

Subcontractor payments fact sheet

Transport for NSW has prepared this fact sheet to assist subcontractors and suppliers, carrying out work and/or providing goods and services on Transport for NSW projects, to be aware of their rights to recover payments under the Building and Construction Industry Security of Payment Act 1999 (NSW).

Terms used in this fact sheet

- The **Principal** is Transport for NSW.
- The **Contractor** (sometimes called a Head Contractor) is the company that Transport for NSW engages directly to deliver a project.
- A **Subcontractor** is engaged by a contractor to perform some of the work that the Contractor must deliver for Transport for NSW.
- A **Sub-subcontractor** is engaged by a Subcontractor to perform some of the work that the Subcontractor must deliver for the Contractor.
- A **Supplier** provides goods or services, but does not work for a Contractor, a Subcontractor or Sub-subcontractor.

How Transport for NSW supports companies on their projects to secure recovery of payments

The Building and Construction Industry Security of Payment Act 1999 (NSW) works to ensure prompt cash flow to contractors, subcontractors, sub-subcontractors and suppliers under a statutory scheme by which Transport for NSW is bound. It does this by regulating the payment regime for Contractors and Subcontractors.

The Act allows three ways for the recovery of payments from:

- Transport for NSW by a Contractor; or
- a Contractor by a Subcontractor; or
- a Subcontractor by a Sub-subcontractor.

The Act provides strong mechanisms to recover unpaid and/or disputed monies to assist in faster settlement of disputed payment claims including:

- a successful adjudication determination;
- issuing a Payment Withholding Request (PWR); and
- then, if successful and the payment claim remains unpaid, making a claim on the Principal (in the case of a PWR from a Subcontractor or Supplier to a Contractor) or a Contractor (in the case of a PWR from a Sub-subcontractor or Supplier to a Subcontractor) under section 6 of the Contractors Debts Act 1997 (NSW).

Transport for NSW recommends that Subcontractors, Sub-subcontractors and Suppliers seek **early** legal advice to benefit from these recovery mechanisms.

Protection for Subcontractors and Sub-subcontractors

The Act protects Subcontractors, Sub-subcontractors and Suppliers by allowing the withholding of payments to a Contractor or Subcontractor (as relevant) provided an adjudication application to recover a payment claim is underway.

This is because adjudication has the ability to allow Subcontractors and Contractors' Suppliers direct access to Transport for NSW and Sub-subcontractors' and Subcontractors' Suppliers direct access to a Head Contractor.

Adjudication applications

An adjudication application must be made:

- within 10 business days of the scheduled amount indicated in the payment schedule where it is less than the claimed amount; or
- within 20 days after the due date for payment where the whole or any part of the scheduled amount is unpaid.

If a Subcontractor is not paid, the Subcontractor should:

1. make an adjudication application against the Contractor; and
2. at the same time issue a PWR to Transport for NSW.

If a Sub-subcontractor is not paid, the Sub-subcontractor should:

1. make an adjudication application against the Subcontractor; and
2. at the same time issue a PWR to the Contractor.

An adjudication application can be made by a Subcontractor, Sub-subcontractor or Supplier through a lawyer or by its own means. Advice on how to go about making an adjudication application is available from NSW Fair Trading.

A PWR must include a statutory declaration that the Subcontractor (or Sub-subcontractor) genuinely believes the amount is owed.

Once a PWR is received, Transport for NSW (or a Contractor) must withhold a payment for the benefit of the Subcontractor (or Sub-subcontractor).

Transport for NSW (or a Contractor) is obliged to withhold until:

1. the adjudication application is withdrawn by the Subcontractor (or Sub-subcontractor); or
2. the Subcontractor (or Sub-subcontractor) is paid; or
3. the Subcontractor (or Sub-subcontractor) serves a notice of claim on Transport for NSW (or a Contractor) under section 6 of the Contractors Debts Act 1997 (NSW) for payment directly from money payable or due to the Contractor (or Subcontractor); or
4. a period of 20 business days passes after a copy of an adjudication determination is served on Transport for NSW (or a Contractor) by the Subcontractor (or Sub-subcontractor).

Contractor statements and supporting statements

A Contractor commits an offence if it serves a payment claim on Transport for NSW:

- without a supporting statement confirming that all amounts due to Subcontractors have been paid (other than amounts in dispute); or
- knowing that the statement is materially false or misleading.

A **Contractor Statement** should be accompanied by a **Supporting Statement** and confirm that the Contractor has paid its employees, payroll tax and workers compensation insurance.

Where an Administrator/Liquidator has been appointed

An adjudication application cannot be made by a Subcontractor, Sub-subcontractor or Supplier under the *Building and Construction Industry Security of Payment Act 1999* (NSW) if an Administrator or Liquidator has been appointed to the Head Contractor (in the case of a Subcontractor) or the Subcontractor (in the case of a Sub-subcontractor).

Inquiries regarding the recovery of outstanding debts from an insolvent Head Contractor or Subcontractor should be directed to the Administrator or Liquidator.

Additional information and advice

Subcontractors, Sub-subcontractors and Suppliers can access information and advice regarding the Act from NSW Government legislation website www.legislation.nsw.gov.au or NSW Fair Trading www.fairtrading.nsw.gov.au/ftw/Tradespeople/Building_industry_essentials/Security_of_payment.page.