


Preparing for PFI contract expiry: February 2022 guidance - what contracting authorities need to know

In this article, we summarise the key headlines of the IPA's guidance released on 28 February 2022 & pick out what contracting authorities need to know.

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In August last year the Infrastructure and Projects Authority (IPA) published a guidance note entitled 'Managing the Risks of PFI Contract Expiry'. In that guidance the IPA recommended that contracting authorities ought to have a '7-year plan' in respect of the run-up to the expiry of a PFI contract.

On 28 February 2022 the IPA published practical guidance titled 'Preparing for PFI contract expiry - Practical guidance for contracting authorities on managing expiry and service transition'. The purpose is to assist contracting authorities in the preparation for PFI contract expiry, including the transition of services being handed back to the contracting authority.

In this article, we summarise the key headlines of the IPA's guidance released on 28 February 2022 and pick out what contracting authorities need to know.

What is PFI contract expiry?

The Private Finance Initiative (PFI) is a procurement method where the private sector finances, builds, operates infrastructure and provides services, via a Special Purpose Vehicle (SPV), to contracting authorities by way of long-term contractual arrangements (referred to as concession agreements or PFI contracts). These agreements usually last between 15 and 30 years and provide for essential and ongoing services to a range of contracting authorities within the public sector.

The expiry of these agreements means that the SPV will cease to be responsible for the provision of the services and the responsibility will fall to the contracting authority. Clearly, this will require a significant amount of planning and resource to manage. The IPA guidance stresses that without proper PFI contract expiry management and procedures, there are substantial risks of operational disruption, lack of service continuity and financial loss.

Risks and Opportunities

The IPA guidance also highlights that while there are specific risks that need to be appropriately managed, there are also opportunities for the contracting authorities to consider. Some of the key risks and opportunities are set out below.

Risks

- Value can be lost through complex legal disputes, issues with continuity of services or where the asset is not returned in a satisfactory condition.
- Not enough time to manage the complexity of the transaction could lead to service and financial issues.

Opportunities

- Contracting authorities can decide and implement their own strategies for the operation of these contracts (for example, certain commercial priorities may not have been considered when the PFI contract was entered).
- Underlying services may need to be changed and/or upgraded. These services may not be operating as efficiently as possible, so there is scope to make these services more cost effective. This will lead to better service delivery and a lower operating cost for the contracting authority.

How to manage PFI contract expiry

So how can contracting authorities best manage the risks and opportunities set out above? Above all, the IPA advises that the risk management process needs to start early.

Creating a project team to start this work seven years prior to expiry has been recommended by the IPA and the most recent guidance suggests that the process is broken down into manageable sections:

1. Contract awareness and management

Understanding the obligations and the liabilities under the contract is critical for assessing the pre-expiry position. It is never too early to review the handover provisions within a PFI contract to understand how they function.

The IPA advises that the following documents/outputs are created:

- Document register – a list of all PFI documentation held
- Contract review – in-depth legal review of the project agreement
- Expiry gaps list – summary of information/documentation gaps or ambiguities
- Risk register – a list setting out all necessary risks and their mitigations
- Expiry summary – a high-level summary document that can be used to brief stakeholders

2. Relationship management

There are certain recommended steps that a contracting authority can take to bolster its current relationships with the SPV, current service providers and other key stakeholders to enable a smooth transition of services:

- Early and pragmatic discussions at the right level
- Setting out clear expectations and requirements
- Fostering a constructive and collaborative approach to the handback
- Address any issues and/or ambiguities early and proactively

It can be useful to create documents that highlight all relevant parties and stakeholders, both internally and externally. These documents can take the form of a Project organogram and/or a Relationship Map and can assist in understanding each party's role in the process.

3. Assets

For many PFI projects, the assets involved are critical to future service delivery as they underpin the entire project. If the condition of the assets is not known and subsequently does not meet the contractual criteria at expiry, this can cause financial problems for contracting authorities and can adversely affect the provision of services post-expiry.

This is also likely to be an area for dispute if the asset is not handed back in a satisfactory condition. Disputes will cost the contracting authority money, not only in legal fees but in repairing the assets to the required standard.

Accordingly, it is important that contracting authorities:

- understand what is needed in respect of the assets after expiry;
- are aware of the contractual provisions that specify the condition of the asset upon transfer;
- bring the right technical expertise on board; and
- allow time for any necessary remedial works to be completed before expiry.

To assist with this process, the IPA guidance recommends creating detailed schedules and agreements of the assets and the condition they are to be in.

4. Commercial approach

To successfully manage a PFI expiry, the contracting authority will need to have a clear understanding of its desired outcomes as there will be complex and lengthy commercial negotiations over this period.

Starting this process early will enable many areas of commercial contention to be identified and dealt with. It should also identify any leverage that is available to assist in meeting the contracting authority's commercial objectives.

5. Future Services

Service continuity requires the expiry of current services and implementation of future services to be aligned. Developing a robust strategy for the provision of future services is a critical and hugely beneficial exercise.

Engaging early with the PFI company to facilitate information and data transfers will help minimise any risk of service interruption.

The IPA guidance identifies the following key actions contracting authorities can take:

- Develop a future service strategy – wide-reaching scope, covering all aspects of service delivery
- Procurement support – ensuring the contracting authority can provide services in-house and/or the ability to outsource certain services
- Preparation of a transition plan – detailing the transfer of people, assets and data so that service operations can continue seamlessly
- Map out the expiry date – develop a comprehensive plan for the specific date of expiry

If you need help with your PFI expiry plan or the implementation of the expiry process, we are ideally placed to assist. If you would like to discuss this, please contact Natasha Stay or Martin Cannon at Browne Jacobson LLP.

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