

Insights

IMPACT OF COVID-19 ON UK PFI/PF2 CONTRACTS

A TRUE PUBLIC-PRIVATE PARTNERSHIP RESPONSE: SUPPLIER RELIEF

Apr 03, 2020

SUMMARY

The UK's Infrastructure Project Authority's (IPA's) guidance recent note (effective immediately and until at least 30 June 2020) on COVID-19 for PFI/PF2 contractors emphasises an intention by the public sector to, to the extent possible, ensure service provision (and unitary charge payment) continuity.

The guidance also makes it clear that the public sector does not view COVID-19 as a force majeure event. Whilst this is likely to be the case (based on this guidance in this specific context), we nevertheless recommend that PFI/PF2 contractors, practising prudent and active asset management, review the precise drafting of the force majeure drafting in their contracts (and any other related relief, "excusing cause" or public emergency drafting), including in respect of pass-down to sub-contracts.

The public sector expects to provide relief to PFI/PF2 contractors from performance deductions mechanisms in respect of issues arising from COVID-19, but not in respect of underlying performance issues (the guidance suggests that the net availability payments from the previous three months should be used as a reference point/'performance baseline') provided that PFI/PF2 contractors use their "best efforts" to continue to provide services.

The guidance further highlights that any contractual relief/amendment is likely to take the form of bespoke contractual documents implementing temporary amendments to contracts agreed in connection with COVID-19, and whilst some standards may be temporarily qualified/reduced it may be the case that cleaning activity/standards (and potentially other health & safety obligations) are temporarily increased, with adjustments to unitary charge payments to address such increases as appropriate.

PFI/PF2 contractors should continue to review their business contingency plans and to liaise with their contracting authorities as to what performance deductions mechanism in their contracts may

be temporarily qualified, whether any cleaning or health & safety activities and/or standards are required by the contracting authority to be temporarily increased, and how any temporary arrangements will be reflected in contractual amendment documentation.

PFI/PF2 contractors operate critical national infrastructure within the UK, supporting vital services to the UK public sector and this is recognised upfront with the guidance stating that “...*PFI contractors should consider themselves to be part of the public sector response to the current COVID-19 emergency*”.

In doing so the public and private sector will need to seek an open dialogue on increased costs and where increased costs are incurred they are done so on an open book basis, we suggest clients keep records and minute decisions on expenditure carefully to ensure that these decisions can be justified when scrutinised later in possible public audits or at the point of recovery on invoicing. General government procurement guidance should also be reviewed in this context.

Fundamentally, the PFI industry is being asked to stand shoulder-to-shoulder with the public sector to face this national emergency, it is an opportunity for the PFI industry to continue to demonstrate publicly the tangible benefits that PFI contracts can have to the delivery of public services in partnership with the public sector.

Commentary

On Thursday, 2 April 2020 the Infrastructure and Projects Authority (IPA) [released a guidance note on COVID-19](#) in the context of Private Finance Initiative (PFI) and PF2 projects (link below). The guidance is effective immediately and lasts (unless further extended) until 30 June 2020, and the key points in this guidance are as follows:

1. PFI/PF2 contractors should consider themselves part of the wider public sector response to COVID-19 (further below);
2. public and private sector counterparties to PFI/PF2 should co-operate to ensure the continued delivery of public services, and that the public sector’s view is that COVID-19 is not a force majeure event;
3. PFI/PF2 contractors should ensure that business contingency plans are up-to-date and these should be discussed with contracting authorities as necessary to enable service provision continuity; and
4. ensuring service continuity provision will include the maintenance of unitary charge payments, revising contract requirements/standards (including scope changes as necessary) and amending performance deductions mechanisms where appropriate.

The detail of the note suggests that where services provision is impacted by COVID-19 despite the “best efforts” of the PFI/PF2 contractor, there should be a “temporary moratorium” on reductions

through performance deductions mechanisms to allow the contractor to continue to operate and pay its workforce and suppliers. In line with more general procurement guidance the public sector is advised by the IPA to have regard to the net level of unitary charge payments (i.e. the guidance seeks to potentially ‘wipe clean’ the impact of COVID-19, but not performance issues existing prior to the COV-19 emergency).

The guidance further details, as would be expected, that health and safety standards, and contractual requirements regarding the same, should not be compromised or reduced.

In practice, even if not contractually required, many PFI/PF2 contractors may have already increased cleaning activity/standards in their projects as a result of COVID-19, but the guidance note explicitly suggests that contractual documents that may implement temporary arrangements as a result of COVID-19 may look to increase cleaning activity/standards, and acknowledges that unitary charge payments may need to be increased to reflect increased cleaning activity/standards. Whether such increase could be implemented respectively is not detailed in the guidance and is likely to be a matter of commercial discussion with the contracting authority.

Finally, the note comments that a set of FAQs will be developed by the IPA in due course (and the current version of the guidance note may be revised and developed), and provides an IPA email address for queries (ipa-project-and-structured-financ-group@ipa.gov.uk).

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