

Covid-19: Infrastructure and Projects Authority guidance note on PFI and PF2 projects

09 April 2020

Please note: the information contained in our legal updates are correct as of the original date of publication

Major parts of the infrastructure in the UK are currently managed under **PFI contracts** and their contribution to public service delivery is substantial. In the context of the Covid-19 crisis, therefore, their continuing role is of critical importance to essential services, including, more than in any other sector, the continuing functioning of many hospitals.

The key role of PFI contractors has been recognised in a Guidance Note issued by the Infrastructure and Projects Authority on 2 April 2020, which gives a very clear statement that PFI contractors should consider themselves to be part of the public sector response to the current emergency.

In these uncertain times, there is a concern for the continuing financial health of suppliers to the public sector. Government has introduced a range of measures of support to business generally, but a PFI contractor is not, in the majority of cases, exposed to wider worries about the state of the economy. Most are structured as Special Purpose Vehicles with little or no operational role in the PFI contracts. They are largely a vehicle for the receipt of income from the authority and distribution to their lenders, equity subscribers and operating contractors. But in the operating supply chain, a number of contractors will be exposed to a number of financial pressures and contracting authorities may need to be seeking assurances from the PFI contractor about the continuing flow of cash to the operators (especially if there is to be an increase to deal with additional operational needs).

The Guidance Note is helpful in reminding everyone concerned that now is not the time to panic. It is very much of the Keep Calm and Carry On variety and sensibly advises contracting authorities to be sensible in how they manage the difficulties which some PFI contractors might be exposed to.

Its first point is to express the view that Covid-19 is not an event of force majeure. This will be true in most cases, where the contract follows standard terms in SOPC4 (and its predecessors) and the PF2 standard form of contract. However, those contracting authorities which entered into early PFI schemes which predated standard form drafting ought to undertake due diligence to ensure that the situation would not be classified as force majeure, since more bespoke drafting might have captured a wider set of events. More generally, it may also be sensible to check that it is not caught by any of the other provisions in the contract dealing with supervening events. Thereafter the detail of the note focuses upon the effect of the emergency on the PFI contractor's ability to satisfy contract standards and the terms of the payment and performance mechanisms. The Guidance makes a number of recommendations to deal with this:

- Moratorium on deductions and performance point accumulation
- Maintenance of the unitary charge at a level consistent with recent performance pre-crisis
- Tolerance of the need to introduce new ways of working to protect staff
- Where relevant, increase in the unitary charge to match an increase in contract requirements and performance

The Guidance Note is quite general and does not differentiate between the effect upon different types of project. In this respect, this is consistent with the need for contract managers to review the position locally with their legal advisers and to work through the full implications upon their scheme.

There is clearly a major difference between the effect the emergency will have upon a hospital PFI project and a school scheme. The hospital scheme will be facing additional burdens as the demands of cleaning and maintenance increase in a facility which is operating in a different way for the duration of the crisis. The contractor's staff, like all those working in the NHS in this crisis, will be exposed to the virus and is likely to be struggling with staff shortages. This comes at a time when their commercial revenue from car parking and retail premises has hit the floor. The contractor may not be assisted by the contract in managing these pressures and will welcome the intent of the Guidance Note.

By contrast, with many schools in full or partial shut down, day to day services such as cleaning, catering and caretaking are either not required or only in substantially reduced volumes. (One might note also that the average pupil exerts a daily toll on the fabric of a building and that the shutdown may be good news for a contractor's risk profile).

More specialist schemes such as waste, leisure and housing will have a number of specific challenges affecting them, which need to be worked through between the contracting authority and the contractor. Both waste and leisure projects will be financially underpinned by commercial third party income considerations and these will be severely tested in the current climate. A waste facility will have been designed and built based upon assumptions regarding waste volume and composition, which are likely to be altered currently, with specialist food and garden waste collections not being made and household waste recycling centres generally closed to the public.

There is no doubt that service continuity is paramount. Contracting authorities and contractors alike need to be working together to get through this, but there is a danger in the haste to address service needs, that contracting authorities might apply unwarranted penalties upon the contractor or by contrast grant an unmerited windfall. For example, it may make more sense not to suspend the performance regime (as this might give rise to a drop in standards) but instead to agree to exercise reasonable discretion in the actual levying of deductions or the application of penalty points.

This is also a rapidly developing situation and everyone needs to be adaptable to further changes.

If you would like to discuss any of the issues in this article please contact us.

Contact



Michael Mousdale

Consultant

Michael.Mousdale@brownejacobson.com

+44 (0)330 045 2499

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