

ECA Eastern Regional Conference

18th October 2019

The Payment Landscape post-Carillion: Where are we now?

**Professor Rudi Klein, Barrister
CEO, SEC Group
President, NEC Users' Group**

Formerly member of UK Government's Carillion Task Force

***“Money is like muck,
not good except it be
spread”.***

Francis Bacon, lawyer, courtier and philosopher
in *Essays* (1625)

CONSTRUCTION BUSINESSES IN DISTRESS

2018 Q.2	2019 Q.2	% CHANGE
60,468	62, 423	3%

Source: Begbies Traynor

FUNDING SOURCES

33%



Bank overdrafts

17%



Personal savings

(almost doubled since 2018)

16%



Unsecured personal
finance, e.g.
credit cards

15%



Bank Loans

5%



Private equity

4%



Invoice Finance

Source: Bibby Financial Services, *Subcontracting Growth 2019*.

“If all my payments were made within 30 days my business would have doubled in size over a 2/3 year period.”

Source: MD of Glasgow small steelwork contractor whose firm went into insolvency in 2018 because of non-payment.

“Almost 30% of people working in the industry are suffering from mental distress due to payment problems.”

Source: Construction News

*“Almost £1 million of cash retentions
is lost each working day due to
upstream insolvencies.”*

Source: Pye Tait Consulting

“Payment terms within contracts (for example, retentions) can drive poor behaviours, by putting financial strain into the supply chain. For example, non-payment of invoices and consequent cash flow issues can cause subcontractors to substitute materials purely on price rather than value for money or suitability for purpose.”

Dame Judith Hackitt's report, May 2018. Report on Building safety.

“Almost 3000 construction insolvencies in 2018 (highest figure for any sector).”

Source: ONS

CARILLION GROUP

*(overall losses could exceed
£15 bn)*

INTERSERVE

KIER?

(£245m of debt)

PROJECT BANK ACCOUNTS (PBAs)

- ▶ Most effective way of ensuring cashflow to supply chain; it doesn't have to travel through all the tiers of contracting.
- ▶ Highways England use PBAs for all their work; tier 3 contractors are paid within 18 days of the main contract valuation date.
- ▶ Environment Agency have used PBAs on 29 projects.
- ▶ Private Member's Bill introduced in January 2019 to mandate PBAs for projects over £1½m.
- ▶ Queensland has legislated to mandate the use of PBAs in both public and private sectors.

PUBLIC CONTRACT REGULATIONS 2015

- ▶ Contract authorities under statutory duty to ensure 30 day payment clauses in tiers 1, 2 and 3 contracts.
- ▶ Such clauses absent from Carillion's sub-contracts.
- ▶ But no effective enforcement; complaints can be made to Public Procurement Review Service but has no sanction to deal with non-compliance.

REPORTING OF PAYMENT PRACTICES AND PERFORMANCE REGULATIONS 2017

- ▶ Large companies required to report on payment practices as from 6 April 2017.
- ▶ Large companies are those which have exceeded at least 2 of the following thresholds:
 - turnover p.a. of £36m or more;
 - balance sheet total of £18m or more;
 - over 250 employees.

- ▶ Companies are required to publish payment practices twice a year on a government web service.
- ▶ They must report on:
 - standard payment terms;
 - average payment times from invoice date;
 - proportion of invoices paid beyond agreed terms, within 30 days, between 31 and 60 days and over 60 days.

WILL REGULATIONS MAKE A DIFFERENCE?

- ▶ Only if companies with long payment periods are challenged to reduce them.
- ▶ The data is unlikely to be subject to verification.

- ▶ Circumspection is required. Those claiming to pay promptly within short timescales may:
 - be paying less than that applied for;
 - may be arguing monies not due because of an invalid application;
 - may be using an early finance facility (although this should be declared as part of the reporting requirement).

RETENTIONS

- ▶ Review of retention system announced in October 2015.
- ▶ Consultation closed on 19 January 2018.
- ▶ Industry debate between protection of monies and statutory abolition but government will insist on alternative security such as bonding.

- ▶ Construction (Retention Deposit Schemes) Bill, 2017-2019 (“Aldous Bill”).
- ▶ Bill sought to outlaw cash retentions unless deposited in a scheme (modelled on statutory tenancy deposit schemes).
- ▶ Bill supported by 89 organisations and over 280 MPs.
- ▶ A platform for protecting cash retentions is currently under development.

CONSTRUCTION ACT REVIEW

- ▶ Consultation closed on 19 January 2018.
- ▶ No publication of results but there are indications that any action is unlikely.
- ▶ BUT the cost of adjudicating does require to be addressed.

PAYMENT PERFORMANCE TO BE TAKEN INTO ACCOUNT ON GOVERNMENT PROCUREMENT

- ▶ Contracts must be over £5m.
- ▶ Applies to procurements advertised after 1 September 2019.
- ▶ Bidders must demonstrate that they have paid 95% of invoices within 60 days in at least one of 2 previous 6 month reporting periods.
- ▶ If between 75% and 95% of monies have been paid within 60 days a company must demonstrate it has an action plan to improve its performance.

OTHER MEASURES

- ▶ Office of Small Business Commissioner set up in December 2017 to provide guidance on payment and decide on payment disputes between large and small firms (NB. Some dispute over extent to which construction included within remit.)
- ▶ Government to consult on increasing powers of Small Business Commissioner to include imposing penalties on large companies guilty of unfair payment practices.

- ▶ Commissioner will take over **Prompt Payment Code**.
- ▶ This year the Code suddenly came to life with expulsion of a number of construction firms including Balfour Beatty, Costain (now re-admitted), Laing O'Rourke, Interserve Construction and Persimmon Homes.

FUTURE AGENDA

- ▶ Mandate PBAs across public sector construction and then private sector (by legislation).
- ▶ Statutory maximum of 30 day payments on public contracts.
- ▶ Statutory ring-fencing of cash retentions.
- ▶ Other measures to include statutory outlawing of pay-when/if paid on insolvency and payments made to be included on preferred lists.

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