ADMINISTRATIONS

ISG's prison PBAs 'not protecting subcontractors at all'

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HMP Birmingham

As a pre-action legal letter is sent to the MoJ, *CN* asks if project bank account agreements are worth the paper they're written on

In March 2024, an email dropped into the inboxes of subcontractors that had been appointed to ISG's £61m refurbishment of 300 prison cells at HMP Birmingham. It bore good news – the project was to be covered by a project bank account (PBA) managed by the main contractor and the client, the Ministry of Justice (MoJ).

A PBA is a ring-fenced bank account from which payments are made directly and simultaneously to a lead contractor and members of the supply chain. A 2012 guide to PBAs released by the Cabinet Office is clear. PBAs are "intended to allow payment to named suppliers to continue in the event of the insolvency of the contractor", the guidance says.

> "Why do we have government bodies suggesting PBAs are the best way forward, when they appear not to be protecting subcontractors at all?"
>
> Kate Kenneally, Hill Dickinson

The email from ISG was unambiguous about the advantages of using PBAs. "The MoJ are promoting this approach across their projects to avoid a Carillion-type situation, providing more surety that the wider supply chain will receive any payments that they are due in the event of the failure of the constructor," the contractor said.

Six months later ISG went bust. Subcontractors expecting payment for work they had carried out and that had been signed off by ISG's quantity surveyors felt relaxed. After all, they were protected by the PBAs. "They were set up to protect people like me," one told *Construction News*. "They're a fantastic initiative."

But by October, it was clear that not a penny was coming to those who thought they were owed money. The subcontractor, who said his firm was owed almost £200,000 for completed work, said: "I felt like I'd fallen off a cliff. There's no value you can put on the emotional rollercoaster you go through when it's that sort of money."

Taking action

The MoJ and ISG used PBAs across three prison jobs that were live when ISG went under – HMP Birmingham, HMP Guys Marsh and HMP Liverpool.

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Ask a question

Last month, lawyers from Hill Dickinson, acting on behalf of six supply chain firms employed on the jobs, sent a pre-action legal letter to the MoJ, demanding payment. More firms owed smaller amounts are considering joining the action, according to the lawyers.

Iain McIlwee, chief executive of the Finishes and Interiors Sector industry body, is involved in the case, and has estimated that 40 subcontractors he is in contact with are short of around £20m from the three prison PBAs. He believes more firms are yet to be identified.

> "How can it be right that contractors have completed work but find themselves hundreds of thousands of pounds out of pocket"
>
> Iain McIlwee, Finishes and Interiors Sector

The case raises questions over how PBAs – introduced to protect the supply chain from tier one failures – are implemented. Hill Dickinson partner Kate Kenneally, who is working on the case, told *CN*: "The big question mark now is: what's the utility of PBAs? And why do we have major institutions or government bodies suggesting that they are the best way forward, when actually they appear not to be protecting subcontractors at all?"

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Following Carillion's collapse in 2018, which resulted in £2bn of supply chain losses, PBAs were widely adopted across central government to protect SMEs in public procurement. *The Construction Playbook* states they should be used by government departments unless there are "compelling reasons not to".

McIlwee said: "Hard-working SMEs from across the supply chain entered into an agreement with our government with the clear understanding that they would benefit from the protection of a PBA in the event of an insolvency event. This protection has to date failed them."

Under PBAs' fair payment terms, subcontractors should be paid within 30 days of submitting their claims for work. After claims are submitted, quantity surveyors employed by the main contractor assess the work to make sure it is completed to a good standard. Once this certification process is complete, the client is notified. Payments are then released by the client to the subcontractors – normally on the same day.

Emerging issues

The six firms say they completed work that was certified well in time for payments to be expected in their accounts in August – the month before ISG's collapse.

But they say the money did not arrive. So how did these firms end up not being paid for certified work that they did under the PBA arrangements?

Issues began to emerge in July 2024, when some contractors say they noticed that payments due had not appeared in their bank accounts. Kenneally said that it appears that fewer and fewer payments were made to the supply chain in each of the following two months. In September, the month of ISG's collapse, no payments to the firms she is representing appear to have been made at all.

The supply chain on the three jobs comprised an army of fit-out contractors, mechanical and electrical businesses, and labour agencies. McIlwee picked up the case after being approached by 40 of his members in September, asking when they would be paid via the PBAs for work they had completed. Rather than being reassured by officials at the MoJ, he said he was advised that there was no money in the PBAs and there was no intention for the MoJ to deposit money into them.

In March this year, after representations made by lawyers on McIlwee's behalf, the MoJ emailed all subcontractors across its ISG PBA jobs. This email revealed the exact amount left sitting in the PBAs. "The total balance as of 20 September was £239.40," it said.

Clarity needed

Kenneally is hoping her firm's pre-action letter prises greater clarity from the MoJ as to where the money owed to the supply chain went. At the moment, only fragments of information about the sequence of events is available.

The MoJ's email indicated that ISG did not pocket any money paid into the PBAs. "We can confirm that where payments were made into the project bank accounts by MoJ in respect of ISG's applications for payment, corresponding payments were promptly made out of the project bank accounts to ISG and its supply chain to ensure members of the supply chain were paid without delay," it said.

If ISG didn't hold onto cash owed to the subcontractors, is it possible the MoJ failed to make payments after being informed that the work was signed off? Or could ISG have forgotten to tell the department


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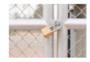
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that work had been signed off? "It's possible that due to (what we imagine was) a difficult situation at ISG as it neared insolvency, staff may have been distracted and have not released payments to subcontractors," Kenneally said. "But we would like to know from the MoJ first whether they did in fact make all the payments due last summer under the PBAs."

Hill Dickinson's letter requests supporting documentation relating to the status of payments due last summer. "As the ultimate client and a party to the PBA Trust Deed, the MoJ is contractually obliged to ensure these payments are made," she argues. "The failure to do so constitutes a breach of both the PBA and the associated contractual framework."

According to data supplied by the MoJ to *CN* under the Freedom of Information (FOI) Act, the department did, in fact, pay at least some money into all three of its ISG prison contract PBAs every month up to August 2024. In one case, however – the HMP Birmingham job – no payments were recorded relating to the September pay run.

The MoJ said it "did not withhold" this payment. Instead, the payment was delayed because it was "subject to numerous revisions by ISG" – and thus was only due after ISG went into administration. However, the MoJ did make payments to the other two PBAs in September, according to the FOI response.

Passing the buck?

The MoJ told *CN* it would not comment on Hill Dickinson's claim that not all the money due to the supply chain for signed-off work had been paid, as it is an ongoing legal matter.

But the government's initial stance on the issue was laid out in its March email to the contractors. This said PBAs "do not provide complete protection from ISG's insolvency, and they do not create a legally binding obligation for MoJ to pay subcontractors directly. We appreciate that you may be disappointed with this news, however we would like to assure you that we have considered the matter in depth over the last few months."

The latest official update on the matter came in June via a written parliamentary answer by prisons minister Lord Timpson. He said: "Subcontractors have been made aware that the department is not able to underwrite debt owed by ISG as a result of their administration, and that they should engage with the joint administrators (Ernst & Young) with regard to any claims arising from their contracts with ISG."

This attempt to pass responsibility to the administrators is not good enough, said Hill Dickinson partner Sarah Emerson, who is also working on the case. Even if there were administrative issues that caused payments to remain unmade, she said the MoJ is still liable for paying the supply chain. "Under the PBAs' trustee status, the department owes a duty in law, which is quite distinct from the normal employer-contractor relationship. When you assume a trustee role, which [MoJ] did, then they are supposed to protect and ultimately look after that money."

Meanwhile, in July, the Cabinet Office quietly withdrew its PBA guidance document. The guidance is still online, but a note has been added by the department, saying that it is "now out of date" and that "a replacement is being prepared". The department had not confirmed to *CN* the reason for the move at the time of publication.

McIlwee welcomes the move to look again at the guidance, saying PBAs are a good idea if they operate the way they should – protecting subcontractors hit by the collapse of a main contractor. "How can it be right that contractors have completed work and fulfilled their responsibilities but find themselves hundreds of thousands of pounds out of pocket, due to the failings of others?" he asks. "[The case] does not necessarily reveal a fundamental flaw with PBAs. But it does show big problems with the way these particular arrangements were operated".