PFI perspectives
Reviewing the infrastructure landscape

Part 1

The positives and challenges of PFI and opportunities for the future

Bevan Brittan

PFI perspectives
Reviewing the infrastructure landscape

Foreword

More than 25 years on from the first PFI projects, the industry faces a number of challenges: multiple defects issues, high profile disputes, insolvencies and the need to plan for expiry and handback.

In autumn 2024, we held a series of webinars, with panellists from local authorities, health trusts, Project Companies, FM contractors, lenders and the Infrastructure and Projects Authority ("IPA") and central government. We felt this was an opportune time to do so, given the recent election of a Labour government, and widely publicised discussions about how to deliver infrastructure.

Our sector-leading experts set out their views on the very real benefits delivered by the PFI model, the challenges facing the industry, potential solutions to some of those challenges, and on how the PFI model can be adapted to deliver future infrastructure investment.

Bevan Brittan has advised on over 800 PFI/PPP schemes, and has extensive experience in the market. Our specialist teams currently support the establishment and procurement of new PPP schemes, and the management of existing PFI/PPP schemes, including variations, assistance with the expiry process, contract management, and disputes.

Working with different stakeholders across the industry means we understand the value of seeing things from different perspectives.

In this first report, we look at the positives, and the challenges, of PFI. Whilst our panellists will not endorse all our conclusions, the discussions demonstrate that stakeholders in the sector have much in common, and are passionate and engaged about working together to drive positive change.

In our report, we refer to a number of earlier reports issued by the National Audit Office ("NAO") and the IPA, including the White Fraiser Report, which was issued by the IPA and written in response to concerns about behaviours and an increased risks of disputes. We also refer to the Association of Infrastructure Investors in Public Private Partnerships Report, 'The Private Finance Initiative Model and the Social Infrastructure Challenge', September 2024 ("AIIP Report"). However, our report is not intended to be a comprehensive review of all issued guidance.

We also explore whether a PFI/PPP model could be the solution to the challenge of delivering new economic and social infrastructure. Our report is not intended to be a comprehensive review of all available models, and at the time of writing, it is not clear whether there is any appetite for using private finance in this way. However, the engaging discussions highlighted the real benefits that PFI/PPP models can and have delivered.

Following a comment from one panellist, the motto adopted by a number of our speakers was *"Do PFI, but do it better"*. We look briefly in this report at new models. Later this autumn, we will also issue a separate report on ways to address some of the challenges with existing operational PFIs.

Judith Hopper, Bevan Brittan
November 2024

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Wiltshire Council

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Rosemary Jago
Partner
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The positives of PFIs

Introduction

"It's about those relationships and that partnership working that addresses the day to day challenges and where we can go that extra mile".

Stephanie Exell
Managing Director at InfraRed

A number of our panellists noted the very real positives delivered by PFI. This is something which can be overlooked in wider media commentary on PFIs, or in industry discussions where the focus is, understandably, on the immediate, medium term and long-term challenges facing various stakeholders.

We were therefore keen for our panels to share their views on the benefits of the model.

The quality of PFI assets

"The pride comes from seeing something go from an Excel spreadsheet to a physical building."

Nick Lane
Director, Infrastructure and Government at PwC

Many of our panellists commented on the high quality of numerous PFI assets.

A number of examples were referred to by our panellists. Sam Thurgood from CBRE referred to his experience working on Alder Hey Children's Hospital (a project on which Bevan Brittan also advised):

"It pushed not only the boundaries of hospital design but actually the way it was delivered in partnership between the NHS, the local authority and then with the private sector… was absolutely fantastic. In the end it delivered an incredible asset not only for the local community but also for children across the UK and all delivered under PFI."

Sam Thurgood
Strategic Estates Specialist at CBRE

Emma Brown from Wiltshire Council noted that one of their PFI projects has delivered 242 social housing units to the community, adding that she felt the level of professionalism and support the tenants receive from the PFI provider is *"exceptional"*.

Jeanette Batten from Dartford and Gravesham NHS Trust also recounted her experience of the Pembury Hospital project. This project involved constructing a new state-of-the-art acute hospital on an old workhouse site which involved a number of challenges, including a judicial review prior to tender, and a difficult handover process during the very cold spell in the winter of 2010:

"And for me I think it was the first patient that I saw who was a very small boy, in his pyjamas and playing with his toys in his single room with his parents, and that was the turning point: you knew then that is what the whole thing had been for."

Jeanette Batten
Director of Estates, Facilities and Capital Projects at Dartford & Gravesham NHS Trust

Comparison to pre-PFI assets and to current non-PFI assets

"Previous to my career in the infrastructure business I was a teacher and for many of my days in the classroom you'd be pushing a bucket around trying to catch the drips, or be telling students that they can't use certain toilets because they weren't available. That doesn't happen today [with PFIs], and if it does, then there is often a solution and a plan to fix that and to take it forward".

Stephanie Exell
Managing Director at InfraRed

Panellists noted the very real challenges with the condition and quality of non-PFI assets.

It is noted that the recent AIIP Report[1] confirmed that PFI projects have generally been good at 'ring-fencing' lifecycle replacement and maintenance spending throughout the lifespan of the contract, to achieve successful public projects, against diminishing capital expenditure since 2010.

In some cases, the complexity and cost of the infrastructure (such as energy projects, for example) means that the projects may not otherwise have been delivered without private finance.

Nick Iliff of the IPA also noted that assets which are built and maintained through the PFI, PPP and LIFT models are very often regarded to be the best in their class by the authorities managing them.

1 The Association of Infrastructure Investors in Public Private Partnerships, 'The Private Finance Initiative Model and the Social Infrastructure Challenge', paragraph 23 September 2024.

Wider benefits

"You can develop a whole infrastructure of businesses in your city, your town or area that can grow and depend on that pipeline of work as well. That confidence breeds growth and investment, creating more opportunity that goes way beyond public infrastructure projects and encouraging more economically active people."

Jo Barnes
Managing Director at Sewell Group

Panellists also noted that PFI can deliver far more than bricks and mortar – they provide wider benefits for the entire community.

The quality of the buildings in schools, hospitals, prisons and social accommodation/ housing projects must be seen in the context of the positive impact the fabric of those buildings can have on the experience of end users, and on the employees who work in those buildings.

There are other examples, including energy from waste and energy recovery facilities assisting local authorities in meeting recycling targets and with the drive towards achievement of the Net Zero Agenda.

Anecdotally, there are examples of improved patient care and better educational outcomes from PFI assets. However, the sector would benefit from more data to support this. This type of analysis could be crucial in persuading politicians and the wider public of the benefits of PFI projects, and that there is a genuine benefit to using public-private partnerships for future investment and delivery of infrastructure.

Overcoming major challenges

"I think one of our biggest achievements possibly across the industry was the response to Covid-19 in 2020… I'm really proud of what we achieved and what I think the industry achieved generally in some pretty short timescales at that time".

Kevin Hawkins
Operations Director and Head of Social Infrastructure at Kajima Europe

Where the industry has faced genuine emergencies that have required partnership working, stakeholders have worked together to find solutions.

A number of panellists gave the example of COVID-19, where stakeholders worked together at short notice to agree variations. The good overall condition of PFI assets in the health sector also meant that those facilities could continue to run effectively during the pandemic, enabling the redeployment of experienced staff to establish Nightingale hospitals and additional centres for the vaccine roll-out. This was a demonstration of true partnering and collaborative working, with a focus on required outcomes, rather than the letter of specific contractual provisions.

Another example is the sector response to the Carillion insolvency, where parties worked together to ensure that, ultimately, there was no impact on end users.

The AIIP Report also noted that assets within PFI projects are already helping to meet the NHS target of 2045 and the Government's 2050 Net Zero commitment[2]. Further, the IPA paper on Decarbonisation of Operational PFI Projects noted examples of successfully implemented schemes including air conditioning optimisation, LED lighting installations and project companies commissioning decarbonisation reports for schools to identify options to reduce energy consumption and carbon emissions[3].

2 The Association of Infrastructure Investors in Public Private Partnerships, 'The Private Finance Initiative Model and the Social Infrastructure Challenge', paragraph 26 September 2024

3 Infrastructure and Projects Authority, 'Executive Summary: Decarbonisation of Operational PFI Projects', Appendix: Case Studies July 2023.

Engaged stakeholders

"What I noticed when I [worked for MHCLG] was the huge amount of positivity that was coming back to me when I spoke to authorities about the impact their projects had had in turning round very, very deprived areas."

Georgia Lewis
Senior Strategy Director at Local Partnerships LLP

Many stakeholders are passionate about PFI and the benefits it can deliver. Panellists commented that there are a number of projects that work well to deliver high quality services to the public sector, and where parties work mutually and collaboratively.

Within the public sector there are many contract managers who are highly skilled and knowledgeable, and who understand the value of both strong contract management and strong relationship management.

Within the private sector, many individuals are strong advocates for the benefits of PFI, and motivated by a sense of pride in what the assets can deliver.

Amanda Gomersall, of Leeds Teaching Hospital NHS Trust, emphasised the benefits of cultivating a *"shared vison"* with stakeholders to create a *"real change"*. This was demonstrated by Amanda's anecdote of giving a site tour to a funder to show changes to wards made through variations (mostly during the COVID-19 pandemic). The tour helped to convey the results of the funders' input, and their efforts in ensuring a quick turnaround on the project. This positive engagement enabled the effective delivery of an LED project, through a process akin to programmed maintenance, rather than a more complex variation process.

Across organisations, objectives are aligned. Each of the lender, FM contractor and Project Company panels noted the pride they take from working in partnership to support assets that deliver key public services, and which can have a real impact on society.

As the White Fraiser Report noted, many corporate institutions will have responsible business and ESG agendas[4] and will be genuinely invested in delivering not only revenue and profit but demonstrating that they have helped deliver social value.

The FM contractor panel also noted that the staff delivering the FM services are often members of the local community, and are therefore invested in wanting to deliver a good result for their clients. It was noted that rooting the contract in the experience of the end user –whether a patient in a hospital or a pupil in a school – helps the parties remember why the relationship, and the underlying project, ultimately matters.

4 Barry White, Andrew Fraiser, 'White Fraiser Report – Private Finance Initiative sector', Infrastructure and Projects Authority July 2023.

The challenges

Introduction

"I think what is lacking on both sides, not just on one side, is empathy for that opposing view and pressure and challenges that we're under".

Kevin Hawkins
Operations Director and Head of Social Infrastructure at Kajima Europe

One of the drivers for organising the panel series was that, as advisors to different stakeholders, we see commonalities in some of the challenges faced. We discuss some of those challenges further below.

Stereotypes

A number of panellists noted the world view of PFI contracts as being seen overly favourable to the private sector, with an assumption that the private sector is driven solely by profits.

This stereotype fails to take into account the fact that, as set out in the Positives section of the report above, many Project Companies, FM Contractors and lenders are invested in the successful delivery of a project and feel unfairly tarred by a perception that their interests are truly – or solely – profit driven.

In fact some Project Companies and FM Contractors operate on very small margins. It was reported, for example, that the insolvency of Carillion was caused by operational issues relating to four UK PFI/PPP contracts[5], with Carillion's FM Contracts operating on net margins of just 1%[6]. We discuss the financial challenges in the sector further below.

On the public sector side, participants noted that they are sometimes seen as naïve, uncommercial or unskilled. There are many examples within the industry which disprove this simplistic assumption (although, as we note further below, there are challenges with both capacity and capability).

These assumptions do impact on relationship management. Those working in the public sector who believe that the private sector are solely driven by profits and do not have their best interests at heart may struggle to build a collaborative relationship.

Conversely, a belief by some within the private sector (and/or their advisors) that public sector bodies are not capable of engaging in effective contract management can result in poor behaviours, on the assumption that those behaviours will not be challenged or addressed.

In the context of disputes, this can result in an aggressive approach, with an expectation that the public sector will always seek a commercial resolution rather than using the dispute resolution procedure ("**DRP**") set out in the underlying contract. Whilst the stereotype is not without foundation – the White Fraiser Report, for example, noted that a lack of resources and corporate bandwidth have contributed to avoidance of referring disputes to the DRP[7] – the belief that the public sector will always avoid the DRP is ultimately unhelpful and reduces the likelihood of the successful resolution of disputes.

A number of panellists noted the negative publicity in media reporting on PFI projects, which may take a narrow view of "value for money" and which does not take into account how costs are spread over the life of the project.

The ability of all stakeholders to share 'good news stories' therefore has an important role to play in shaping the future of the industry.

5 Simon Goodley, 'The Four contracts that finished Carillion', The Guardian January 2018.

6 National Audit Office, 'Investigation into the government's handling of the collapse of Carillion', Summary, paragraph 2 June 2018. Please see Carillion: 12 months on from a PFI perspective | Bevan Brittan LLP for further information.

7 Barry White, Andrew Fraiser, 'White Fraiser Report – Private Finance Initiative sector', Infrastructure and Projects Authority July 2023

Financial challenges

Those implementing and entering into PFIs did not envisage an operational phase which would largely take place against the backdrop of austerity.

Public sector bodies have faced challenging budgets, in some cases leading to the hollowing out of contract management teams. In addition, there has been an expectation that savings should be made on PFI contracts in the same way as was expected for other goods and services contracts. Project Companies, in taking the risk on construction, did not anticipate significant construction defects claims, in some cases after the long-stop date for commencing court proceedings against the construction contractor has passed. Similarly, FM Contractors face challenges in incurring higher than planned costs of maintaining defective assets.

For lenders, the fact that there has not been a pipeline of future projects has seen focus switch to different types of projects, including utilities, energy and digital projects, and the lenders' panel also noted the downgrading of projects by Moody's, which in turn will potentially impact on the willingness to invest in future models. One panellist noted that, on distressed projects, the level of deductions can be *"eye-watering"*, and there are a number of projects which are either in insolvency arrangements, or on the precipice of such arrangements.

Where there are financial challenges for multiple parties, this can give rise to a greater risk of disputes. Conflicting priorities are obstacles to effective contract management. The White Fraiser Report reiterated the requirement for clearly defined strategic objectives for contractual compliance and reduction of the risk of unwanted outcomes[8]. Understanding the commercial realities in which each stakeholder is operating can be critical to resolving disputes.

8 Barry White, Andrew Fraiser, 'White Fraiser Report – Private Finance Initiative sector', Infrastructure and Projects Authority July 2023.

The contract documentation

Interpretation

PFI contracts are often lengthy, with the Project Agreement and multiple schedules, typically running to thousands of pages.

Critically, there are also a number of wider documents which form part of the PFI project contractual documentation, including supply chain documentation (relating to both construction and maintenance / services), direct agreements, financing agreements, and leases / subleases. The documentation is complex and often interwoven. This complexity can add to challenges in interpreting the contractual position.

The earliest PFI contracts were drafted against the backdrop of political pressure to demonstrate progress before the 2001 general election and prior to standardisation[9]. This means that a number of early contracts contain idiosyncrasies. Further, such early contracts are notably light on detail around the expiry process.

Even post-standardisation, the nature of the contracts means that they contain a number of what were described by the Court of Appeal as *"infelicities and oddities"*[10] and expiry provisions which are not always consistent with the recommended IPA approach of 7 years to prepare for expiry[11].

This can create a number of challenges:

a. it can be difficult for someone who is new to the contract to understand the key provisions; and
b. PFI contracts can give rise to a number of questions of contractual interpretation, which can be more difficult to resolve, as the impact of a disagreement about a contractual provision may be amplified over the life of the contract, and it can be harder to negotiate a 'middle ground'.

An additional challenge arises over the lifespan of a project due to variations that are made to the underlying contractual documentation. Given the complexity of the original documentation, keeping abreast of changes to the documentation is fundamental (and not to be underestimated). We discuss variations further below.

9 Version 1 of the 'Standardisation of PFI Contracts' was published in 1999. Increasingly detailed versions of SoPC followed in 2002, 2004, 2005 and 2007 (and bespoke standard form contracts for different sectors).
10 Amey Birmingham Highways Ltd v Birmingham City Council [2018] EWCA Civ 264.
11 National Audit Office, 'Managing PFI assets and services as contracts end', Summary paragraph 11 HM Treasury June 2020.

Contract management

Discussions with panellists reveal that, whilst by no means universal, there are two diametrically opposed approaches to contract management in the PFI sector which both create risks and challenges.

The first is the approach which can be described as *'putting the contract in the drawer and not thinking about it'*. This is, we would suggest, not the best approach to contract management. However, the challenge for a lay person who does take the contract out of the metaphorical drawer is that the length and complexity of the documents means that they will not be easy to navigate without a certain level of knowledge as to the key provisions.

A number of panellists noted how helpful support, guidance and training from both central government and the IPA can be to a public sector body seeking to manage a PFI contract.

Different challenges arise where there is an over-officious interpretation of the contract that loses sight of the strategic objectives, a challenge noted in the White Fraiser Report[12].

There is a balance between these two approaches, but it requires both capacity and capability, and a strong approach to relationship management. We discuss both capacity and capability, and relationship management, further below.

One point that should be noted, however, is that some commentary which refers to over-judicious use of the payment mechanism by the public sector[13] fails to take into account that, broadly, the payment mechanism is the 'sole remedy' available in the contract[14]. For a number public sector organisations, deductions are driven not by a desire to achieve costs savings, but after a lengthy process of trying, and failing, to encourage the private sector to comply with its contractual obligations.

Observers therefore need to recognise the nuance of the position and the distinction between cases where the payment mechanism is applied on the basis that there are no other available remedies and commercial discussions have failed to produce a resolution, and others where there may be a different strategic objective and where deductions are being used to generate costs savings, which in turn can contribute to a breakdown of trust and collaboration.

12 Barry White, Andrew Fraiser, 'White Fraiser Report – Private Finance Initiative sector', Infrastructure and Projects Authority July 2023.
13 The Association of Infrastructure Investors in Public Private Partnerships, 'The Private Finance Initiative Model and the Social Infrastructure Challenge', paragraph 106 September 2024.
14 There is usually a carve-out for injunctive relief. In some contracts, there can also be indemnities and other remedies available.

Variations

"I have known of occasions where grant funding or central funding has had to be returned purely on the basis that we cannot get a variation over the line with the SPV and parties because of the legal aspects and commercial aspects that need to be agreed before that variation can be implemented. And that is hugely disappointing… we shouldn't be in that position… because we can't move forward".

Jeanette Batten
Director of Estates, Facilities and Capital Projects at Dartford & Gravesham NHS Trust

There is general consensus across the sector that variations are a challenge, and prove to be too costly and time consuming.

The implementation of variations can be a source of friction in operational PFI projects and can negatively impact the relationship between public and private sectors. The White Fraiser Report notes variations as one area generating a *"significant degree of frustration"* on the public sector side, largely as a consequence of having to manage priorities (e.g. clinical priorities within the health sector) against a backdrop of uncertain timetables and significant costs[15].

It should be noted that the picture is not universal – there are also positive examples of partnership working to deliver variations at pace. As noted above, Project Companies and FM contractors responded quickly at the start of the COVID-19 pandemic to implement the necessary works to increase capacity in hospitals at short notice, or to agree procedures and processes for dealing with the increase in household waste during the pandemic.

Some panellists did query whether PFIs are agile enough to give flexibility in a changing world – with, for example, the digital landscape being very different to 25 years ago – and whether other non-PFI projects give greater flexibility to introducing new service components.

However, it should be noted that sometimes the challenge is not the wording of the contract itself, but additional requirements being put in place by Project Companies or funders – such as the implementation of a variation protocol (in some cases without involving the public sector) – which adds hurdles to the process that were not originally included in the variation drafting.

It is clear that part of the problem is that, with the exception of the NHS LIFT market, there is no standardised approach to risk profile or documentation with regards to variations. Some projects have naturally developed their own precedents over time, but there are dangers in simply "rolling over" documentation from an earlier variation without understanding the contracting structure and technical / commercial context that underpinned the earlier deal, and/or taking into account necessary considerations for the current variation to be implemented.

Adverse experiences developed on other projects can also often create corporate attitudes and policy which impact unhelpfully on unconnected schemes. It was noted in the health session that variations are much harder to implement when dealing with funders, Project Companies and FM Contractors who have "had their fingers burned" and/ or been involved in other poorly performing contracts, which leads to an increased hostility towards risk transfer, which in turn invariably adds some level of time and cost to the variation process.

The AIIP Report identifies the risk transfer and payment mechanism as being factors that drive variations to be difficult and costly to effect, and *"greater flexibility may be more achievable in a model that does not have such complexity in its configuration"*[16].

15 Barry White, Andrew Fraiser, 'White Fraiser Report – Private Finance Initiative sector', Infrastructure and Projects Authority July 2023.
16 The Association of Infrastructure Investors in Public Private Partnerships, 'The Private Finance Initiative Model and the Social Infrastructure Challenge', paragraph 37 September 2024.

Net zero

One obvious area where change will be required is in delivering on net zero commitments. The UK Government has adopted a suite of policies in order to reach net zero, set out in two strategy publications: the Net Zero Strategy (2021)[17] and Powering Up Britain: The Net Zero Growth Plan (2023)[18].

Possibilities for the PFI estate include retrofitting and energy related performance variations to leverage energy efficiencies and carbon reduction.

Where extensions to existing facilities or new facilities are being considered within an existing PFI/PPP project, the adoption of carbon neutral practices, contractual requirements and procurement aspects will be key considerations for all parties.

However, there is an obvious challenge in ensuring that all project parties (both public and private, as well their advisers) agree a proactive, pragmatic, flexible solution – particularly in relation to the approach in respect of existing contractual requirements and existing procurement aspects (which can be addressed) – in order for all parties to work together to achieve net zero.

In this context, a number of participants highlighted that the challenge of implementing variations is seen as a deterrent to having the necessary discussions around net zero. This is particularly critical on expiry and handback and the replacement of assets which have reached end of life, or where the contract requires lifecycle elements to be replaced. Put simply, there will be little logic in replacing a boiler when a conversation around eco alternatives would be a better solution – but that requires parties to have faith in the ability of the partners to work together to deliver change.

Diverging from the contract

The challenges around variations also increase the risk that parties will seek to make changes outside the contract. In the local authorities session, Georgia Lewis from Local Partnerships LLP noted that the process can feel so unwieldy and costly that it may ultimately either deter parties from having the conversations which should be taking place, or result in parties departing from the parameters of the prescribed mechanism.

This can result in legal arguments around waiver and estoppel if the strict contractual requirements have not been met.

Crucially, it can also ultimately lead to a lack of trust if one party later moves away from what was perceived to be an agreed approach, whether that be due to a change in personnel, legal advice or new factors emerging which mean that the arrangement is no longer considered practicable or reasonable.

17 HM Government, 'Net Zero Strategy: Build Back Greener', October 2021.
18 HM Government, 'Powering Up Britain: Net Zero Growth Plan', April 2023.

Resources

The PFI challenges around resources are multifaceted and the discussions highlighted aspects relating to not only capacity and capability, but also recruitment, retention and the skills shortage.

Importantly, a number of these issues will be exacerbated by the fact that stakeholders will, in the run up to handback, need to run not only PFI 'business as usual' activities (i.e. the day to day operation of the project), but also prepare for expiry and handback, as well as the procurement and implementation of (or bidding for) future service delivery to the underlying asset.

"Self-monitoring"

"One of the [common] misconceptions… was that PFI projects would be entirely self-managing and therefore just outsourcing the whole responsibility."

Nick Iliff
Project Director, Commercial Specialist, Project and Structured Finance Group at the Infrastructure and Projects Authority.

The fact that PFIs were typically described as 'self-monitoring', together with the need to cut budgets, resulted in a hollowing out of contract management teams for a significant number of contracting authorities.

This has resulted in a number of contracts not being adequately managed, which ultimately creates additional risks around not only day to day operation and management, but also around expiry / handback, and increases the risk of disputes as issues accumulate.

The White Fraiser Report suggests that 'self-reporting' better represents the need for the public sector to set in place appropriate monitoring and auditing[19]. We agree with this observation, but would note that, for some organisations, the challenge is that they do not have sufficient resource in order to do so.

19 Barry White, Andrew Fraiser, 'White Fraiser Report – Private Finance Initiative sector', Infrastructure and Projects Authority July 2023.

Capacity

"We have Trusts that have a massive acute [hospital] that is most of their estate and understandably they have a very big contract team managing a very big contract and they're fully resourced and that's absolutely fine. We have other Trusts where the PFI might be a very small part, it might be a wing on the side of a building and actually the cost of managing that is not much different… and so it's more challenging for them…"

James Green

Deputy Director – PFI and Private Finance at the Department of Health and Social Care

As noted above, PFI contracts are complex, and to operate effectively require all stakeholders to put in place contract management teams who understand both how the contracts operate, the mechanisms and levers available for effective contract management, and how to build relationships with other stakeholders.

For many public sector bodies, resource can be a challenge. For example, a local authority may have multiple PFIs with separate central government sponsoring departments. In some cases, those contracts will sit with different teams who do not share knowledge as to the management of the different PFI contracts internally. In other cases, one small contract management team may be trying to manage all the contracts, but without sufficient resource to do so.

The White Fraiser Report noted that, where the PFI asset is a small element of the overall estate (stretching resources elsewhere), tight budgets result in low prioritisation of contract management[20].

Capacity is likely to have worsened for the public sector with headcount reductions, reducing not only the PFI-specific contract management resources[21], but wider resources (such as in-house legal teams, or the budget to instruct external advisors) more generally.

Challenges with capacity are not limited to the public sector. There are also instances of Project Companies being under-resourced, in some cases seeking to limit their role to administering the payment provisions, and pushing heavily on FM Contractors to deliver all other requirements.

"Staff welfare and staff retention is a real challenge, particularly when we can see that horizon of expiry and how you reassure people you know that they ought to stay on".

Sarah Channin

Commercial Director PFI Expiry & Lifecycle at Equans

Talent attraction and retention is also a challenge for FM Contractors. Our FM Contractors panel commented that the recruitment of high calibre staff has become difficult, and that one of the reasons for this is reputational and wellbeing considerations associated with aggressive contract management and disputes[22].

Additionally, expiry and handback adds to the recruitment and retention challenge. As with any outsourced service, there is a challenge for the incumbent to retain staff who are potentially at risk of TUPE.

As noted above, capacity is dependent on the stage of the PFI project. Expiry will require business as usual contract management, expiry project management, and the potential procurement of future services. Accordingly, ensuring there is sufficient capacity in the run-up to expiry is critical. As noted above, the IPA guidance is to start planning for expiry at least 7 years in advance.

20 Barry White, Andrew Fraiser, 'White Fraiser Report – Private Finance Initiative sector', Infrastructure and Projects Authority July 2023.
21 The Association of Infrastructure Investors in Public Private Partnerships, 'The Private Finance Initiative Model and the Social Infrastructure Challenge', paragraph 47 September 2024.
22 Barry White, Andrew Fraiser, 'White Fraiser Report – Private Finance Initiative sector', Infrastructure and Projects Authority July 2023.

Loss of corporate knowledge

"From a service provider aspect there has been significant changes from the client side in terms of knowledge… the knowledge has fallen away which means that service providers are having to provide multiple copies of information that was issued many years ago. Knowledge from 20 years ago in some cases is lost due to retirement and people moving on. I have a PFI expiring in three years and we are having to provide information from 22 years ago. Agreements back then were done with a handshake/verbal, based around trust, and not all had variations. It is a challenge because I always like to understand: what is the outcome from asking for that information, what is it that they are wanting to achieve. The relationship aspect is very important and that we continue to work with the third party consultants and be open and transparent with each other. We need one direction of travel rather than going off in different directions which is what causes the problems I think."

Lesley McGregor
Managing Director at Eric Wright Partnerships

Panellists mentioned that, with projects lasting 20-25 years, there can be instances of insufficient record keeping and document management. These might include lost as-built drawings, variations or knowledge around 'Services Commencement Dates'. On a number of projects, the insolvency of Carillion meant that new parties didn't have access to information in respect of the PFI contracts which they took on.

Where there is a lack of transparency as to what data and information is available, this can result in a breakdown in trust, which in turn contributes to a worsening relationship.

Changes in personnel over the intervening period can also mean that, if records have not been kept, the parties may not be clear as to what the intentions were behind a specific document, for example. One panellist noted that, in their experience, projects which have had the same personnel since inception tended to be better managed due to continuity of corporate knowledge and maintenance of relationships.

Skills shortage

"If we want to be able to develop a programme of PPPs… are there enough credible willing contractors that can deliver against the objectives that our country needs here and now?"

Ashish Anand
Managing Director at Assured Guaranty

In both the lenders' session and the FM Contractors' session, it was noted that the lack of confidence in the PFI / PPP model from central government has impacted on the supply chain, as there has been no infrastructure pipeline funded through this model.

In the lenders' session, Darryl Murphy from Aviva Investors commented that the policy deficit, and failure to deliver a pipeline of projects, has resulted in lenders looking at other jurisdictions and other areas in which to diversify, including utilities, energy and digital.

Expiry will also create further skills challenges. For example, in the run-up to expiry, there is a contractual requirement for pre-expiry surveys, but a question as to whether there are sufficient surveyors and engineers to deliver those survey requirements. Industry specific issues can then exacerbate this problem. Further, fire engineers for cladding issues are in short supply post-Grenfell, and as at 2021 there were only 212 qualified and practicing fire engineers in the country[23].

23 Jack Simpson, 'EWS crisis: number of fire engineers available for EWS1 checks drops by a quarter in eight months', Inside Housing, April 2021, https://www.insidehousing.co.uk/news/ews-crisis-number-of-fire-engineers-available-for-ews1-checks-drops-by-a-quarter-in-eight-months-70469.

Capability

"We are trying to promote as much as we can [around work][the work we are doing] with the IPA on training and contract management best practice and government commercial best practice to make sure people have the skills they need… We are now at a point where most of our projects are going through big lifecycle developments… we're getting more challenges on projects which means you need different skills and you need different people to do different things to manage those projects. So I think that skill mix isn't the same through a whole project life and that's a challenge as well because you've got to change over time. I think the expiry bit is an extra challenge because people are busy enough managing the initial contract and now you are asking them to do something else and it needs different skills… The future services, how you going to procure those? Those aren't the same skills as the day to day contract management".

James Green
Deputy Director – PFI and Private Finance at the Department of Health and Social Care

It was noted in a number of panels that capacity is an issue which needs to be aligned with capability: it should not assume that one will follow the other.

Where capability is an issue, the IPA / central government panel noted the challenges faced for all stakeholders due to the loss of corporate knowledge and expertise as the project progresses, with original teams being replaced. The contracts may be high value and complex, but one or two individuals can make a significant difference to the successful operation of those contracts.

A number of panellists noted how helpful the support from both the IPA (including the PFI centre of excellence) and central government has been to management of their PFI assets, with support including guidance, training and documentation available.

However, it was also noted that support is not uniformly accessed. Further, it is typically provided in the context of specific projects, such as support on expiry. This usually means there is still a requirement for public sector bodies to provide overall management support and training, and the capacity for the required level of management varies significantly from organisation to organisation.

For local authorities, it was felt by some that there is a lack of clarity (or certainty) as to who at any particular sponsoring department and/or the IPA should be contacted by a local authority seeking responses to a particular question, or further support. However, a least one panellist noted that the support received from sponsoring departments, including Department for Education and Ministry for Housing and Local Government, has been highly beneficial.

Long-term planning

"The NHS has issues [which] often take priority… so trying to get them to focus on things that are perhaps 10 years out… can be quite challenging…

Every single hospital in the country is running extremely hot at the moment and [it is][there is an issue with] actually being able to deliver the works whilst keeping the show on the road in the hospital. I think those have been some of the biggest challenges with major lifecycle works that need to be done in PFIs… if there are a lot of works that need to be done that is a lot of planning and it is a lot of implementation and…it might need decamp facilities, so I think some of these things can become quite complicated quite quickly… Some trusts are thinking about it but I think a lot of trusts are perhaps leaving it for tomorrow."

Rhiannon Williams
Director at Grant Thornton UK LLP

As set out above, the IPA recommends that the public sector starts preparing for expiry 7 years in advance, but that can be a challenge when contracting authorities have a number of more urgent pressing concerns.

Where the contracting authority is unable to define its strategy for future services (whether insourcing, outsourcing or not exercising the PFI break clause), the lack of certainty also creates further risks around recruitment and retention.

Senior buy-in from public sector bodies to ensure that there is therefore both capacity and capability for long-term planning, including planning for future services, is therefore critical.

Condition of the asset

There are a number of industry challenges with asset condition, including construction issues such as fire defects, heating and ventilation, water issues, and equipment lifecycle in PFIs where buildings are constructed, and maintenance / construction challenges in highways, street lighting and energy from waste PFIs.

As a project approaches expiry and handback, there should be a greater focus on asset condition to ensure it is handed back in an appropriate condition. However, there is a possibility for disputes in respect of both remedial works and required maintenance. The NAO noted the risks around a *"misalignment of investor and authority incentives"*[24]: whilst the public sector's objective should be to ensure that sufficient maintenance is undertaken during the project term, so that the asset is received in the best possible condition on expiry, the PFI provider may be incentivised to limit expenditure on maintenance towards the end of the PFI contract to ensure higher returns for investors.

One challenge is whether the contract itself is clear on the underlying condition requirement.

Post-Grenfell, there is also, understandably, more focus on ensuring the condition of the asset meets fire safety requirements and the asset itself is safe. This is a particular focus in projects where end users may be vulnerable and / or immobile.

There are projects where such issues have been successfully addressed in a collaborative approach. In others, however, they remain the focus of a dispute or disputes, sometimes years after issues are identified, or where a party has requested further information to ascertain the position.

24 National Audit Office, 'Managing PFI assets and services as contracts end', summary paragraph 13 HM Treasury June 2020.

Relationship management

"PFI works if you get the relationship right in the first place… it is not about cutting corners or altering risk profile…it is about the shared vision".

Amanda Gomersall
Associate Director E&F Commercial Services at Leeds Teaching Hospitals NHS Trust

The successful delivery of a project relies not only on contract management but parallel relationship management.

A number of our panellists had experienced examples of poor relationship management. Different aspects of poor relationships as discussed by our panellists are set out below.

Lack of transparency

"Sometimes the transparency and the data is an area we struggle on, to actually [have] the detail of what are the benefits of that project are versus another one."

James Green
Deputy Director – PFI and Private Finance at the Department of Health and Social Care

It is widely accepted that PFI contracts are relational contracts in which an implied duty of good faith arises[25]. There is therefore not only a need, but an established legal requirement, for openness, honesty and transparency.

Once trust falls away, it becomes harder for parties to work together to achieve commercial aims.

Navigating the contractual landscape

The contractual landscape can also add to the challenges, with some public sector bodies unsure of how and when to bring FM contractors into the conversation.

In some cases, FM contractors are left entirely out of discussions around assets, and in our discussions FM contractors highlighted that their working knowledge of the assets means that they can, and do, add real value to those discussions.

In other cases, Project Companies drop out of the discussions completely, leaving public sector bodies to liaise with an FM contractor against whom it has limited, or no, enforcement rights.

Creating a landscape of open dialogue between all invested parties is therefore critical.

Toxic behaviours

The authors of the White Fraiser Report highlighted concerns that, in some cases, communication between private and public sector consultees appears fractured. The Report stated that private sector consultees are concerned that public sector consultees are being mismanaged, resulting in aggressive interpretation of PFI contracts, whereas public sector consultees stated that such aggression often follows a long period of unsuccessful, less confrontational approaches[26].

25 Amey Birmingham Highways Ltd v Birmingham City Council [2018] EWCA Civ 264, Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111.
26 Barry White, Andrew Fraiser, 'White Fraiser Report – Private Finance Initiative sector', Infrastructure and Projects Authority July 2023.

'It's fine'

Whilst it is agreed poor relationships are a significant challenge to PFI, some panellists also noted that relationships which are 'too good' can also be problematic.

There are, unfortunately, projects where the relationship is so amicable that no deductions have ever been applied. The risk for the public sector in those cases is that the reason deductions have never been applied is not because problems do not exist, but rather due to failures to scrutinise and challenge reporting information.

Some public sector bodies wish to avoid a formal DRP. Whilst that is a valid position, it is important to stress that, in our experience, robust contract management goes hand in hand with relationship management: a relationship where parties never seek to resolve issues is more likely to result in a significant dispute than ones where the parties work together collaboratively to resolve problems when they arise.

The White Fraiser Report estimated that, at any one time, the number of PFI projects engaged in disputes makes up less than 10% of the total number of operational PFI projects, with a smaller percentage of disputes referred to formal DRP.

This would suggest that disputes are perhaps not as widespread as some commentary would suggest.

Panellists noted that, in some cases, the Liaison Committee does not work effectively, or at all, with people on the Liaison Committee being the same individuals who are managing the contract daily. In other cases, Liaison Committee meetings do not take place. This may, of course, be due in part to the capacity and/or capability issues referred to above.

A dysfunctional Liaison Committee can and does create a barrier to the escalation process and precludes conversations about strategy and desired objectives as, when the committee does meet, the discussion revolves around daily contract management only.

Expiry

"The public sector don't have enough of an understanding of when lenders are a relevant voice in the expiry process or when they are expected to have already exited".

Nick Lane
Director, Infrastructure and Government at PwC

A number of panellists noted the challenges around expiry and the level of preparation required.

One particular challenge is that the projects which are coming to expiry now are the earlier contracts, i.e. before standardisation. As noted above, these agreements may have limited provisions on expiry/handback.

Panellists echoed this point, and urged local authorities to start conducting surveys to understand the condition of the assets, sooner rather than later. Importantly, the conduct of surveys should not be rushed and should be coordinated. Equally, there is a value to Project Cos being proactive in respect of survey requirements.

It is important that all stakeholders understand the role each party can and will play in an expiry project.

The prevailing view is that the level of preparedness varies from project to project. On the public sector side, some local authorities are well prepared and have engaged well with Project Companies, but others less so. The IPA pre-expiry health checks[27] should in theory highlight to the contracting authority the very real risks of expiry not being well-managed, but without senior buy-in those health checks are sometimes failing to have the (presumably) desired impact of a change of approach by the contracting authority in question.

As echoed throughout this report, collaboration between parties will be key when preparing for expiry and handback, and also future service delivery to the underlying assets. This can be difficult where the focus for many public sector organisations is on financial and estate issues today, not on events happening in several years.

Whilst it is sensible to start compiling lists of issues that will be need to be resolved pre-expiry as early as possible, a particular challenge does arise around issues where there are insufficient records, whether that be on asset management, what variations have been agreed and, in some cases, the services commencement date.

Sector specific issues can also have an impact. For example, for hospitals with very little spare capacity, there is likely to be a significant challenge in seeking to deliver major lifecycle works in the run-up to expiry, whilst also meeting patient care requirements.

Much of the guidance issued to date stresses the importance of identifying future services requirements[28], but the private sector typically reports a lack of clarity regarding the 'end game' intended by the public sector[29].

The challenge for the sector as a whole is that, if assets are handed back in poor condition, it will result in an erosion of public confidence, which will potentially shape the discussions around future infrastructure delivery.

Furthermore, it will also have a financial impact on already stretched public service finances if they have to address those poor conditions.

27 HM Government, 'A Guide to PFI Expiry Health Checks', July 2023. Please see PFI Expiry Health Checks – are you ready? | Bevan Brittan LLP for further information.

28 HM Government, 'Preparing for PFI contract expiry', February 2022.

29 Barry White, Andrew Fraiser, 'White Fraiser Report – Private Finance Initiative sector', Infrastructure and Projects Authority July 2023.

The future

Introduction

"Talent attraction and retention is always a challenge, but if business has more confidence in the future opportunities and needs of its customers, business is best placed to invest in the future talent pipeline."

Jo Barnes
Managing Director at Sewell Group

The recent change in government has encouraged fresh interest in the future of new public infrastructure and the question of how new infrastructure is funded.

The panel discussions took place ahead of the autumn Budget. Whilst it currently remains unclear what use, if any, the Labour government will make of private finance, the majority of finalists believed that the PFI/ PPP model offers a good opportunity to deliver new infrastructure, with the motto of the series being **'do PFI, but do it better'**, drawing on the positives and some of the lessons learnt from PFI and PPPs.

What should a new model look like?

'There is a danger that social infrastructure isn't talked about very much because of the focus on energy transition decarbonisation and economic growth and industrial strategy.'

Darryl Murphy
Managing Director, Head of Infrastructure Debt at Aviva Investors

Panellists agreed that any new model will need to strike a balance between complexity and repeatability. Nick Lane at PwC commented that *"the model must also be appropriate to the type of project, whether that be social infrastructure or economic infrastructure"*.

Ashish Anand, Managing Director at Assured Guaranty, echoed this commenting that *"there should be nuance to the application of certain models to certain projects, with a consideration of more than just the size or complexity of the development."*

The panellists recognised the need to reflect on the positives and lessons learned from the past, and that the collective knowledge gathered in the last 25 years should be captured in the design and development of any new privately financed PFI/PPP model.

PFI/PPP Models in UK

There are a number of potential models which could be used to deliver new infrastructure.

Some panellists noted that there may be a distinction between the appropriateness of the type of model used for the delivery of a range of new social and economic infrastructure on a single or multiple asset basis.

The panellists made reference to the success of Local Asset Based Vehicles ("LABVs") and the Welsh Government's Mutual Investment Model ("MIM") to deliver a range of new infrastructure on an individual asset basis. Also, the Regulated Asset Base ("RAB") model, previously used in the development of water, gas and electricity networks and now the nuclear sector. Another model commented upon was the Non-Profit Distributing ("NPD") model introduced by the Scottish Government as an alternative to PFI in 2005, frequently used for projects with an overall cost of over £20 million across sector

The panellists also made reference to the success of national PPP programmes, including the NHS Local Improvement Finance Trust (LIFT), Building Schools for the Future (BSF) and the Welsh Education Partnership ("WEP") using MIM, incorporating net zero carbon requirements and KPIs to deliver community benefits.

How to compare all the available models?

PFI delivers a single asset, endeavours to pass all risk to the Project Companies, and keeps the project off the government balance sheet for the public sector. It uses private sector finance to fund the build and central government credits to pay the unitary and/or service charge leaving the Project Companies to 'self-report' on performance. The NPD and Tax Incremental Financing ("TIF") models represent a further evolution of PFI. Key elements of the NPD model are the introduction of public shareholding held by local government (the 'Golden Share') and the inclusion of a central government independent director sitting on the board. The TIF model, originally a US model, used in Scotland for infrastructure regeneration projects in transport and flood defence where the interest received from TIF-funded projects is often tax free.

RAB works on the basis that some of the construction costs are funded by consumers paying a small additional amount in their energy bills during the construction of the facility, reducing the amount of private sector borrowing.

National programmes such as LIFT, BSF and WEP support the delivery of a pipeline of new facilities through strategic arrangements between the public and private sector, based on a standard form(s) of Agreement. The most recent form of PPP, the WEP, incorporates the MIM form of Project Agreement offering an off-government balance sheet form of Project Agreement to be entered into for each new project. Additionally, WEP incorporates KPIs to incentivise community benefits and net zero carbon requirements.

Is there an obvious solution?

Key to choosing an appropriate model is preparation and analysis of what the project entails. Is it one large indivisible project or similar smaller tranches of work? What is the level of certainty on key items within a project? How much public body input or control is required during the lifetime of the project? Can any cheaper finance be incorporated? Is it appropriate for certain risks to sit with the public body and if so, which ones? Where there are similar, smaller tranches of work, how can it be ensured that competition is maintained throughout the life of the project? These considerations help determine the relevant model for the project, whether that be the models referred to above or a recognition that the project requires a more strategic partnering arrangement to work together with a private sector partner.

A pertinent question, however, as raised by Nick Brown, Chief Financial Officer at the Government Property Agency, is "what appetite the UK Government has to fund projects, whether today or in the future?"

Whilst there have been no significant announcements at the time of writing, the creation of the National Infrastructure and Service Transformation Authority (**"NISTA"**), a new infrastructure body which will see the merger of the IPA and the National Infrastructure Commission (**"NIC"**) by spring 2025, may indicate that there will be opportunities in the future

Having worked on the development of standard form documentation for previous models, including NHS LIFT and Building Schools for the Future. Whatever the model, at Bevan Brittan we have significant experience of working with public and private sector clients to structure and implement complex infrastructure and energy projects, individually and from a national programme perspective. We look forward to the challenge of delivering the next generation of new social and economic infrastructure across sector.

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