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Insights

JCT PROJECT BANK ACCOUNT DOCUMENTATION – WHAT'S CHANGED IN 2022?

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In 1999, the first *project bank account* (PBA) was used on a Ministry of Defence project. Since that time they have been successfully used on a number of high profile major projects, for example Crossrail.

The government has promoted their use over the years and, since 2010, it has mandated their use on all government projects. The government's *2020 Construction Playbook* confirms that they should be used "unless there are compelling reasons not to".

Standard form PBA documentation has been readily available for many years for example, *NEC (Y(UK)1)*, *PPC 2000* and (of course) *JCT*.

Despite this, it is still rare to see PBAs used outside the public sector. The old criticisms remain: they are complicated, time consuming to set up and expensive to operate. Some main contractors perceive them to be an unwarranted fetter on their ability to control the flow of cash to their supply chain. But PBAs do have many advantages (certainty of payment, protection on insolvency, fewer defaults, predictable cash flow) with suppliers often regarding them as a significant benefit and being prepared to offer lower prices where they are used.

So it is good to see that, in April 2022, JCT *published* a new edition of its PBA documentation to try and dispel these criticisms.

The 2022 edition is intended for mass appeal with JCT making clear that this form of PBA is suitable for use on all projects no matter the size. In response to the "traditional" criticisms referred to earlier, JCT states:

> "… *the commitment by the employer and the contractor to administering payment each month should be no greater than under a non-PBA project*."

When we looked at the *2009 version* of the PBA (which is similar to the 2016 version) *we commented* that "the current drafting leaves much to be desired…". This blog takes a look at the new JCT PBA documentation and considers whether it addresses those concerns.

WHAT'S CHANGED?

The basic tenets remain the same

We'll come on to key changes in a moment, but first it's worth saying that the intention of the 2022 JCT PBA documentation is the same: to leave the employer as close as possible to the same position as if it were simply making payment under the building contract.

The same parties enter into it (employer, contractor, subcontractors, not the bank). The structure remains the same: a set of "Enabling Provisions" to be included in the building contract, a PBA Agreement and an agreement to allow subcontractors appointed after the date of the PBA to be joined into the arrangements.

General tidying up

The 2022 edition has been subject to a thorough tidy up.

JCT says the documentation has been presented to be "clear and straightforward and to tackle any unfamiliarity users may have with the PBA arrangement." There is a clear drive to reduce wordiness and clarify content – this is no bad thing.

For example, certain important terms that previously lacked a definition (for example, "bank account") have been defined. Interpretation provisions have been moved to the front end of the agreement as opposed to being dotted throughout and unnecessary boilerplate provisions have been dispensed with. New recitals have been added to clarify that the PBA Agreement is supplemental to and varies the building contract and subcontracts.

We *criticised previous versions* for loose references to monies being "due". The problem being that the underlying JCT contracts don't work on the basis of monies being "due". Instead, they use precise terminology, such as "final date for payment" and so on. The 2022 edition has sorted out the disconnect with other documents in the JCT suite taking care to ensure that the terminology in the PBA documentation dovetails with the underlying building contracts and subcontracts.

Structure

The structure in the 2022 edition is basically the same as the 2016 version although there are some changes worth noting:

- **Joining Agreement.** This is the new name for what was previously termed the "Additional Party Deed" and it is included as a schedule to the PBA Agreement as opposed to being a standalone document.
- **Slimmed down Enabling Provisions.** The 2016 edition contained extensive provisions for inclusion in building contracts and subcontracts. These have been slimmed down in the 2022

version.

The 2016 enabling provisions not only placed an obligation on the employer and contractor to enter into the PBA Agreement within 7 days of entering into the building contract (this remains in the 2022 edition) but also set out extensive provisions in relation to how payment should be made. We noted in our earlier blogs that these provisions were repetitious and inconsistent with JCT standard forms.

The payment provisions are no longer part of the Enabling Provisions in the 2022 edition. They now sit in the main body of the PBA Agreement and the repetition and inconsistencies have been addressed.

The 2016 enabling provisions to be included in subcontracts did not contain an obligation on the subcontractor to enter into the PBA Agreement. Instead they focused on payment obligations. This seemed a bit odd. The 2022 edition has remedied this, moving the payment terms to the main body of the PBA Agreement and including obligations on the subcontractor to enter into the PBA Agreement.

It is worth noting, the 2022 edition still does not address what happens if any of the parties fail to enter into the PBA Agreement within the respective timeframes but this can be appropriately addressed in the building contract and subcontracts.

Payment

While the basics of how the PBA is meant to operate have not changed in the 2022 edition, what has changed is the level of detail (coupled with guidance) prescribing how it should operate, together with the introduction of new concepts such as a “Payment Schedule”. Whether such extensive provisions will put off those unfamiliar with PBAs from using the mechanism remains to be seen.

Just a few other observations:

- **No mention of bank mandate** – but it still has to be agreed. To set up the account, the parties need to agree a mandate with the bank. Appended as a schedule to 2016 PBA Agreement the parties had 14 days to organise the mandate. Despite all its detail, 2022 doesn’t mention the mandate, nor does it factor it into the parties’ timeframe for opening the account (see below). It would therefore be prudent for parties to agree the mandate with the bank before signing the PBA Agreement.

- **New (shorter) timeframe for opening account** – parties now have 7 days from signing the PBA Agreement to open the account. 2016 contained no timeframe for doing this. This timeframe may be unrealistic but the obvious easy solution to this is to extend the the timeframe if necessary. Nonetheless, one to be aware of.

- **New concept of payment schedule –** 2022 places a new obligation on the contractor to provide the employer with a payment schedule showing the net amounts to be paid to the contractor and subcontractors. This schedule is then used to instruct the bank how to make payments. The guidance includes a sample payment schedule.

- **Removal of contractor's ability to withdraw monies owned by it from the PBA.**

- **Changes to charges and interest** – an interesting change in the 2022 edition is that the employer is now responsible for bank charges (not the contractor as in 2016) but the interest on the PBA belongs to the employer (not the contractor as in 2016).

- **PBA Agreement varies payment time periods in building contract and subcontracts** – this is to ensure payments are made from the PBA to the contractor and subcontractors at the same time. The guidance contains a diagram to illustrate this. *Payment timeframes* in construction contracts can be tricky enough to track without additional changes from supplemental agreements. Parties should take care to be very clear what is due and when.

Do the trust provisions work?

We *previously blogged* separately about the trust provisions in the 2009 version of the PBA. We concluded that they possibly worked but it was by no means certain. The 2022 provisions are very similar to the 2009 version.

The problem with the provision (clause 5.3 in the 2022 edition) is that while it provides that monies paid into the PBA will be kept separate and held on trust for the contractor and each of the sub-contractors in the respective amounts owing to them, it only works if and when the PBA bank receives instructions as to how monies are to be allocated.

If there is any delay between the money being paid in and the bank receiving instructions and the contractor becomes insolvent during this period, while it may be argued that an implied or resulting trust exists by virtue of the terms of the PBA Agreement, the success of such an argument remains uncertain.

FINAL THOUGHTS

With continued concerns about cash flow within the supply chain and, therefore, increased pressure on the industry to use tools such as PBAs on both public and private sector projects, JCT's updated PBA documentation may gain more traction than its previous versions. But as with all these things, behavioural change is key and this may require some parties to put aside traditionally held negative views of PBAs and take a fresh look at their potential benefits.

This article first appeared on the Practical Law Construction blog dated 8 June 2022.

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