

Higher education projects – the end is nigh?

📅 26 April 2023

Private Finance Initiative (PFI) contracts have been used to finance public sector infrastructure and capital equipment projects since the 1990s but given that the government announced it will no longer support this model, the bulk will start to expire from 2025.

The Higher Education (HE) sector didn't form part of the PFI pipeline, but many institutions have 'PFI-like' projects with similarities to PFI: a private sector investor which agrees to build, finance and maintain an asset in return for a unitary payment - handing it back to the institution at the end.

This means that, although not strictly PFI, HE projects and PFI will have many issues in common as they near the end of their terms. As a result many of the issues raised by the Infrastructure and Projects Authority (IPA) in its guidance on PFI expiry will apply to the HE sector.

The project has years to run – surely we don't need to worry about this yet?

The IPA recommends that institutions start planning for this “*at least seven years*” in advance of expiry. Even if that suggested period errs on the side of caution, it underscores the gravity of the issues which the IPA expects to arise in major accommodation projects, and that these issues won't be quick fixes.

The National Audit Office has also found that many organisations underestimate the operational disruption, costs and potential reputational damage which can arise on expiry.

What are the key risks of inaction?

- If the project company is not meeting its obligations, and allowing the asset to deteriorate, the institution might face having to pay twice for this work. (Once through the unitary charge, and again to remedy the situation following expiry).
- When the project ends, it will be difficult - if not impossible - to seek any remedy from the project company for prior breaches
- Service disruption: the project will have a fixed expiry date. If steps are not taken in sufficient time, there is a risk that services will not be smoothly transferred (whether back in-house, or to a service provider).
- Further financial implications could arise as a result of any assets which have not been maintained in accordance with the project company's obligations, which will, in all likelihood, be more expensive to operate going forward.

What are the upsides if we get ahead of the curve on this?

Project expiry does present an opportunity to consider whether the project should be replaced on a 'like-for-like' basis or can more effectively slot into alternative plans. New technological drivers may have emerged, student requirements and priorities will have shifted, and the green agenda has moved on rapidly since the project was conceived.

A key part of preparation for expiry will therefore be to consider optimum future use of the asset, the services required, and how it fits into the institution's overall estate and wider strategy.

It may also be helpful to discuss these plans with the project company, which might be spending money on (and charging the institution for) assets and services which will no longer be required on expiry.

This could form the basis of a discussion with the project company about variations to the contract, and the steps necessary to deliver effective transition from the contract.

So, what do we need to do?

Every project is different, but successful delivery will always require:

- planning – start reviewing the project at the earliest opportunity and develop a clear timeline
- engage with the project company in relation to expiry and, potentially, changes to the contract
- understand the contract, and the project company obligations under it
- establish (and then seek) the internal (and any external) resource required, and establish the governance pathways needed to take effective commercial decisions
- be clear about the objectives – what we require from the project company and what we seek to deliver following expiry
- survey the assets and, if necessary, carry out an audit of the project company compliance with the contract to date

The best outcome will be delivered by combining a strategic vision with a clear understanding of the institution's contractual rights. Having the right team in place, with the required resources and sufficient time available, will be key to success.

If you're in need of any legal support or strategic direction for your projects, please get in touch.

Key contacts



Craig Elder
Partner

craig.elder@brownejacobson.com

+44 (0)115 976 6089



Dominic Swift
Partner

dominic.swift@brownejacobson.com

+44 (0)121 237 3980

Related expertise

Services

Commercial services in higher
education

Education law

Public private partnerships (PPP)
and PFI