

Managing PFI contract expiry and maintaining party relationships

22 May 2024

In our series of articles we consider some of the key risks that parties will want to manage as PFI contracts move towards expiry.

This article in particular focuses on the management of party relationships.

When a Private Finance Initiative (PFI) contract expires, the assets are handed back to the contracting authority. As of September 2023, in the UK there are still over 550 operational PFI schemes and the majority of these schemes are due to expire within the next 15 years. As the duration of a PFI contract is usually for a considerable period (around 15 to 30 years), the hand back process can be time consuming, technical and costly. Due to this, there is a risk that relationships between the contracting parties break down which can unfortunately result in increased disputes.

This note is intended to discuss the importance of managing relationships in a PFI contract and mitigating the risk of a breakdown in relations.

The importance of maintaining a commercial relationship between the parties

As with any contract, it is important to maintain the commercial relationship between the parties. However, this is particularly important with PFI contracts, which are often referred to as 'relational contracts', due to their long-term nature and reliance upon trust between the parties.

Positive relationships between parties is critical to ensuring that projects are managed effectively in the long term and deliver value for the public sector. PFI contracts involve a considerable amount of risk and costs and the relationship between the parties can put great weight on the deliverables and outputs.

A collaborative relationship between parties offers flexibility and trust and whilst this is recommended by the White Fraiser Report (20 July 2023), it can often be hard to achieve. In situations where a breakdown of the commercial relationship arises, there are significant consequences for both the project and parties involved.

Steps you can take to maintain relationships

Regular and open communication:

- Contracts will often provide for liaison processes which can be a helpful forum for identifying issues.
- Where the contract does not contain liaison provisions, the parties should develop a communication strategy.

Familiarise yourself with the contract and discuss any gaps/uncertainties:

- It is not unusual for PFI contracts to be silent in certain circumstances and many PFI contracts which were signed prior to the development of standard forms contain very little detail around the process and requirements that apply upon hand back/expiry.

- Parties should seek to obtain a complete copy of the contract, including any variations. Where variations have been agreed but not documented, parties should consider whether it would be beneficial to prepare and agree a conformed copy of the contract.

Establish a process for early identification of disputes:

- Having early discussions at the right level can 'unlock' certain disagreements between parties or establish a process for escalation without referring to potentially time consuming and costly formal dispute processes/proceedings.
- Parties could consider agreeing terms for a dispute avoidance mechanism.

What happens if there is a breakdown in the commercial relationship

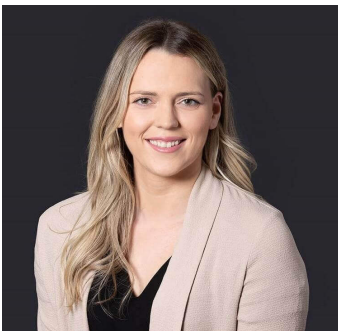
It is important to recognise that a break down in the parties' relationship may not just occur as a PFI contract approaches its expiry - although the hand back process that occurs towards the expiry of a PFI contract can be a heavily contested area.

If relations start to break down between the parties, early identification and escalation should be focused upon utilising the approaches we outline above. Parties should avoid 'saving up' disputes until the end of the contract as the hand back process is time limited and resource intensive.

If the parties do encounter a dispute, the contract itself will typically contain a provision for dispute resolution. For example, the parties may have to engage in a form of ADR such as mediation or arbitration. Parties can also consider terminating the contract but this can be a complex process and may have significant implications for either party. For various reasons, [dispute resolution](#) or indeed avoidance may be the best approach.

Before proceeding with any course of action regarding a PFI dispute we would recommend that you seek independent legal advice from the outset. If you would like further advice regarding a [PFI contract](#) or if you are involved in a [PFI dispute](#), please do not hesitate to contact us.

Contact

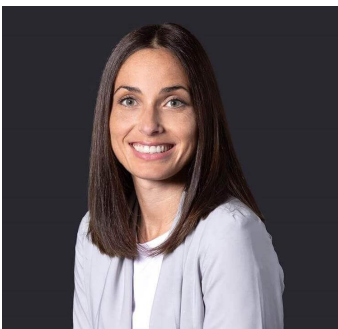


Natasha Davison

Senior Associate

natasha.davison@brownejacobson.com

+44 (0)330 045 2568



Chloe Poskitt

Legal Director

chloe.poskitt@brownejacobson.com

+44 (0)115 934 2058

Related expertise

PFI disputes

Public contracts, projects and funding

Public law

Public private partnerships (PPP) and PFI