

What are we to do about self reporting in PFI contracts?

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Between the early 1990s and 2018, an estimated 700 PFI contracts were entered into. Over one-fifth of those are due to expire within the next decade, triggering the handback process whereby private sector service providers return assets to the public sector.

When PFI contracts were introduced, the theory behind them was laudable in the eyes of many: use the private sector to finance public works projects, with the public sector then repaying those funds over the course of the project instead of having to source and invest capital up front.

Unfortunately, in many instances, the reality of PFI contracts in practice (due to the many problems the public sector has faced and still faces) meant the PFI model became more laughable than laudable. One such problem is that of monitoring and 'self-reporting', whereby the terms of the PFI contract require the private sector service provider (the "Contractor") to monitor its own performance and report back to the public authority on that performance and any service failures.

This methodology presents a plethora of challenges that public authorities are facing everyday:

Firstly, there is the question of trust: can a private sector Contractor be trusted to self-report where it has failed in its performance?

Because most PFI contracts hold Contractors to account by enabling the public authority to make deductions to payments in response to performance failures, an under-performing Contractor will want to minimise what information is fed back to the public authority. This could mean withholding information that would be detrimental to their income. Contractors are also enticed to monitor in a manner that reduces the chances of becoming aware of a failure that it would have to report (thus opening up an argument that you can't self-report on a failure you don't know about).

This is a very real problem for public authorities operating PFI contracts, as the case of Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust 2012 shows. Here, the Contractor failed to provide reports for the first three months of the contract and didn't report some of its own performance failures (these were instead identified by the Trust). The case even identified an occurrence where the Contractor omitted pages of an inspection report by a health and safety expert that identified a number of areas where improvement should be completed with immediate effect.

Let's say hypothetically all PFI Contractors could be trusted to monitor their own performance appropriately and fully self-report.

The next question is how can public authorities validate and authenticate the information and data provided in the Contractor-provided reports?

At a time when the budgets of most public sector bodies are stretched, many do not have the resources in terms of finance, time and expertise to review regular Contractor reports to the extent required and, on top of that, conduct their own monitoring to check the reports are correct. That's if it is possible for the public authority to comprehend the reports in the first place, given that often they can be incredibly complex and overflowing with data.

Furthermore, there's the question of whether public authorities should have to monitor PFI contract performance for themselves?

After all, monitoring and self-reporting are commonly part of the service for which the Contractor is paid.

From the Contractor perspective, in many instances they too are frustrated by the concept of monitoring and self-reporting. Many PFI contracts often aren't clear on what exactly needs monitoring, how to monitor it and how to report it. This frequently results in a situation where Contractors, even with the best will in the world, may not be able to monitor and report upon PFI performance effectively. In this scenario, neither party is satisfied because the Contractor may be delivering the service appropriately but struggle to monitor and report on the performance in accordance with the contract requirements, driving the public authority to push for improved monitoring and reporting, perhaps unnecessarily. Over time, the relationship between the parties can deteriorate and disputes often follow.

Given the problems outlined above, what can parties bound by the limitations of monitoring and self-reporting in PFI contracts do moving forward?

First and foremost, any public authority that has not already introduced some form of monitoring conducted by itself or a third party would be wise to. As outlined above, even where self-reporting by a Contractor is occurring, possible errors, oversights and omissions in reports could mean that performance is not meeting the standards the public authority requires.

Of course, additional monitoring by the public authority will add a new expense at a time when public bodies' resources are already strained. Where ongoing monitoring by a public authority isn't possible, whether due to limited resources or lack of expertise (or both), at the very least they should be implementing a process whereby they regularly review the reports provided by the Contractor and undertake spot checks to ensure the Contractor's reports provide an accurate picture of performance. In instances where a Contractor fails to adequately monitor its performance, provide reports or self-report on service failures, public authorities should seek to strictly enforce the terms of the PFI contract.

Another option is to pursue a variation to the monitoring and reporting terms of the PFI contract. This approach could make monitoring and reporting obligations clearer for all parties which in turn could reduce the likelihood of any disputes arising. However, any public authority that considers this option should be aware that where a contract's terms favour the Contractor, the Contractor may push back against any notion of changing or increasing its obligations. Furthermore, even where the Contractor consents to changing the monitoring and/or self-reporting obligations, the public authority may go to the expense of negotiating and implementing the contract variations only to find that the underlying problems that undermine self-reporting mean the public authority still doesn't receive accurate reports and service failures continue to go under or even unreported.

The stark reality is that self-reporting in PFI contracts favours Contractors. While one-fifth of PFI contracts will be coming to an end in the next few years, many have plenty of years left to run. Where this is the case, it may be beneficial for public authorities to seriously consider the options outlined above to address the limitations of monitoring and reporting in their PFI contracts and find a better way of working within the terms of their contracts.

Browne Jacobson's experienced teams are available to advise on the options outlined above and on other [PFI contract](#) matters.

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