

PFI perspectives

Reviewing the infrastructure landscape

Part 2

Opportunities and solutions for the
remaining term of PFI projects

Bevan Brittan 

PFI perspectives

Reviewing the infrastructure landscape

Introduction

We recently [issued a report](#) setting out our findings and observations from a series of webinars held with various stakeholders in the PFI market discussing the positives and the challenges in the market, and what the future may hold.

The discussions revealed certain themes with common challenges faced by different sectors in the industry. As we strive to adopt a collaborative and problem-solving approach, our PFI experts have reflected on those discussions.

We set out our observations below on common approaches and methods that can be adopted to address some of the challenges in the market. Whilst these will not solve all issues – financial challenges and people management are critical to successful delivery – a standardised approach to some of these issues should result in better working relationships, and ultimately a better outcome for service users.

The recommendations made are not endorsed by our panellists, and we anticipate there will be a range of views on our proposals, but we believe that discussion around these key issues is of value to find a way forward that represents the interests of all stakeholders.

Judith Hopper, Bevan Brittan

December 2024



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The panel

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Watch the full session [here](#).



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Watch the full session [here](#).



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Project re-set

Introduction

“We’ve seen instances where projects have turned around, where there is a will to join in and work together at a senior level. I think using a reset approach and amnesty to try and agree some parameters around this could help move that forward and certainly help set some of these projects up for success as they move into expiry”.

Sonia McRobb

Senior Associate at Rider Levett Bucknall

‘Project reset’ is a phrase that has gained traction in the PFI market, but can mean a number of quite different things. While it is commonly used in the context of the lead up to expiry, the benefits of a project reset are not limited to the twilight years of the contract and it can also be successfully deployed mid-contract term.

Project re-set

The White Fraiser Report identifies a 'project reset' as a mechanism by which a surveyor or surveyors identify non-compliant assets¹, and the private sector benefits from a period of relief from some deductions during a reasonable period of time while the issues highlighted by the surveys are rectified. This is consistent with the 'Centre of Best Practice' ("CoBP") model in the health sector.

Under the CoBP model, the joint appointment of independent surveyors provides the public sector with 'assurance not reassurance' as to the condition of the assets and their compliance with the standards required by the contract. In return, the Project Co receives the benefit of specific and limited reliefs from the operation of the payment mechanism for an agreed period while the survey findings are addressed.

This central finding of the need for a 'project reset' in the White Fraiser Report generated significant amounts of comment in the market and further guidance from the IPA is expected in the near future. In our view, and having advised on a number of CoBP project resets, it is not a panacea for a project already in distress, which may require a more bespoke approach. However, there are clear benefits to standardisation of the 'project reset' model, including the setting of clear expectations, delivering consistency of approach, and improving the efficiency and speed at which the reset can be delivered.

One note of caution is whether there is sufficient resource and capacity in the market both to deliver the technical survey requirements, and the contract management and programming skills that will be critical to the successful implementation of the remedial works across entire portfolios, if 'project reset' is widely adopted and implemented.

The term 'project reset' can also be used to more generally describe a resetting of relationships between the public and private sector, to allow the parties to move past historic difficulties and adopt a more collaborative approach, especially in the run up to expiry. This does not require a re-writing of the contract or involvement of lawyers, and is more about the parties recognising there needs to be a change of behaviours on both sides. We discuss relationship management further below.

¹ Barry White, Andrew Fraiser, 'White Fraiser Report – Private Finance Initiative sector', Section 5 Paragraph 3 Infrastructure and Projects Authority July 2023.

Data and Information Management

Introduction

“We need to make sure that contracts are not so rigid that they don’t flex with the changing times. I think we’re going to see an awful lot more change a lot more rapidly over the next 10-15 years with generative AI and a whole series of other new products no doubt coming along that we can’t even imagine at the moment.”

Nicholas Brown

Chief Financial Officer at the Government Property Agency

Data and information management is key to effective project management. It is also crucial to informing and managing both effective expiry/handback, and the delivery of future services.

The IPA Guidance on PFI expiry² stresses the importance of two key elements of information:

1. contract documentation; and
2. asset information. These elements are equally important to ‘business as usual’ operational management of a PFI, and the effective delivery of future services, as they are to expiry.

² IPA, : ‘Preparing for PFI contract expiry’, February 2022.

Contract documentation

It is important that all relevant contract documentation is collated, including all variations (both formal deeds of variation and change notices), in order to establish the current contractual position and, crucially, to ensure that this is kept updated throughout the remainder of the project term.

We would advise that, where possible, a 'conformed' version of the Project Agreement and other key documents is produced which takes account of previous variations. Bevan Brittan offers clients a 'conforming' service to produce conformed documents for clients to use as an effective contract management and risk management tool.

In addition to collating the current contracts, a significant challenge for PFI stakeholders is the efficient storage of the relevant contract documentation, for effective use by their teams. A robust system will also assist in the inevitable event of a change of personnel (and indeed recruitment of additional resource). All too often, we encounter clients who are unaware of their contractual position due to the departure of colleagues with project knowledge.

We encourage clients to engage with other stakeholders to understand their contract management systems and, where possible, provide access to a single system. As set out above, it is helpful if the parties work from a single and up to date contract which incorporates all variations.

Stakeholders will be familiar with a number of technology solutions available in the market. Bevan Brittan has its own electronic platform (BB Collaborate) which we use to host project documentation for clients, including the conformed documents mentioned above. BB Collaborate allows for documentation to be stored in such a way that the contracts and documents can be searched and sorted with ease. This is particularly helpful when a client is trying to locate a particular document on limited details (for example, locating a particular historic works variation where the year of completion is unknown), or when trying to limit search results in a particular way (for example, generating a list of documents which relate only to a specific area of the site).

Contractual obligations

We also work with clients to produce Project Agreement obligations trackers. These can be helpful in ensuring all parties are clear as to the contractual requirements, both in terms of what actions are required of them upon certain triggers, but also what they should expect from the other side and when this is due.

We have also provided clients with guides to the contracts, to assist them in understanding the processes to follow.

Asset information: rights to information

In addition to the contract documents, PFI projects generate a wealth of other data/information.

The data and information produced is critical:

- a. In the operational phase, to allow authorities to move from 'self-monitoring' to 'self-reporting', as discussed in the 'Challenges' section of the report;
- b. In planning for expiry³. The IPA Guidance on PFI expiry contains a useful checklist of information which provides an indication of the volume and nature of some of the data; and
- c. In the arrangement of future services.

The PFI contract will include rights to information. The types of information to which the parties have access was enhanced throughout the contract standardisation process. However, it is also widely accepted that there is an implied duty of good faith in PFI contracts, on the basis that they are relational contracts⁴. As good faith clearly requires parties to be both transparent and honest, that should include sharing information.

Although (as noted in the Challenges section of the Part 1 Report) the payment mechanism is typically the 'sole remedy' under a PFI contract, there is also usually a carve-out for injunctive relief and specific performance, and there is legal precedent for that being used to obtain information⁵. In the case of *Buckinghamshire Council v FCC Buckinghamshire Ltd* [2021] EWHC 2867 (TCC), the court confirmed not only that specific performance will be granted where a party has a contractual right to information, but also that when interpreting contractual provisions in a PFI contract, the court will take into account not only the strict wording, but also the commercial rationale and business common sense underpinning the contract.

As noted in the Part 1 Report, the failure to share data is often a key reason for a breakdown in trust and confidence, which undermines working relationships. However, on occasions, there will be a reluctance to share information due to the risk of retrospective deductions being applied for 'non-reporting', which can apply in certain projects. This can limit the willingness to share information.

As with 'project reset', there may be circumstances where it would benefit the parties to consider waiving those deductions to incentivise parties to share the requisite information.

Asset information: systems

Asset condition is a key consideration (and a hot topic), particularly in the context of PFI expiry, and there is much discussion as to what data should be maintained, and the relevant format.

In addition to ensuring that they collate all relevant information internally, we would encourage public and private sector stakeholders to engage with each other to agree appropriate systems, formats and practical arrangements for managing and sharing data.

FM contractors will usually employ sophisticated Computer-Aided Facilities Management ("CAFM"), Building Information Modelling ("BIM") systems and other systems that are maintained through the project term, but contracting authorities do not always have access (whether during the contract term or on expiry).

A standardised approach to the data required, and the format and systems required, would be a significant benefit when engaging on asset condition in the context of expiry and future services.

However, it is important that there is not too much rigidity, and that parties can be agile and flexible in order to respond to new technologies. We would note that this does require parties to have faith in the variations process, which we discuss further below.

3 IPA, 'Preparing for PFI contract expiry', February 2022.

4 *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264.

5 *Buckinghamshire Council v FCC Buckinghamshire Ltd* [2021] EWHC 2867 (TCC).

Varying the contract to meet expiry and net zero solutions

Introduction

“There have been so many changes, whether that is around the net zero piece or technological developments or just the need for climate adaptability . . . All of these things, whilst they are challenges in their own right, are also opportunities”.

Sarah Channin

Commercial Director PFI Expiry & Lifecycle at Equans

Where there is sufficient time left in the project, there are benefits to parties engaging in discussions to ensure that the contract remains fit for purpose for the remainder of the term. Two obvious themes for any such discussions are the expiry provisions, and discussions around net zero.

Variations

We note that some parties will be deterred by the challenges of agreeing variations, as discussed in our Part 1 Report. It is fair to say that, even where there is a standard process in the contract for implementing a variation, the interpretation of that process from project to project is in practice much more varied.

With the exception of the NHS LIFT market, there is no standardised approach to risk profile or documentation. 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.

Whilst there are clear risks where parties do not follow the prescribed mechanism set out in the contract, a degree of pragmatism needs to be brought in relation to variations to ensure that the change process, in particular where a detailed Change Protocol is included in the contract and is being followed by the parties, does not result in costly Deeds of Variation (DoV) needing to be entered into too frequently. It should only be substantial changes that result in amendments to the drafting in the main body of the Project Agreement which should need to be documented through DoVs.

Where DoVs are required, Bevan Brittan's BB Collaborate system can also be used by clients as a tool to help track the progress of (possibly multiple) ongoing variations. This platform is particularly useful for tracking the ongoing and outstanding actions of all parties. The aim is to provide clients with oversight and visibility while also attempting to speed up the variation process through increased action-accountability.

Parties should seek to document other changes in accordance with any change protocol requirements, which should include clear and accurate correspondence between the authorised representatives and maintaining an up to date change log.

Further central guidance would be welcomed to provide greater consistency in terms of risk profile, process and (where appropriate) documentation to support the public sector and to drive efficiency and improve timescales for delivering variations.

Expiry

As set out in the 'Challenges' section of the Part 1 Report, it is well publicised that that contractual provisions around expiry remain 'light' in many early PFI projects.

There would therefore be a benefit to incorporating new provisions on expiry in the event of any variations which are required to deal with other operational issues and / or address net zero.

Discussion from stakeholders, and central guidance as to whether a standardised approach to ensuring expiry provisions are fit for purpose, would be welcomed.

Net zero and climate adaptability

“It is not an easy conversation and it takes quite a lot of time, but the alternative is we get brand new boilers in the building and we probably end up having to rip them out in a couple of years to meet our net zero targets”.

Sam Thurgood

Strategic Estates Specialist at CBRE

As set out in the ‘Challenges’ section, whilst the NAO highlighted the risks around a *“misalignment of investor and authority incentives”* as a challenge in the PFI market⁶, one area where there should not (in theory) be any such misalignment is in relation to net zero.

With over 300 local authorities having declared a climate emergency⁷, and the NHS also aiming to become a net zero carbon national health service⁸, there should in theory be a clear desire by public bodies to review PFI assets to assist in meeting net zero targets. Similarly, Project Cos, FM contractors and lenders will have ESG and Responsible Business agendas.

Stakeholders should critically evaluate their existing portfolio of projects and determine what changes can be made during the remaining life of a contract but also on early termination to cater for the net zero agenda. There are a range of possibilities, including green energy solutions, and energy related performance variations to leverage energy efficiencies and carbon reduction.

These discussions should also include climate adaptability, which could include the temperature of buildings and / or flood risks.

However, it requires the parties to have discussions about the art of the possible. The danger is that a combination of factors, including parties being distracted by disputes, an over-officious interpretation of the contract, and / or poor working relationships, will mean that key opportunities are missed, and / or that as part of lifecycle works, upgrades or replacements are provided for components which no longer meet net zero requirements.

Success requires both a collaborative approach, and faith in the variations process being used in a swift and cost-efficient way to deliver the requisite change.

It also requires transparency from the private sector on the budgeted cost of any major mechanical, electrical and plumbing (MEP) asset renewal prior to expiry, so that open dialogue about how those enhancements will be funded can take place.

⁶ National Audit Office, ‘Managing PFI assets and services as contracts end’, summary paragraph 13 HM Treasury June 2020.

⁷ Local Government Association, ‘Delivering local net zero: How councils could go further and faster’, WPI Economics, October 2021.

⁸ NHS Innovation Service, ‘Delivering a net zero health service’

Capacity and capability

The public sector

In the run-up to expiry, issues of capacity and capability will be exacerbated, as the public sector body will need to deal not only with 'business as usual' activities, but also in planning for expiry, and where necessary planning for and procuring future services.

A number of the panellists commented on how helpful the IPA guidance, and support from central government, has been in supporting public sector bodies. However, it is also noted that much of the guidance is focussed on expiry, and still requires investment to boost the capacity of the public sector in the project.

Senior buy-in is critical to the successful delivery of projects, and it is critical that all stakeholders are aware of the reputational risks from poor delivery: not only in discussions around value for money, but also where there are condition and compliance issues.

The value of the IPA expiry health checks should be to highlight the challenges to be overcome. However, with a number of immediate pressing concerns for public sector bodies, further guidance from central government around the need for investment in capacity would be welcomed.

The private sector

As noted in the sessions, capacity is not only a public sector challenge. Arguably, the private sector may have a greater challenge if it has a portfolio of projects all going through an expiry process at the same time.

Inevitably the private sector has an opportunity to learn and develop systems for handback processes across a range of projects, perhaps adapting experiences and efficiencies between different markets.

A combination of greater support for the public sector, and a future pipeline of projects, may well encourage greater investment in existing projects. With the right relationships, the private sector has the opportunity to transfer efficiencies learnt from working with one public sector client to another. Learning does not have to be public to public or private to private, but the best projects will be those where learning is public to private and vice versa.

Relationship management and managing disputes

Effective relationship management

“You don’t have to be best mates with your contract counterparty, but at the same time, you don’t want to be worst enemies with them. You want to pitch a . . . good, solid, robust commercial relationship”.

Nick Iliff

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

As noted in the Challenges section of the Part 1 Report, a number of our stakeholders expressed concern about toxic working relationships, and the resulting impact on projects.

The key to contract management is to be clear about commercial and strategic objectives. It is also critical that parties understand the value of parallel relationship management, which is both robust and collaborative.

As noted above, senior buy-in for all stakeholders is key in ensuring the appropriate investment in relationship management. The question is how best that can be achieved.

White Fraiser Report

Some recent sector commentary, including both the White Fraiser Report and the AIIIP Report, has highlighted concerns about increasing disputes in the sector.

The White Fraiser Report estimates that only around 10% of operational PFI projects are actively engaged in disputes, and that less than 10% of those are referred to a formal dispute resolution procedure (“DRP”). What is not clear is whether, for the estimated 10% of projects engaging in disputes, parties are failing to use the DRP (which is typically designed to resolve disputes quickly) and whether disputes are lasting longer as a result. We are certainly aware of disputes where the same issues have been discussed by the parties over a period of several months, and sometimes years, with an associated drain on time, resource and energy. In such circumstances there is an argument for more effective use of the DRP to resolve issues, rather than allowing them to fester and impact on both relationships and the operational delivery of the rest of the project. Most DRP processes allow for escalation through consultation and mediation as a means of resolving disputes and the more formal adjudication and litigation/arbitration routes are not an inevitability.

It is also not clear whether, for the estimated 90% of projects where there are no disputes, this is a sign that the PFI is being managed well, or simply that issues which arise are not being challenged or addressed. The risk is that problems are being stored up for the future. Good contract management should allow for challenge and mature relationships should be robust enough to address and resolve that challenge.

IPA funding for disputes?

An important message for the public sector should be around the effective use of both management meetings, and, where necessary, the contractual DRP, which in PFI contracts is typically a multi-tiered escalation of the dispute, with the first step being negotiation between the parties.

Use of the DRP should not be seen as a sign of failure, or that the dispute is destined to result in Court proceedings (which we discuss further below). Bevan Brittan has acted on a number of cases where the DRP has been used very effectively to resolve disagreements between contracting parties, without the need for more formal proceedings. In our view, that is achievable where parties have both the benefit of advice, as well as a clear strategy for its commercial objectives and aims in the negotiations.

Given the concerns set out in the White Fraiser Report about toxicity in relationships between contracting parties, and the challenges with capacity highlighted in our Part 1 Report, there would potentially be a value to IPA-appointed legal and/ or advisory panels with experience of PFI contract management whom public sector bodies can access to provide a view on the merits of taking a case to DRP, with funding provided on the basis that:

- a. any case meets the merits requirements;
- b. the party confirms that it and any advisors will adopt an approach which complies with the Nolan principles; and
- c. there is a clear strategic objective which justifies the time and cost of DRP.

This would help address the capacity challenges by allowing cash-strapped public sector organisations to take forward critical issues, whilst ensuring that, where possible, disputes are resolved in a pragmatic and dispassionate way.

Distressed projects

Notwithstanding our general comments on the number of disputes in the sector, there have been a small number of high profile Court cases where there is a clear risk of insolvency on the part of Project Companies and/ or FM Contractors due to the level of deductions applied.

Those cases have arisen due to a combination of factors, and there is not in our view a “one size fits all” to ensuring that those cases do not increase in number as expiry approaches, but contributory factors can include an escalation in payment deductions, an inability to agree remedial plans and a worsening or toxic commercial relationship.

We understand that the IPA is to produce guidance in due course on distressed projects and would note the importance of parties understanding the risks associated with termination and /or Project Company insolvency disputes, including significant legal fees, risks to reputation, and risks to service delivery.

Our response to the IPA proposal for a Dispute Resolution Forum

As an alternative to the DRP, and with a view to reducing the number of disputes occurring on PFI projects, the White Fraiser Report made an interesting recommendation that a 'PFI Dispute Resolution Forum' ("DRF") be established, to act as an alternative means of dispute resolution to that found in parties' PFI contracts.

The proposal is that the DRF would comprise of 5 appropriately experienced adjudicators/arbitrators, with an elected chair managing the process of how individual disputes referred to the forum would be progressed and resolved.

The report stated that the DRF would result in better decision making processes, on the basis that it was stated that the complexity of disputes being referred to adjudication under contractual DRP is often beyond the capabilities of adjudicators appointed to resolve them, and that the DRF would be able to draw on the expertise of "non-legal PFI experts" to inform their decision-making.

The report expressed the view that the confidentiality of adjudication decisions results in "the same disputes being referred to private dispute resolution forums time and time again", and that if decisions of the DRF were made public (albeit anonymised to protect the identity of the parties), a "meaningful bank of jurisprudential precedent" would develop, resulting in fewer disputes developing and/or being referred to the DRF.

We agree that there would be some benefit to an IPA appointed adjudication / arbitration panel, although would query whether 5 appointments would be sufficient to cover the sector, and whether the proposed approach would result in delays to issues being resolved.

While we fully agree with the report's aims of reducing the number of disputes occurring on PFI projects, there are in our view a number potential drawbacks in the establishment of a DRF as proposed.

A crucial point to note is that, whilst a number of disputes relate to the same issues, they are often fact-specific, and are accordingly required to be considered on their own merits.

Even where the dispute purely relates to a matter of contractual interpretation, there is no guarantee that a similar dispute will have the same contractual wording: while there are some standardised terms across PFI contracts, the idiosyncrasies of individual contracts are often a relevant factor.

In these circumstances, we query whether the development of a body of 'PFI common law' is viable. Given the relatively small number of disputes referred to DRP, it is not clear whether the development of a body of PFI common law is a realistic prospect. It is worth noting in this regard that, notwithstanding the number of PFI / PPP projects (over 800), and the fact that it is now over 25 years since the commencement of the first projects, there have been a relatively small number of reported Court cases.

There are also risks for the public sector in agreeing to the DRF proposal. The first is a perceived risk that investors with access to portfolios will have the benefit of choosing a case where the merits are less strong on the facts, with the aim of dissuading public sector bodies with similar cases from being referred to the DRF. This might mean that parties with good cases will be unnecessarily deterred from enforcing their contractual rights.

Next, there is a very real likelihood that parties will spend time arguing as to whether the published anonymised decision is in fact binding, or can be distinguished on the facts from the current case. This is time and money which would arguably be better spent referring the matter straight to DRP.

Many stakeholders, including but not limited to public sector bodies, may also be concerned that, even if anonymised, the published decisions will give rise to a risk of loss of confidentiality and reputational damage as a result. Given the nature of the services provided by way of PFI contracts, these contracts are often highly sensitive: many organisations will approach this perceived risk with extreme caution. The confidentiality of the adjudication process is, in our experience, valued by many stakeholders.

Finally, we would note that, if a DRF is to prove successful, the endeavour requires parties to disputes to consistently agree to refer their disputes to the DRF rather than to contractual DRPs already agreed. While parties may have specific reasons as to why they would prefer not to use the contractual DRP on a case by case basis, it remains to be seen whether the replacement of one dispute resolution procedure with another would serve to produce the practical outcomes the White Fraiser Report strives to achieve.

Mediation

There is another alternative to the DRP which is referred to in some, but not all, PFI contracts: mediation.

Mediation is not generally an adversarial process, and it does not provide a determination of a dispute. However, it has the great advantage of allowing for creative solutions which are, strictly, outside the scope of a legal or technical dispute, but which can have a fundamental impact on a project's success.

In the Challenges section in Part 1 of the Report and further above, we have discussed the importance of relationship management. Anecdotally, there is evidence of the performance of projects being fundamentally transformed by one individual leaving an organisation where that individual has proved a blocker to a collaborative working relationship.

A legal dispute will not, for example, resolve the issue of the breakdown in the working relationship between the private sector FM manager and the Estates Director of an NHS Trust. It is, however, precisely the type of topic that can be discussed in a mediation, with the process allowing the parties to discuss matters openly, with the benefit of an experienced facilitator to work through the impact, and the possible ways forward.

Given that disputes frequently arise due to a combination of contract and relationship management issues, we advocate for greater use of mediation in the sector. An experienced PFI practitioner should be able to prepare a party for a mediation process so that all issues are on the table for discussion and resolution, and not just those that may be the flash point for formal dispute. Run properly, with the right number and seniority of attendees, they should result in a genuine resetting of relationships for all involved.

On projects which are particularly distressed, there would also be a clear value to project mediators, who can meet the parties at agreed intervals to work through issues, with the aim of returning the project to an even keel.

In our view, this would have the benefit of building collaborative relationships and resolving disputes. This should be the key aim. Whilst there is a cost associated with mediation, if it serves to overcome barriers and strengthen working relationships as well as resolving legal disputes, then it would be time and money well spent.

Our advice to clients is that any strategy for resolving disputes must focus not only on the legal levers and remedies, but on the key commercial objective, and the potential outcomes. Contract management must also run in conjunction with effective and robust relationship management.

Ultimately, the long-term interests of all stakeholders will be best served by recognising the factors contributing to disputes, and working pragmatically to resolve those issues.

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2. Barry White, Andrew Fraiser, 'White Fraiser Report – Private Finance Initiative sector', Section 5 Paragraph 3 Infrastructure and Projects Authority July 2023.
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