

Building Industry Fairness Reforms: Project Bank Accounts

Subcontractor Guidelines

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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 subcontractors' 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 Subcontractors seeking to work on government building projects.

There are additional guidelines for Head Contractors seeking to work on government building projects; and Queensland Government officers (or their agents) involved in the procurement and/or 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 (PBA) is three bank accounts that operate under 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.

Rather than progress payments being made from the Principal (in this case the State Government) directly to the regular banking account of the Head Contractor, payments are paid into the PBA and funds are dispersed by the financial institution to the regular accounts of Head Contractors and Subcontractors.

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 State Authority if it has elected to require a PBA). Project bank accounts are only required for first tier-subcontracts, meaning that second and third tier subcontracts (sub-sub-contracts) do not require project bank accounts to be established.

It is the responsibility of the Head Contractor to determine if a project bank account is or will be required under the building contract, and then 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.

Subcontractors will be advised by the Head Contractor before they enter into a subcontract whether the building contract is a PBA contract.

PBA threshold self-assessment tests

There are three 'threshold tests' that need to be considered by the Head Contractor to determine if a project bank account is or will be required for a contract. When ALL THREE thresholds are met, the contract is considered a 'PBA contract' and a PBA is required.

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 percent** of the contract price is for that type of 'building work'. Refer to Attachment 1 for definitions of building work.

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 (including GST) will only require a PBA if the contractor has or will engage at least one Subcontractor in relation to the work under the building contract.

However, a project bank account will not be required if the 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"> • 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) <i>Note: the PBA will not be required for the ongoing service and maintenance after the modernisation work is complete.</i> • Construction of 18, 2-bedroom apartments by the Department of Housing and Public Works with a contract price of \$3 million. 	<ul style="list-style-type: none"> • Upgrade of an ambulance station by Queensland Ambulance Services where the accepted contract price is \$800,000. • Redevelopment of a surgical outpatient unit by a Hospital and Health Service that has not elected to require a PBA*. • New primary school construction by Department of Education and Training with a contract price of \$36 million. • Courthouse upgrade by Department of Justice and Attorney-General with a contract price of \$11 million. <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 need to consider whether these amendments cause the contract to become a 'PBA Contract'.

If a building contract didn't require a project bank account 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.

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 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.)

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

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.

Subcontractors must be advised if a project bank account is later required under the building contract. The Subcontractor becomes a PBA beneficiary and will receive payments from the PBA.

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:

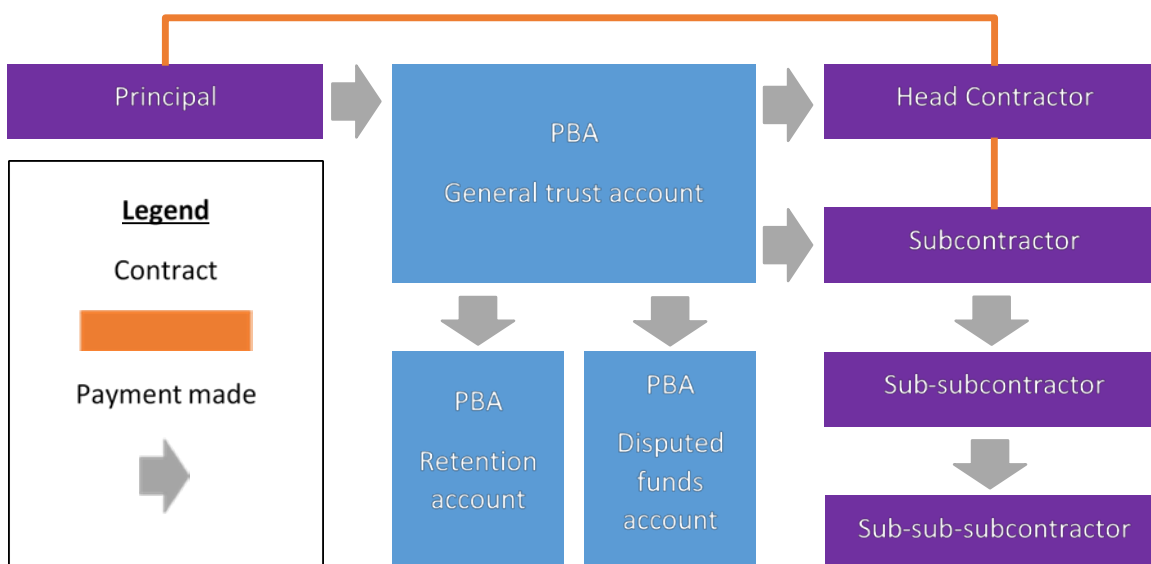
- for individuals, they are members of the same family (including a person's spouse, parent or grandparent, child or grandchild, brother, sister, aunt, uncle, nephew or niece either by birth or marriage)
- for an individual and a corporation, the person is a majority shareholder, director or secretary 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 (3) 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).

Deposits into the trust account can only be made using electronic transfers, and withdrawals from the trust accounts and transfers between the trust accounts can only be made using a payment instruction given to the financial institution.

A PBA cannot be used for any purpose other to pay an amount due to a Subcontractor beneficiary or for paying the Head Contractor a contracted amount. Amounts paid or required to be paid into a trust account **cannot** be used for payment of Head Contractor's debts, taken in execution under a court order for the benefit of a Head Contractor's creditors, or invested by the Head Contractor.

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.

Principals must be provided with electronic viewing access to the project bank account to enable oversight of all transactions and funds held in the PBA trust accounts, information relevant to payment instructions, and account payment reports.

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, including retention amounts, have been paid in accordance with the subcontract), 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 under a subcontract).

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

The Head Contractor may employ or engage an agent to do any act relating to the PBA on behalf of the Head Contractor. A Head Contractor may also delegate to another person any powers of the contractor in relation to a PBA. However, the Head Contractor remains liable for the acts or defaults of an agent or delegate, and any costs associated with the employment or engagement of the agent/delegate are not recoverable from the PBA or its beneficiaries.

Entering into subcontracts

Before entering into a subcontract, the Head Contractor must advise (using an approved form) the Subcontractor that a PBA will be used for making payments and provide the Subcontractor with details of the financial institution (i.e. the name of the banking institution and branch) at which the trust accounts are to be held. 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 the Principal (within 5 business days of entering into the subcontract) with information about the Subcontractor 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.

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.

Subcontractors would regularly provide this information to the Head Contractor at the time of entering a subcontract. Subcontractors should be aware of the statutory time limitations imposed on Head Contractors for providing information to Principals about subcontracts, and ensure they provide or update information to the Head Contractor in a timely manner.

How payments will work using a PBA

There are no significant changes to the way claims for progress payments are made between the Principal and Head Contractor or between the Head Contractor and Subcontractor. Subcontractors will continue to make payment claims (progress and/or final payment claims) to the Head Contractor in accordance with their subcontract.

The only difference is that amounts to which Head Contractors are entitled under the contract will be paid by the Principal into the project bank account (and NOT into the Head Contractor's personal bank account); and amounts owed to Subcontractors and the Head Contractor will be paid from the project bank account. The diagram at Attachment 3 shows the process for claims and payments.

Where a PBA is required under a contract, Subcontractors are '**beneficiaries**' to the PBA trust accounts.

Payment Instruction (PI) and receiving payments from a PBA

Any withdrawal (payments) from a PBA trust account and transfers between PBA trust accounts may only be made using a **payment instruction** given to the financial institution.

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.

If the payment instruction includes a payment to a Subcontractor or is made on behalf of a Subcontractor (e.g. payment of a retention amount into the retention trust account), the Head Contractor must provide the Subcontractor 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.

Subcontractors receiving this information should review it for discrepancies, checking the bank account details and name of account to ensure these are correct, and checking the amount to be paid against the amount stated in the payment schedule (or if no payment schedule has been provided, confirm it is equal to the amount claimed). Where relevant, Subcontractors should also review any retention or disputed amounts paid into the retention and disputed funds trust accounts against the Subcontractor (refer to sections 5.2 and 5.3 below for further information).

The Principal, who is concurrently provided with a copy of the instruction information, is legislatively required to review that information and report any discrepancies to the QBCC Commissioner.

The Act imposes certain obligations on Head Contractors, which are designed to secure payments to Subcontractors. These obligations include:

- the Head Contractor must top-up the trust account with its own funds if there will be insufficient funds available in the PBA trust accounts to pay an amount due to a Subcontractor
- 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 Subcontractors 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.*

Being paid 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 retention trust account for the PBA.

The Head Contractor must direct, via a payment instruction, the retention amount into the retention trust account of the PBA (usually 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 will be provided to the Subcontractor and the Principal. Subcontractors should review the payment instruction information to ensure the correct retention amounts are being transferred and held on their behalf and report any concerns about retention amounts to the QBCC.

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 should state (as a minimum) 'Retention - Subcontractor name' or a suitable abbreviation e.g. 'Retn – Subcontractor initials'.

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

- to pay the Subcontractor an amount withheld under 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, or
- to make a payment ordered by a court.

Disputes over progress payments

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

1. the Subcontractor makes a valid payment claim and the head contract provides a payment schedule, 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).

2. 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. 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).

What happens 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 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 will also be provided to the Subcontractor (and the Principal).

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. The provision of a copy of the payment instruction information to the Subcontractor satisfies this obligation to notify.

If a Subcontractor has concerns that an amount paid is not of an amount owed and/or promised, and they have not been advised of a payment into the disputed funds trust account, the Subcontractor should raise their concerns with the QBCC, or consider the options available to them under the subcontract.

Amounts held in the disputed funds trust account need only be held there for 60 days unless the amount is subject to an ongoing **'dispute resolution process'**. After 60 days the Head Contractor may return the amount to the general trust account (or retention trust account if applicable).

Despite any amount that may be held in the disputed fund trust account, Subcontractors continue to have their same legal rights to adjudication, to file a Subcontractor charges claim or to apply to any other dispute resolution or court process where they believe they have a claim over amounts owed under the subcontract.

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.

Termination or insolvency of Head Contractor

If the Head Contractor is terminated for contractor default or the Head Contractor enters into insolvency, the Principal *may* step into the role of trustee. A QBCC S54 Notice of Principal as Trustee 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

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, as the ‘acting’ trustee over the project bank account the Principal may (via a payment instruction) make payments to the Subcontractor beneficiaries or Head Contractor (as a beneficiary) that are required under the Act.

Next steps

The introduction of project bank accounts does not change how the Queensland Government tenders for and awards building contracts. This guideline 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.

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 contents of these guidelines are 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: When is a PBA required? Definitions for threshold tests

What is 'building work' (Threshold test 1)

'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 carried out by a person in relation to the construction of building designed by the person, 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 or public transport infrastructure such as busways, railways and associated bus/rail stations or an authorised activity under a resource authority. These types of projects therefore WILL NOT require that a PBA be established.

'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:

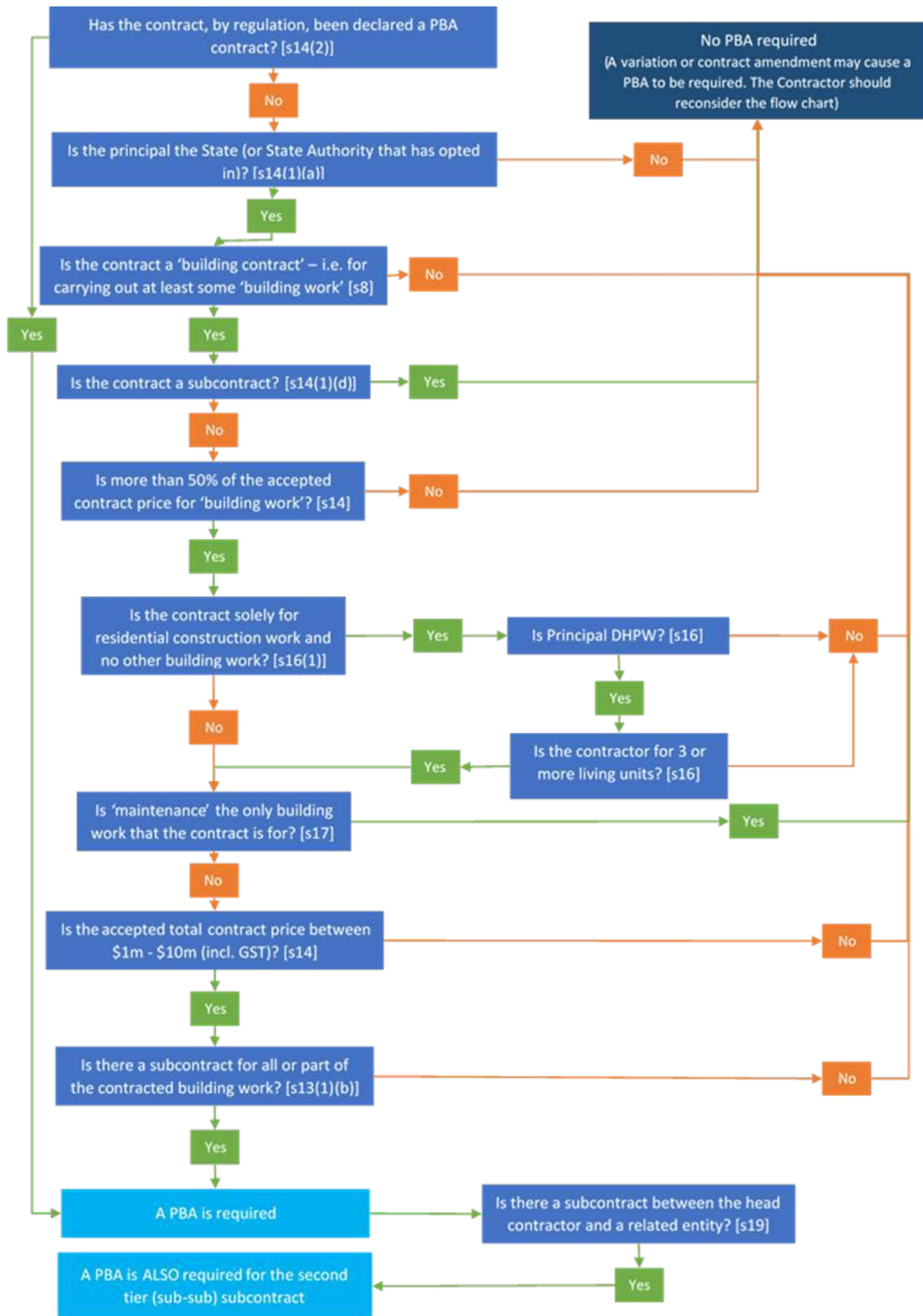
- Contracts for **residential construction work** (except for residential construction contracts for 3 or more living units where the Department of Housing and Public Work is the Principal). For example:
 - construction of a duplex, with each unit containing two bedrooms by the Department of Housing and Public Works.
 - Police service residential accommodation where 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.

What is a 'Subcontractor' (Threshold test 3)

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 obligated to pay suppliers in accordance with existing contract and industry laws.

Attachment 2: Decision tree – when is a PBA required



Attachment 3: PBA Establishment and payment process flowchart

