  |
| 7   | S50 notice of subcontract provided to Principal within 5 days of entering into the subcontract <ul style="list-style-type: none"> <li>• (If relevant) S23 notice of related entity provided to QBCC and Principal within 5 days of entering into subcontract</li> <li>• (If relevant) Updated S50 notice of subcontract provided to Principal within 5 days of becoming aware of a change of Subcontractor information</li> </ul> |
| <b>When making a payment claim to the Principal:</b>  |   |
| 8   | Subcontractor payment summary provided to the Principal with each payment claim (contractual)   |
| 9   | Statutory declaration provided to the Principal with each payment claim (contractual)   |
| <b>When making payment to Subcontractors, including transfers into the retention and disputed funds trust accounts:</b> |   |
| 10  | Payment instruction uploaded to the financial institution   |
| 11  | Payment into the retention and/or disputed funds trust accounts are 'identifiable'  |
| 12  | Balance of bank account are sufficient or is topped up to ensure payment instruction can be executed  |
| 13  | Copy of the payment instruction information provided to the Principal and relevant Subcontractor/s as soon as practicable (or within 3 days) of the upload to the bank  |
| <b>When closing the PBA:</b>  |   |
| 14  | S26 notice advising the accounts of the PBA have been closed provided to the Principal within 5 business days of the accounts' closure.   |
| 15  | Retention trust account balance report (contractual)  |
| 16  | Disputed funds trust account balance report (contractual)   |

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