



Working together to support building engineering services excellence

ECA & BESA response to the *consultation on how Government should take account of a supplier's approach to payment in the procurement of major contracts*

ECA and the BESA welcome the opportunity to respond to this consultation. We jointly represent the interests of over 4,000 businesses covering a broad range of engineering, design, installation and facilities management activity, including electrical, heating, plumbing, energy management, micro-generation, ductwork, ventilation, fire and security, and wireless systems. These works not only form a key part of the UK construction and facilities management (£240bn GDP) and maintenance services supply chain, but they form 40% of the cost of construction and facilities management.

Executive summary: ECA and BESA response

- We very much support the Government's proposal to link the acquisition of business and the performance of how firms pay their suppliers. This is an important link – and furthermore – it begins to integrate and connect the initiatives and regulations that the Government has already delivered upon.
- Most firms that work in the construction and facilities management sectors are in the supply chain. They are predominantly small businesses and often micro-businesses. *Being paid is their number one business concern.*
- The steps that the Government has taken in the last eight years to help firms get paid in a more timely fashion are very positive and have all been welcomed by our sector. We list these as:
 - Prompt Payment Code / Construction Supply Chain Payment Charter
 - Mystery Shopper scheme
 - Central Government payment targets
 - Mandatory reporting of payment practices for large companies
 - Public Contracts Regulations (PCR) 2015
 - Promotion and use of Project Bank Accounts in public sector
 - Greater direct engagement between the contracting body and sub-contractors
 - Contracts Finder, G Cloud and Crown Market Place
 - Supply chain finance initiatives
 - Aim to outlaw 'grossly unfair' contractual practices and allowing trade bodies to act on behalf of an aggrieved claimant
 - Amendments to the Housing Grants, Construction and Regeneration Act 1996
 - Amendment to the Late Payment of Commercial Debts (Interest) Act
 - Establishment of a Small Business Commissioner
- Despite this body of work, these measures have arguably not yet had a demonstrable impact, achieved a critical mass, nor have they been mutually reinforcing.
- The Government's proposal to link prospective supplier's performance in terms of its payment practices to the procurement and tender criteria – is therefore extremely welcome. This is because the proposal seeks to join up some of the above initiatives and regulations; and strengthens their impact which is an issue we have been highlighting and working with Government on for some time.
- We fundamentally believe that implementing measures to link contractual performance/behaviour and procurement award systems is the only way to seek to drive improvement in commercial behaviour.
- This will also limit the scope for intermediaries supplying into the public sector to generate profit through the exploitation of their supply chains to the detriment of the quality and value for money received by public sector clients. For example, linking payment performance/compliance to future procurement awards creates a reason to improve upon past mandatory reporting of payment practices. This will also drive suppliers demonstrating their payment performance under such a procurement framework, to sign up to the Prompt Payment Code. It will also give the Code a more robust framework and those that are signed up may follow it more rigidly. The Small Business Commissioner, if empowered, could play a role as an independent regulator and adjudicator over

ECA & BESA

Rotherwick House, 3 Thomas More Street, London E1W 1YZ

how such systems work strategically and ensuring supplier feedback informs future procurement decisions (it should be noted that currently complaints cannot be made to the Commissioner where there exists, as in construction, statutory adjudication, i.e. most of the construction supply chain are outwith the Commissioner's jurisdiction).

- In developing this procurement framework, ECA and BESA suggest:
 - The requirement should apply beyond central Government departments and their executive agencies to include local authority, trusts and other public sector bodies work above a certain threshold (as does Contracts Finder).
 - We believe that the individual contract threshold of £5m per annum is too high – if a £5m threshold is to be used, the threshold of £5m should be across the total value of the project works. However, ultimately we would lower it to be symbiotic with the other initiatives listed earlier and in the consultation, e.g. Contract Finder. If the thresholds are linked the initiatives start to integrate in a meaningful way.
 - If not, we risk this really positive initiative being too narrowly-applied.
 - We do not see option 1 and 2 as a choice between each other, rather different parts of a sensible overall approach.
 - In terms of how the framework is applied, option 1 seeks views on contracting authorities imposing proportionate requirements which bidders would have to satisfy at the selection part of a tender. As far as possible, we would suggest that the Government sets out a standardised or benchmarked approach for how contracting authorities should require proof of a bidder's commitment to fair and prompt payment. Standardised guidelines will be easier to implement and measure, and for firms to comply with, without the risk of radical inconsistencies. As part of this, we support a 'within 30 days' measurement, as this is what Government publicly and rightly states (and has legislated for) it wants to see movement towards.
 - Option 2 suggests that Government considers certain payment behaviours to amount to Grave Professional Misconduct, by which a contracting authority ahead of selection stage may exclude a prospective supplier from the tendering process. We support the Government setting a benchmark for what this would mean in practice, but would argue that any tolerance of less than 95% of payments due within 30 days over two consecutive six month periods would be to condone a level of non-compliance with the Public Contracts Regulations. The benefit of this approach is that it is very clear and it would trigger immediate Board level interest from potential suppliers to Government in ensuring that they kept to a level of performance that did not jeopardise their ability to bid for new work.
 - Provided the definition of Grave Professional Misconduct is sufficient and robust enough and sets out minimum grounds for compliance, this requirement would bring us closer to achieving the overall strategic aim of the Government's payment work – to bring about a change in culture and behaviour towards fair and prompt payment.
 - Finally, we support the facility for suppliers to engage with the client or contracting authority directly – which is permissible under EU procurement rules. This is happening in some cases, but should be promoted more widely. At the contracting authority end, 'the recipient' of the information needs to be empowered to make change happen. Even if not activated, it may result in keeping the main contractor 'on their toes'. This is about ensuring greater transparency in the supply chain; which also chimes with our key requirement for Government to end the use of non-independently held retentions in construction contracts through legislation.

Questions: ECA and BESA response

Question 1: What evidence do you consider contracting authorities would need to request from a bidder to assess the effectiveness of supply chain management payment practices?

We broadly support the bullets noted in the consultation document around how a contracting authority might seek to understand a prospective supplier's payment processes and previous performance; both of which would be reviewed in the procurement selection criteria.

As part of this, it is important that questions extend beyond documenting good process. Carillion was a member of the Prompt Payment Code, so the questions do need to test payment history (where the organisation has a past trading history).

We are however, concerned that the need to '*demonstrate an effective approach to supply chain management is related and proportionate to the subject-matter of the contract*' may provide scope for contracting authorities to effectively contract out of the measures the consultation is seeking to put in place. At the very least, Government should clarify that contracting authorities should assume that '*an effective approach to supply chain management is related and proportionate to the subject-matter of the contract*' unless they can demonstrate otherwise. In which case, both justification and evidence for departure from this assumption should be lodged and verified with and by the Small Business Commissioner as a public record in order to preserve the integrity and consistency of public sector procurement and the improvement in commercial behaviour.

Of the bullets noted, we explicitly support adherence to the meeting 30 day payment terms and passing these down public sector supply chains. We recently conducted a freedom of information request¹ with local authorities which suggest that, three years in, take-up around the PCR 2015 is slowing with just over half (51.3%) of respondents having built in a contractual requirement for payment to flow through the supply chain within 30 days routinely (the full results are on page 7). This is another way of ensuring the aim of the PCR is delivered.

The second bullet needs to be reflective of all areas of commerce – for example, most construction works are not invoiced until after payment is made. Further, the terminology needs to reflect various legislative frameworks, for example, the Housing Grants Construction and Regeneration Act 1996 refers to payments being due and a final date for payment (on which monies are actually received), whereas, the Late Payment of Commercial Debts (Interest) Act simply refers to dates on which payments become due (which is not the same as a payment due date under the earlier legislation). We would therefore suggest it refers to the robustness of its systems and processes for scrutinising and paying amounts as they fall due and how it resolves disputed payment due promptly and effectively.

We would also recommend the fourth and fifth bullet is amended to ensure the criteria includes a requirement for suppliers to acknowledge the level of residual liability they carry for interest on payments which are due, but not yet paid, i.e. late. This requirement will account for the difference in a business never having paid interest on late payment because it has refused, negotiated settlements or used its commercial position to avoid payment of interest, against a business which carries a significant liability for late payment interest which has a direct correlation to a percentage of payments which are made late.

The last bullet seeks historic performance on paying invoices (which should refer to payments due rather than invoiced), including against standard terms, and as a percentage of payments made within a specific time, such as 60 days. We support this. While this would require an additional check from respondents, we would support a requirement for listing within 30 day payments as a percentage of total payments made. This is in line with the Government's stated ambition of 'what good looks like' (as per Reg. 113, the Public Contracts Regulation 2015) and the duty to report on payment via the BEIS website.

The Government notes that ultimately each contracting authority would decide on their own criteria. We support Government issuing guidance or a statement around what is considered a good standard template. It is then up to contracting authorities to deviate from that and contracting authorities should, where they depart from that template, have to report to the Small Business Commissioner the rationale for why they have departed from the template, including necessary supporting evidence. This would enable Government to encourage as much alignment as possible, to make the process as efficient as possible. After all, if the measurements are not carried out consistently there will not be

¹ Between 8 March and 24 April, 195 Councils responded to our request.

robust consistent data on which Government buyers can rely for demonstration of a *'fair, effective and responsible approach to payment in supply chain management'*.

Question 2: What evidence do you consider contracting authorities would need to request from a bidder to demonstrate Grave Professional Misconduct in payment practice?

Though it is right that the question is asked, it is quite possible that respondent suppliers may not overtly highlight practices which delay payment, either because it is not in their interest to raise them or because they may consider that they are part of standard business practice. Similarly, while respondents should list any valid claims made around late or withheld payment, we know that only a very small minority of cases are actually pursued. (The Cabinet Office, Crown Commercial Services, contracting authorities and the Small Business Commissioner should liaise and coordinate, so that information derived through and held by the Small Business Commissioner can be usefully considered). Respondents may reasonably feel it unfair to list currently disputed claims, as there has been no finding made against them. All these limitations do make it difficult in terms of what information a contracting authority might be able to use to make a judgment (which can stand legal scrutiny).

As such, the easiest and most applicable measure is to use the benchmark in the Prompt Payment Code – that 95% of payments should be made within 60 days – as the consultation document suggests. As we note in the next question, we would go further and introduce this requirement for within 30 days payment – which is the Government's stated ambition for prompt payment.

Using a benchmark in this way would mean that by utilising public procurement, that it would enable Government objectives around already-established initiatives like the Prompt Payment Code, the Public Contracts Regulations and the duty to report on payment to be better met. With the "scourge of late payment" mentioned in the Spring Statement by the Chancellor, it would also send a strong message to large suppliers that Government is serious about "eliminating" late payment and that firms need to focus on improving their payment practices. In this respect the Small Business Commissioner should have powers and scope to use the data from the BEIS duty to report on payment website to inform compliance with the Prompt Payment Code and Public Contracts Regulations, and to confirm whether a specific business can be confirmed as demonstrating actions constituting a serious, culpable, systemic approach that demonstrates Grave Professional Misconduct.

Without a definition of what behaviour equates to a serious, culpable, systemic approach that demonstrates Grave Professional Misconduct the criteria listed will inevitably become subjective and inconsistent. The following criteria will lead to disputes because of their subjective nature: '**knowingly** delaying the raising of purchase orders or disputing invoices **unnecessarily**' and 'failure to communicate **honestly and effectively** with subcontractors about payment issues and practices'. The final bullet requires claims for late payment interest to have been made which we know from experience creditors are reluctant to claim if they can recover the capital sum of the debt or because, as with Mystery Shopper, they are reluctant to compromise the commercial position and reputation by whistle-blowing.

The Small Business, Enterprise and Employment Act 2015 introduced a statutory duty for large businesses to report on their payment practices, but this does not differentiate between a company's purchase ledger and its supply chain ledger. This means the data regarding the measurement of supply chain payments will be heavily influenced by the purchase ledger payments which are high volume, low value and mainly instantaneous payments. The duty to report should be adjusted to differentiate between payment made under a purchase ledger and those made under a supply chain ledger. The second weakness of the Small Business, Enterprise and Employment Act 2015 statutory duty for large businesses to report on their payment practices is that the criteria for those who are subject to the duty is by company and not by corporate group. This means that some large corporate groups may fall below the threshold for reporting, by reason of their corporate structure, i.e. individual companies within the group do not individually exceed the threshold for constituting a large company.

On the issue of those trading entities without a duty to report payment history such as special purpose vehicles or joint ventures, they should be encouraged to become signatories to the Prompt Payment

Code and maintain voluntary compliance with the duty to report on payment, despite not qualifying under the Small Business, Enterprise and Employment Act 2015 as a large business. This would enable them, where they strategically want to work with the public sector, to demonstrate good commercial behaviour.

We also support the self-clean option where a supplier may have dipped below the benchmark. The aim is not to exclude, but to ensure large suppliers pay on time as the norm. However, if a large supplier continues, as confirmed by the Small Business Commissioner, to demonstrate Grave Professional Misconduct by virtue of not meeting the payment threshold, then it should be deemed that they are unable or unwilling to self-clean. In this case, a large supplier would warrant exclusion from Government tenders for three years. Confirmation that a bidder's failure to meet the Prompt Payment Code's objectives will be assumed to constitute a serious, culpable, systemic approach that demonstrates Grave Professional Misconduct should be in place to strengthen the Code, the Small Business Commissioner's role and the incentive to improve commercial behaviour in relation to payment.

Question 3: Do you agree that failure to pay 95% of payment within 60 days over two consecutive six month periods is an appropriate benchmark of payment performance. Are there other benchmarks that should be considered?

Yes, if this refers to a minimum acceptable benchmark, such as around judging Grave Professional Misconduct, or as part of the supplier selection criteria. But we would support the inclusion of a within 30 day payment measure within any selection criteria as set down by Reg. 113, the Public Contracts Regulation 2015. Therefore, the Government should consider Grave Professional Misconduct to be where payments are made within 30 days under 95% of the time for two consecutive quarters – thereby working to push more firms (and not just the public sector) to pay within 30 days.

If a within 30 days payment measure is absent, we risk sending a message that paying within 60 days is adequate and no more. The quicker SMEs receive payment, the more surety and confidence they will have in seeking to take on new work, employing people, taking on apprentices and investing in equipment. This will align with the Government's commitment from the Cabinet Office and Crown Commercial Services that SMEs should be paid within 30 days.

Question 4: Do you agree that applying this measure to contracts valued above £5million per year is an appropriate threshold? If not, what threshold should apply and why?

No. If £5m is applied on a per contract, per year basis, it risks applying to too few contracts, especially where procurement routes such as; construction management, framework contracts, call-off contracts, or other term contracts are used which effectively break-up the value of the overall package of works. We would suggest a lower per contract, per year threshold. Or for construction contracts, the £5m threshold should relate to the contract value for the entire project or term. This latter option would support a more targeted approach (ie towards construction, engineering and maintenance contracts where payment abuses have been most prominently highlighted). We would also suggest there may be more merit in aligning the financial threshold with those set by the Contract Finder and EU procurement rules such that there is alignment across policy initiatives in this regard.

Question 5: Would there be benefit in giving sub-contractors greater access to the contracting authority (as described above) to make them aware of significant payment issues?

Yes. This does already happen to our knowledge for some contracts. But it does make sense to promote this link as it could resolve some problems. Aligning Mystery Shopper (as a whistle-blowing facility) with the Small Business Commissioner and giving the latter investigative and reporting powers, would allow public sector clients/buyers to take both a strategic and operational approach to compliance within the supply chain through increased awareness of non-compliance.

It might also motivate the main contractor to keep better relations with its supply chain, even if the facility is seldom used. If the facility is used, then the recipient of the information needs the ability to act on this (after reviewing the matter).

Deployment of technology and digital payment platforms

However, we would also that argue contracting authorities, by embracing technologies available in the market could take a more invasive approach to monitoring and enforcement payment within its supply chains as opposed to relying on supply chain SMEs to whistle-blow.

UK construction averages four to five levels within its supply chain and 70 sub-contract packages. It suffers from high fragmentation and disaggregation. This has a direct impact on its opaque, handling of payment making the commercial eco-system in which the industry operates incredibly fragile. The industry comprises 280,000 businesses of which 84% are SMEs– turnover is estimated by UK Government to be circa £225bn representing 10% of employment and enabling a further £540bn contribution to economic output.

As the public sector accounts for between 25-40% of demand in construction and FM, and it is a client who will invariably own the assets once built, it is under key policy requirements (Social Value Act 2012), incentivised to procure on a quality, not lowest price basis. The requirement to be able to demonstrate value for money therefore necessitates an increasing need to be able to provide granular data around payments and cash-flow disbursements through the design and construction phases of a project which drives change in the area of payment. Industry has accepted the case for digital payment management platforms and is beginning to embrace the productivity benefits in order to maintain its competitive edge and we would urge Government clients/procurers to do likewise through GDS teams.

There are already three major platforms in operation within UK construction that enable monitoring and enforcement to lead to improved productivity, lower cost and in turn growth. The technology providers emerged in the UK three to four years ago and both the; design of the solutions and the industry acceptance of smarter ways of managing commercial processes are now mature.

Other measures – Integration

The consultation asks about ideas to support the wider policy objective of spreading prompt payment across the economy. We have consistently worked with all parts of Government to assist in:

- a) connecting the keystones which Government has put in place over the last five years to ensure transparency on negative commercial behaviours to allow the supplier market to migrate towards those who have a proven higher standard of commercial ethics and integrity; and,
- b) stopping the most potentially abusive aspects of non-payments such as around retentions, and linking commercial performance into the public sector procurement system in order to drive out negative behaviours and ensure Government is supported by a robust, ethical supply-chain
- c) ensuring greater consistency of adoption where really effective measures are in force, but are currently only being practiced in pockets and to a limited degree.

Government should seek to initiate this through a cross-departmental decision-making body, chaired by an appropriate person (we recommend the Small Business Commissioner), which can effectively bring the strands together and seek to introduce a fully coherent and coordinated approach, underpinned by strong levels of transparency.

We fundamentally see the role of the Small Business Commissioner as one of strategic leadership in the area of late and non-payment. We feel Government should be congratulated for the hard work it has undertaken in the area of embedding the initiatives set out in the executive summary, but the current challenge is enabling those initiatives to have meaningful impact in the following ways:

- a) integrating those initiatives to allow meaningful data collection on commercial behaviours such as payment; and,

- b) linking the data on commercial behaviour to the future ability of suppliers to effectively compete for procurement opportunities within the public sector.

This consultation focuses on (b), but we would strongly urge Government to incorporate solutions which also enable (a). For example, the BEIS payment performance reporting website exists independently to the Companies House website, Contracts Finder website, the Prompt Payment Code website, Construction Pipeline (IPA) website, Mystery Shopper website and the Small Business Commissioner website – there is minimal if any linkage between them. If a project was undertaken to integrate (beyond simple sign-posting) and link the data from the aforementioned websites, both public sector procurers/buyers and suppliers would have greater transparency over trading risks which could be factored into more intelligent procurement decisions and tendering submissions. This project could be scoped and delivered for a relatively modest cost given the proportionately high impact it would have by introducing transparency across all of these initiatives.

More on our position regarding data connectivity in these policy areas for construction is attached below.

Public Contracts Regulations

It has now been three years since the introduction of the Public Contracts Regulation in March 2015. In that time, we have undertaken three FOIs to understand local authorities' compliance with the legal requirement to embed provisions into construction, engineering and maintenance contracts to require within 30 day payment to flow down the supply chain; and then to see if processes are in place to monitor this.

As such, we are able to offer comparative analysis of compliance and attitudes to the legislative requirements over time. The below tables compare responses received from FOI requests in October 2015, September-November 2016 and March-April 2018.

Question on building in contractual requirements²:

	A) Have done	B) Will be	C) Will not	D) Don't know/ other
October 2015	28%	33%	21%	18%
Sept-Nov 2016	41%	25%	27%	7%
March-April 2018	51%	23%	18%	8%
			(rounded to total 100)	

Question on putting in place monitoring³:

	A) Have done	B) Will be	C) Will not	D) Don't know/ other
October 2015	14%	24%	39%	23%
Sept-Nov 2016	9.5%	22%	59%	9.5%
March-April 2018	11%	25.5%	46.5%	17%

² Question on contractual requirements: For civil engineering, construction and building maintenance contracts (including frameworks) established since 1 January 2017, have you incorporated into contractual requirements for your main contractors/suppliers to pay the suppliers directly below them in the supply chain within 30 days (or are you taking steps to apply this)?

³ Question on putting in place monitoring: For civil engineering, construction and building maintenance contracts (including frameworks) established since 1 January 2017, have you, or will you, be putting in place monitoring and reporting whether your main contractors/suppliers are paying their sub-contractors/suppliers within 30 days?

These figures – from those that responded – indicate that compliance is mixed. Rather than developing new initiatives, if Government was able as a priority to convey the importance of complying with the law to non central government contracting authorities (and monitoring compliance throughout the supply chain), this would be very impactful on spreading prompt payment and improving commercial behaviour in the UK economy.

Ending of non-independently held retentions

Mandating the use of Project Bank Accounts for public sector work above a certain value is an initiative we wholeheartedly support. This should be implemented as part of the Government's response to the outstanding BEIS consultation on retentions; and in our view, moving to legislate to end non-independently held retention of monies for contracts above a certain value. Abuse of the current retentions system is widespread, as can be seen (below) from the results of our member survey, conducted in late-2017⁴.

- 92% of respondents have been a recipient of work held as a retention in the last three years; and looking at all current construction contracts, they on average faced retentions in around two-thirds of cases.
- 56% faced total retentions of over £100,000 against their current contracts. Around three quarters of firms faced a value held of over £20,000.
- Our research shows that respondents must wait longer to get their monies than the typical 12 months defects liability period; 6 months more on average.
- The average amount of monies held over the past three years, which has not been paid back after the completion date and remains outstanding, is £34,826.
- With 5% on average held, there is no clarity on what monies will arrive and when. This makes planning for the monies (and investing it in people, equipment or new markets) remarkably difficult; especially when typical profit margins within the supply chain are typically around 2-3%.

Looking more narrowly, this would help demonstrate that both industry and Government have learnt from the collapse of Carillion. It would also be an important step in putting the building blocks in place to enable the construction industry to act in a more open and collaborative way, since having transparent and fair payment mechanisms is quite clearly central to this. If we the industry are not open and collaborative on a routine basis, then the reality is that the Prime Minister's fourth 'Grand Challenge', which she outlined in her Industrial Strategy speech on 21 May, will not be met. The challenge to use new technologies and modern construction practices to at least halve the energy usage of new buildings by 2030 will only be met by greater cross-disciplinary working and better engagement of the supply chain.

Data & Connectivity

We provide a list below of all the Government measures in place and how they might be linked and better deployed to create a step-change in payment culture.

1. Prompt Payment Code/Construction supply-chain payment charter

Both the Code and the Charter are rhetorical, consensual statements of what 'fair' (or 'good enough') looks like. However, their practical success lacks a) critical mass in the industry and b) a clear monitoring and enforcement system.

Furthermore, any enforcement system, which relies mainly on 'naming and shaming', carries two fundamental flaws:

⁴ The survey of ECA and BESA members was undertaken between 29 November and 18 December 2017. 113 members responded.

- a) in circumstances where an aggrieved party is already compromised due to the payment issues, few such parties can afford to compromise their position further by publicly reporting the issue; and,
- b) naming and shaming the party who is proven to be at fault, may at best have a momentary impact on their share price valuation (if they are sufficiently large), otherwise there is no long lasting damage, reputational or otherwise.

2. Mystery Shopper - whistle blowing

At present, firms can only complain to the Mystery Shopper Scheme where they don't have a 30 day payment clause in their contracts. Again, in circumstances where an aggrieved party is already compromised due to payment issues, few can afford to compromise their position further by publicly reporting the issue; and, unfortunately Mystery Shopper does not have powers to enforce compliance.

Our view is that non-compliance by suppliers to the public sector should result in:

- a) their behaviour being available online within the Contracts Finder/Payment Reporting portal
- b) their scoring in future procurement opportunities being downgraded, based on suitable procurement criteria, such as the use of mandatory payment reporting figures or feedback from public bodies monitoring adherence to the Public Contracts Regulations ; and,
- c) where negative behaviour is perpetuated, removal from lists of approved suppliers for a period of (at least) two years.

Non-compliance by contracting authorities should mean that they should be required to re-tender following a complaint (from any source) that supply chain contracts do not have 30 day payment clauses.

3. Retentions

As referred to on page 8, retentions are a percentage of monies owed which are retained as security against the risk of supplier insolvency or defects. However, recent BEIS commissioned research by Pye Tait indicated that the system is less beneficial as security, and more open to abuse. The report highlighted that £700m of retention monies was lost due to upstream insolvency in the last three years. This means that the construction industry is hemorrhaging almost £1m for each working day, £4.5m a week £20m a month.

Over £10.5bn of SME working capital is locked in retentions annually with cash flow issues leaving suppliers unable to invest in skills, training and ways to improve productivity.

Abuse of retentions and non-payment has been legislated against in many other countries, including the USA, Germany, France, New Zealand, Australia and Canada.

Government has nearly completed its consultation exercise – we believe there is a clear, present and compelling case for the findings to deal with both: the potential for legislative abolition of retentions in the short term and/or a legislative framework for mutual security over retention monies (a deposit scheme).

4. Construction Act

Providing a minimum framework for communication over payment, this system was broadly fit for purpose in 1996. However, it has consequently given rise to an additional, costly compliance system of mandatory notices and dates – these could be simplified to remove the complexity and cost of compliance and ensure the cost of dispute resolution is minimised for SMEs.

However, there are several digital payment platforms which allow complete client visibility as to project costs at all levels of the supply-chain and enable a fast, low-risk open, collaborative perspective on what will be paid and when. These options have low to medium take up in the market, mainly at tier 1 level, but should be embedded as part of the new Construction Sector Deal (as part of Digital Built Britain agenda).

5. Late payment legislation – interest, recovery of reasonable recovery costs

The Late Payment of Commercial Debts Interest Act 1998 offers a punitive deterrent for late payment in the form of simple interest (@ 8% default rate which can be overturned by agreement of 'some other substantial remedy' (the construction market usually stipulates this rate at 5% or 3%), together with compensation and recovery of costs.

It is widely accepted that this option to enforce payment is rarely used, but it is also accepted that if the default rate was high enough, and mandatory (rather than voluntary) it would be considered a substantive deterrent to late payment (creating an accrued volume of liability for debt deterring those who wish to perpetuate bad practice).

6. Public Contracts – payment periods

The Public Contracts Regulations regulate the duration of tier 1, 2 and 3 supply chain payment periods to 30 days, but as we have seen in the aftermath of Carillion, compliance, monitoring and enforcement remain fundamental obstacles to the practical success of this intervention.

As our freedom of information request feedback from local authorities shows (page 7), the Regulations are not wholly followed, and contracts within scope are to a lesser extent monitored. This needs to change.

Consideration should also be given to amending Reg. 46 of the Public Contracts Regulations that gives contracting authorities discretion to award contracts in smaller lots to enable greater SME access. Contracting authorities should be required to do this as a matter of course, subject to where the nature of the contract under consideration requires specialised resources that are only available within a large organisation.

7. Direct Engagement

As an immediate priority, public bodies should be implementing procurement strategies that enable direct engagement between the contracting authority and those firms physically delivering design, construction, FM and related services.

This would stabilise both public sector supply chains and industry capacity – BESA was informed in March 2018 of how powerful this has been for one of its members working on HM Prisons (previously under Carillion).

8. Supply Chain Finance – abuse

Our members have historically not objected to the mechanism of a large corporate buyer using its balance sheet to, through its bank, enable its disproportionately small suppliers to be paid early.

However, Carillion illustrated what happens when UK Government invites and introduces this initiative into UK commerce without monitoring or supervision. In Carillion's example the mechanism was reversed by the large corporate in order to double supply-chain payment periods and exploit a costless source of financing, i.e. trade credit. It is now obvious how harmful this was to the supply chain and it has threatened and in some cases closed supply chain businesses.

9. Project Bank Accounts

In their guidance, note the UK Government has defined Project Bank Accounts (PBAs) as follows – “Project Bank Account (PBA) is a ring-fenced bank account from which payments are made directly and simultaneously by a client to members of his supply chain. PBAs have trust status which secures the funds in it and can only be paid to the beneficiaries – the supply chain members named in the account. Payments out of the PBA are made simultaneously to all parties. The account is held in the names of trustees; likely to be the client and lead contractor (but could also be members of the supply chain).”

The Environment Agency and Highways England, for example, are among several UK Government clients that are successfully using project bank accounts (PBAs) to improve payment practices on their projects.

Wales - Flintshire, Swansea and Torfaen Councils have all identified construction projects to pilot the use of Project Bank Accounts (PBAs). The option to adopt PBAs also features in the North Wales framework agreement for delivery of future schools building programme incorporating all six North Wales Local Authorities.

Northern Ireland - Introduced the use of PBAs in January 2013 on all construction projects above £1m value. Guidance can be found in the Procurement Guidance Note.

Scotland - Following the successful completion of the trial programme recommended by the Review of Scottish Public Sector Procurement in Construction, the guidance on the implementation of Project Bank Accounts (PBAs) in construction contracts has been published. Scottish Government bodies must include PBA in tender documents for contracts commencing procurement procedures from 31 October 2016.

Deployment should be widespread. Hopefully the political awareness around Carillion's collapse and the issues created should mean that further central Government pushes could ensure far greater take-up.

10. Social Value –v– whole life value

The whole-life value principle is that the cost of a building is better represented by the equation: an asset's average costs are 10% construction: 80% operation: 10% de-construction.

The Social Value Act 2012 requires procurement decisions to acknowledge the social economic consequences, but this has not in isolation been adequate to move a culture in the public sector of lowest price, to one of socio-economic quality and whole-life price. We need to drive a greater appreciation of this ratio, which would also enable us to build more energy efficient buildings from the start. This, as we note earlier, is needed in order to meet the Prime Minister's fourth 'grand challenge' within the Industrial Strategy.

11. Grossly unfair contractual practices - Standard Contracts

Contracts are routinely amended in industry for a) project risks, and b) commercial risks, but amendment for commercial risk transfer to a disproportionately small supplier only serves to dump unmanageable risks onto the supplier.

The recent changes are welcomed in as much as they theoretically allow trade bodies to challenge these practices on behalf of their members, but in reality it simply shifts the burden of cost, administration and litigation funding to a trade body that is, in most cases, unable to operate this function.

The ECA and BESA – Working together to represent the engineering services sector

- *ECA and the BESA collaborate on a range of issues affecting the engineering services sector.*
- *The partnership brings together the two leading trade associations representing the interests of engineering services contractors, representing some 4,000 businesses with a combined annual turnover of almost £10bn.*
- *Together, ECA and the BESA cover a broad range of engineering, design, installation and facilities management activity, including electrical, heating, plumbing, energy management, micro-generation, ductwork, ventilation, fire and security, and wireless systems.*
- *Joint working includes representation and services in key areas such as contracts, procurement, payment and health and safety.*
- *Overall, the engineering services sector is estimated to account for some 40% of UK construction and maintenance turnover.*