

## **INFORMATION FOR SUBCONTRACTORS ENGAGED BY REED ON RECENT RMS CONTRACTS**

Roads and Maritime Services (“RMS”) has received a large number of enquiries regarding its position on many issues following the appointment of the Administrator (and then the Liquidator) to Reed Constructions Australia (“Reed”) This summary sheet is intended to provide subcontractors and suppliers with information on the matters as they currently stand.

### **Background**

In 2011, Reed had four contracts under construction for RMS:

- Great Western Highway Upgrade, Woodford to Hazelbrook (“Hazelbrook”)
- Central Coast Highway Upgrade, Erina (“Erina”)
- Newcastle Inner City Bypass, Shortland to Sandgate (“Sandgate”)
- Reconstruction and widening of Alford’s Point Road (“Alford’s Point”).

Under each of its contracts with RMS, Reed was paid on a monthly basis for the work completed each month. Prior to RMS making payment to Reed each month, Reed provided statutory declarations with each payment claim. These statutory declarations included attestations that Reed:

- had complied with all of its relevant obligations under the Works Compensation Act 1987, Payroll Tax 2007 and the Industrial Relations Act 1996;
- had complied with the obligations of the Contractor under the Contract relating to Security of Payment, if any, including payment of employees, workers and Subcontractors of the Contractor; and
- was not, under any law, insolvent or unable to pay its debts as and when they fall due.

RMS has met its contractual obligations to pay Reed for all payment claims it had submitted for work carried out by Reed (and therefore for all work carried out by its subcontractors) up to and including the end of January 2012. In some instances, upon receiving payment claims RMS expedited the payment process by assessing and paying the claims as quickly as practicable and well inside statutory and contractual timeframes. This was done in order to assist Reed to meet its payment obligations to subcontractors. (See further information under heading “Timing of Payments by RMS to Reed” on page 6).

During 2011, several subcontractors indicated to RMS that they had not been paid by Reed for work on RMS projects. On raising these complaints with Reed, RMS was advised in each case that payment arrangements had been or were about to be made. Reed submitted its February 2012 payment claims without the required statutory declarations. Accordingly, RMS processed and assessed the February 2012 payment claim in accordance with the contract but no payment was made to Reed.

RMS is now aware that, in many cases, Reed did not pay its subcontractors for the work carried out by them. RMS sympathises with those subcontractors, but it is not appropriate to use public money to pay for that work twice.

### **Dispute between Reed and RMS**

Reed submitted very large contractual claims to RMS in September 2011 related to adjustment of Telstra assets on each of the Hazelbrook and Erina contracts. These claims were rejected by RMS at first instance on the basis that they were without merit.

Nonetheless, the NSW Government agreed with Reed that these claims be referred to a confidential expert determination process for further review in order that a determination be made quickly, and definitively, as to who was liable. At the time, as stated publicly by the Government, the intention was that any moneys found to be due to Reed would be paid directly to subcontractors.

On 21 May 2012, the expert panel handed down its interim report. It dealt with questions of liability only. It bears the title "interim" because the terms of reference for the panel contemplated the possibility of a determination on quantum following the determination on liability.

RMS regards the determination on liability as wholly favourable to it. However, the Liquidator has not yet indicated to RMS its position on the interim report or the process going forward.

If the Liquidator agrees to pursue a decision on quantum as a result of the interim report, RMS considers that any such amount would be very small (measured in tens of thousands of dollars, not millions). Such an amount would mean a tiny fraction of one-cent-in-the-dollar across the range of subcontractors owed money by Reed on all the RMS projects.

### **Termination of Reed's employment**

On 28 May 2012, RMS terminated Reed's employment under all four contracts.

RMS then decided to complete the roadworks contracts by using its own in-house construction resources for Erina (Hunter Road and Fleet Services) and Alford's Point (Sydney Road and Fleet Services) and by engaging Abigroup from the Lawson Alliance for Hazelbrook and Thiess from the Hunter Expressway Alliance for Sandgate.

Using these organisations means that RMS can ensure delivery on the NSW Government's commitment to give previous Reed subcontractors and suppliers first right of refusal to complete their work. An early resumption of work on site and management of risks inherent in taking over a partially completed construction site were also better suited to an alliance contract rather than a "hard dollar" contract.

Reed entered into voluntary administration on 15 June 2012. John Melliush and Ryan Eagle of Ferrier Hodgson were the appointed Administrators.

On 9 July 2012, the NSW Supreme Court ordered that Reed be placed in liquidation. Mark Robinson of PPB Advisory was appointed the Liquidator.

### **NSW Government's Position**

The Government has made a number of statements about how it is dealing with issues concerning ex-subcontractors of Reed. Some of these are explained below.

*"The NSW Government will not pay twice for the same work"*

RMS has already paid Reed for payment claims submitted for work up to and including the end of January 2012. Of the amount assessed by RMS as owing to Reed for work performed during February 2012, RMS has made payments to certain subcontractors in accordance with legally binding court judgments and orders (see "Residual Funds From February 2012" later in this document). These payments have exhausted the amount owed by RMS to Reed in respect of work performed in February.

The same work for which RMS has paid Reed is the subject of subcontractors' contractual claims on Reed. It is Reed's responsibility to satisfy those subcontractors' claims. RMS will not pay twice. This is normal commercial practice.

*"RMS will work with subcontractors to cross-check against RMS' payments to Reed"*

There may be a very small number of cases where RMS has not yet paid Reed for work carried out by subcontractors because Reed did not claim payment from RMS for that work. RMS has developed a procedure that focuses on the essential matters that need to be established to identify any "payment gap". This procedure is illustrated on the attached flowchart.

In the normal course of events to assess a payment claim, RMS site staff measure up on site or review the quantities claimed by the head contractor each month. What is measured or assessed is related directly to the pay items in the contract's schedule of rates or to lump sum amounts. Often, the work performed under a subcontract is not specific to a pay item in the head contract and/or the measurement of performance under the subcontract is different to that in the head contract. This is a challenge in identifying any "payment gap" and RMS may therefore require additional information about the work in question from the subcontractor.

If a payment gap is identified, RMS will inform the relevant subcontractor and the Liquidator within one month of receipt of complete information from the subcontractor. Any such payment gap is an amount owing by RMS to Reed under the contract and by Reed to the relevant subcontractor under the subcontract. Importantly, now that Reed has gone into liquidation, subcontractors should assume that RMS will not pay subcontractors' claims directly because such payments may not discharge RMS' indebtedness to Reed, or may be treated by the Liquidator as preference payments. The Liquidator has not yet indicated to RMS its position in relation to such amounts, although it should be noted that previously when in administration, the Administrator advised RMS that it took this position. Unless advised to the contrary by the Liquidator, it should be assumed that the Corporations Law constraints apply to any debts owing to Reed.

*"Previously engaged subcontractors will be given the first opportunity to work on the jobs when they recommence"*

Many Reed subcontractors and suppliers have told RMS - including via the email address set up in late May and in June 2012 – [Reedsubcontractors@rms.nsw.gov.au](mailto:Reedsubcontractors@rms.nsw.gov.au) – that they are interested in returning to do further work on the projects.

RMS has kept records of these companies. Since new head contractors are in place on all the contracts, they are being provided with updated lists of previous subcontractors and the process of re-engagement has begun. Generally, the head contractor will first establish contact with subcontractors about capability and other relevant preliminary matters such as insurances, safety and management systems, etc. The Civil Contractors Federation has offered assistance to any subcontractors (whether they are Members of the CCF or not) in this regard – please contact [ccfnsw@civilcontractors.com](mailto:ccfnsw@civilcontractors.com) .

Then when planning for the outstanding work is developed, work packages are identified and subcontractors are invited to quote for them. Subject to the achievement of fair market rates and terms, previous Reed subcontractors can expect to be re-engaged for the new work packages. Subcontractors are invited to contact Bernie Chellingworth, Manager Contracts Administration in RMS on 8588 5757 if they have any concerns over the terms of their re-engagement.

RMS has a list of previous Reed subcontractors and suppliers who registered interest for each of the contracts. Contact Bernie Chellingworth if you are not sure whether your company is on the list.

In early July the number of subcontractors registering for re-engagement for the Erina contract was 37. 80% of these companies had been interviewed and of those, 97% had either been re-engaged or were expected to be re-engaged in due course. Hazelbrook, Alfords Point and Sandgate are not as well advanced in this process.

## **Residual Funds From February 2012**

Before Reed was placed into voluntary administration, some subcontractors and suppliers of Reed had used the *Building and Construction Industry Security of Payments Act 1996 (NSW)* to obtain judgments against Reed. These subcontractors then served on RMS garnishee orders or Notices of Claims under the *Contractors Debts Act 1997 (NSW)* seeking direct payment for work performed for Reed.

Claims of this type were legally binding on RMS, and to the extent that RMS had certified amounts as being payable to Reed, but had not yet been paid to Reed, these amounts were used to satisfy a number of those claims. In making those payments, RMS complied with its legal obligations.

All of the funds originally available for this purpose, totally \$1.882M, have either been paid or assigned, and it is not likely that any further amounts will become available to satisfy those existing claims which remain unsatisfied, or any further claims served by unpaid suppliers or subcontractors of Reed.

RMS continues to receive claims from subcontractors and suppliers, often acting on advice from or represented by a legal firm or a debt recovery agency. For reasons set out above, subcontractors can assume that the Government will not meet those claims.

## **Other Payments To Subcontractors**

Some payments have been made by RMS direct to Reed subcontractors under exceptional circumstances, such as:

- RMS contracts require the contractor to ensure the intellectual property (IP) created under the contract to become the property of RMS. It would appear that Reed did not include this requirement in its subcontracts and it has been necessary for RMS to negotiate the purchase of the IP with the subcontractor as a justifiable commercial transaction to enable prompt re-commencement of the road projects. The cost of RMS obtaining the IP will be charged to Reed.
- Payment for temporary fencing or variable message signs was negotiated with relevant suppliers on the initiative of RMS site staff to ensure safety following Reed stopping work on the Sites.

## **Retention Money Held By Reed**

Some subcontractors have asked RMS for return of retention money that was withheld by Reed. RMS does not have any knowledge of such retention money as this was a matter between Reed and the subcontractor. Subcontractors should take this matter up with the Liquidator.

### **Timing of Payments by RMS to Reed**

Payment requirements in the GC21 head contract with Reed reflect the time frame set out in the Building and Construction Industry Security of Payment Act – that is, a period of 10 Business Days between the time of receiving a Payment Claim from the Contractor to the issue of a Payment Schedule by the Principal and then a further period of 10 Business Days before payment must be made. In some instances RMS expedited its normal payment processes to enable payment much sooner than the total 20 Business Days allowed by the contract, to assist Reed meet its payment obligations to subcontractors.

No progress payment was made before work was performed and payment claims were submitted.

### **Contact Details**

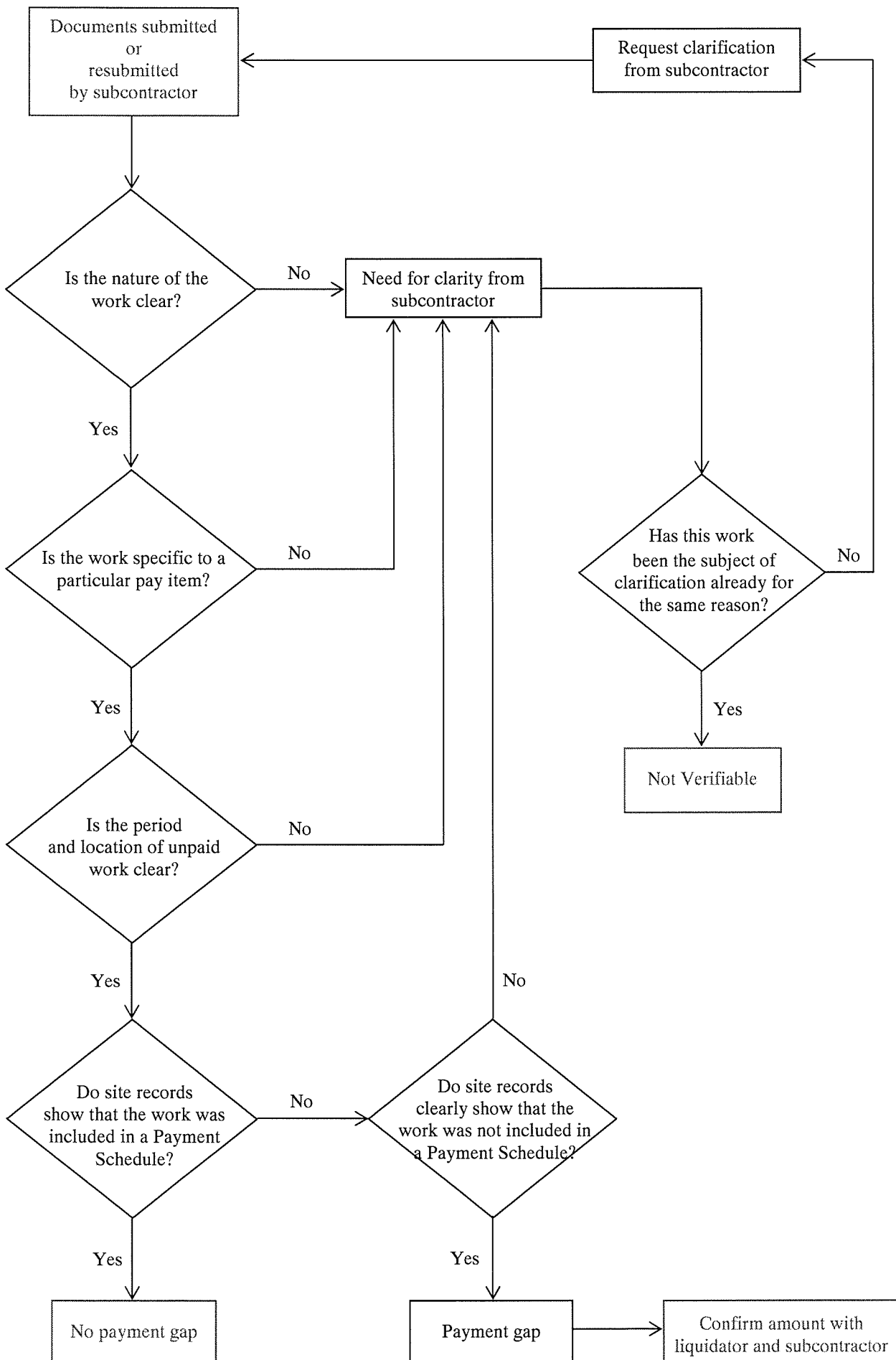
Work on the four sites affected by Reeds insolvency has now recommenced as follows:

1. Central Coast Highway by RMS Hunter Road and Fleet Services. Contact Matt Olle **0243797065**
2. Alford's Point Road upgrade by RMS Sydney Road and Fleet Services. Contact Ken Vo **0293529548**
3. Great Western Highway by Abigroup. Contact Goran Pavic **0247592531**
4. Newcastle Inner City Bypass, Shortland to Sandgate by Thiess. Contact Ken Swift **0240145000**

If you require further information please contact Bernie Chellingworth, RMS Manager Contracts Administration, on **0285885757**.

# FLOWCHART FOR CROSS CHECKING OF REED SUBCONTRACTOR CLAIMS AGAINST RMS PAYMENTS TO REED

(Refer to attached guidance notes)



## **GUIDANCE NOTES FOR THE FLOWCHART FOR CROSS CHECKING OF REED SUBCONTRACTOR CLAIMS**

The aim of reviewing subcontractor claims is to identify if there are any gaps between amounts paid by RMS to Reed and the value of work completed by subcontractors.

If a payment gap is identified, RMS will inform the relevant sub-contractor and the Liquidator. Any such payment gap is an amount owing to Reed by RMS under the contracts. It would also be an amount owed by Reed to the relevant sub-contractor.

Importantly, now that Reed is in liquidation, the Corporations law applies to debts owed to Reed. Accordingly, subcontractors should assume that RMS will not pay subcontractors' claims directly because such payments may not discharge RMS' indebtedness to Reed, and may be treated by the Liquidator as preference payments.

If subcontractors wish RMS to review their claims for unpaid work done for Reed the following information will be required.

- 1) Copies of unpaid invoices
- 2) Copies of any supporting information to clearly identify:
  - When the work was undertaken
  - Accepted subcontract rates for the work as detailed in the subcontract agreement
  - Details of the type and location of work undertaken e.g. excavator hire for bulk excavation in cut 3; excavate for stormwater line from A to B; labour hire for subsoil drain at....; construct stormwater pipe line at .....; concreter for pits at....; kerb and gutter at.....; supply of concrete for bridge at .....; etc

RMS will work with subcontractors to identify how the unpaid claims relate to the work types measured and paid under RMS contracts with Reed.

If RMS payment schedules to Reed show that the work type that a subcontractor was engaged to do has been measured and included, then there is no payment gap.

If site records clearly show that the work was not included in a payment schedule then there is a payment gap.