

Insights

MANAGING PFI CONTRACT EXPIRY RISKS – UPDATED IPA GUIDANCE

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On 28 February 2022, the Infrastructure and Projects Authority (IPA) published its *latest guidance* to contracting authorities (CAs) on preparing for *PFI* contract expiry. It provides practical guidance on managing expiry and service transition. We have previously written about the *IPA's earlier guidance* and its *PFI expiry health check report*.

The guidance is also relevant to private sector entities including investors, funders, asset managers and market suppliers. This is particularly so where both parties want to avoid disputes and work amicably and cooperatively towards a smooth exit, handover and transition process.

This blog takes a closer look at the guidance and considers what the key takeaways are.

GUIDANCE IN THREE PARTS

The guidance is in three parts – A, B and C – all of which are designed to be user friendly:

- Part A sets out why expiry matters. Much of this has been highlighted in the *previous guidance*, but the IPA expands on points it has made before.
- Part B is detailed step by step guidance on how to implement the expiry and handover process, including a one page visualised 5-step expiry planner.
- Part C is a “grab guide” of key recommendations, summarising the main points from parts A and B.

In addition, the “supporting expiry toolkit” is up and running on the *IPA webpage* with additional materials for CAs relevant to the process. The idea is that the toolkit will be added to over time, presumably as learning and experience of the exit processes develops.

KEY TAKEAWAYS

The guidance is detailed and there is a lot of helpful information for CAs and private sector entities to use to prepare for handover and expiry. However, this isn't a one stop shop. Each PFI exit will vary

considerably based on the nature of the asset, services, contract and the CA's future requirements. With that in mind, here are five key takeaway points.

- **Start early and resource properly, it's a complex process.** The IPA recommends that parties should start expiry and transition planning seven years before the expiry date, but given the depth and breadth of actions highlighted in the guidance, I can't help but think the sooner the better.
- **Create economies of scale by sharing knowledge.** The IPA discusses the potential for CAs to build networks to share their experiences. Project companies can take this lesson forward too and both public and private sector entities can also learn from successful PFI project handovers.
- **Know your contract: conduct a clause by clause review of all expiry related provisions,** including:
 - the contractual process for handover and timings;
 - contractual risks, and how to mitigate those;
 - contractual obligations for the project company to meet on handover and exit, including asset condition;
 - understanding contractual obligations and mechanisms relating to asset compliance and, where applicable, identifying the relevant legislative or regulatory standards relevant to asset compliance; and
 - provisions around disclosing and transferring information relevant to continuity of services.

The actions, although aimed at CAs, are relevant to private sector entities too. Legal advice will most likely be required to assist in understanding the practical adequacy of the expiry provisions in the contract. Contractual arrangements may be inadequate, impractical, not fully detailed or ambiguous and it will be necessary to understand the operation and alternative interpretation of ambiguous provisions. Any gaps in the contractual process will need to be bridged through discussions and commercial negotiations between CAs and the private sector.

The ideal scenario, if disputes are to be avoided or minimised, involves both sides engaging (early on in the process) in joint expiry planning, negotiating and/or mediating contentious points with a view to reaching a consensus on the handover processes, the parties' respective obligations and what must be done to meet those obligations.

The output of this consensus could be an agreed, clear and detailed expiry process and single shared set of documentation, including information sharing protocols, risk registers and effective

processes to resolve disputes as they arise. Essentially, the parties agree the handover process. However, if left too late, this collaboration becomes much more difficult to achieve as there simply is not enough time and disputes become more likely (see below).

- **Start Building Constructive Relationships Early**

This follows on from my earlier point about knowing your contract. The IPA emphasises that building constructive relationships at all levels between the parties is key to managing a successful expiry and transition. This is also true for ongoing contract management. It's never too early to establish cooperative engagement. The idea being that when contentious or complex issues arise, which is inevitable, the parties can tackle those contemporaneously. One option is to navigate those issues through commercial negotiation in the first instance.

Where disputes remain unresolved through commercial negotiation, the parties can look to a contractual dispute resolution procedure which can be effective in these circumstances or another mutually agreed method of dispute resolution such as a dispute avoidance board or mediation. It is better for the parties to resolve disputes as they arise and to try and agree a process for resolving disputes **before** they arise. This will hopefully avoid the parties reverting to a more formal (and typically more adversarial) method of dispute resolution.

- **Opportunities for follow on/future services**

Follow on and continuity of services are key. The end of a long-term arrangement provides the opportunity to re-think future service provision including the use of new technologies, digitalisation, focusing on *net zero strategies* and increasing efficiencies.

The IPA notes the “cliff-edge nature of PFI contract expiry”, concluding that all services must be in place before PFI services end. However, we shouldn't overlook the fact that the private sector entities involved in the PFI project may be able to assist in realising these opportunities. There is potential for an ongoing or future relationship, which could also further incentivise the parties to exit their existing project positively and cooperatively.

FINAL THOUGHTS

Exit and handover is a complex process and different for each project. It will not be without challenges, contentious issues and disputes. However, the key to a smooth transition period is collaboration and private and public sectors reaching a consensus on all aspects of the process (or as much as possible) and tackling disagreements contemporaneously as they arise. Where it is not possible to resolve disputes through commercial negotiations, using collaborative methods of dispute resolution, which have ideally been agreed in advance, to avoid more formal (and expensive) disputes.

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