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## Response to 'IPA Guidance: Preparing for PFI Contract Expiry'

### 1. SUMMARY

- The starting point in any debate on PFI contract expiry / 'handback' is the need to ensure that the public sector receives the maximum value possible in the future. All decisions need to be taken with the goal of optimising the long-term interests of the public sector in mind.
- There are many practical issues where BSA members have expressed support for the approach outlined by the IPA.
- There is also substantial room for service and infrastructure providers to contribute above and beyond the actions referenced in the IPA guidance - providing resource and experience where these are lacking, and expertise from operating the assets and from work on other projects. Service providers are expert at scaling and replicating innovation and change, and perhaps more could be made of the positive benefits of joint working and the potential 'offer' from service providers in bringing new ideas to the table.
- Recognising that interests are often aligned, and then maintaining good relationships with stakeholders in the PFI process, working collaboratively and seeking their contribution and support, is the best way to maximise value and benefit for the public sector. One way to make sure everyone is on the same page would be for stakeholders to be able to participate in online training sessions being organised for the public sector.
- The starting point - and default position - for all handback discussions is the contractual obligations. It is recognised that sometimes sticking to the letter of an old contract no longer aligns with the public sector's intended asset use - and therefore its ultimate objectives and the core goal of maximum public sector benefit. However, variations from contract need to be mutually agreed, and some have pointed to an alternative approach to relying on change procedures.
- Those BSA members who have already completed PFI handback report that building good relationships, and maintaining a positive culture, are absolutely central to achieving a successful outcome. Therefore we welcome the strong emphasis in the IPA guidance on the importance of positive relationships across the range of stakeholders involved. Good relationships are especially important where contracts have fewer concrete provisions, but they remain important even where the contract seems clear, for example where mutually agreed changes may be in the public interest. FM stakeholders have a keenness - and a responsibility - to work together with other parties who will rightly have an interest in such discussions.
- Issues like Net Zero are a great way to start to build relationships, and show transparency, as these are often 'win win' for all stakeholders.
- The recommendation of the IPA is that expiry and transition planning should start at least seven years before the scheduled contract expiry, not least to understand the issues and set expectations. There is broad support for this, but even earlier work on building relationships and looking to the future is also helpful. The later the process starts the harder it becomes to depart from the letter of the contract, regardless of whether this best supports optimal public sector outcomes. This is an important issue for the public sector as well as the private sector to bear in mind.

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## 2. BACKGROUND

Some BSA members are equity holders in PFI projects, and many more are involved as service providers in projects established under the PFI model. The BSA therefore established a working party looking at the issue of PFI contract expiry / 'handback', to feed into work on this topic by the IPA and others.

The working party welcomed the IPA's latest guidance '[Preparing for PFI Contract Expiry](#)', which provides much useful and practical advice for public sector organisations preparing for PFI expiry.

The section on 'Relationship Management', from page 29, is particularly relevant, as is the section on 'Future Services', from page 51.

Members also have suggestions for ways in which the private sector can contribute further to the objectives set out in the IPA guidance.

This note explores these points in more detail.

## 3. A WELCOME APPROACH

There are many practical issues where BSA members have expressed support through the working party for the approach outlined by the IPA.

### Common Goals and Aligned Objectives

The starting point in any debate on handback is the need to ensure that, whatever the merits of PFIs to date, the public sector receives the maximum value possible in the future. All decisions need to be taken with the goal of optimising the long-term interests of the public sector in mind.

This means putting at the forefront the needs and wishes of current and future users of the service, taxpayers, and staff.

Not only do stakeholders from private and VCSE sectors share this common, core, goal, but they can support the public sector in achieving it. The guidance rightly highlights the possibility of tensions between various stakeholders and suggests ways in which they can be ameliorated. However it is in no-one's interest, not least the public sector, for PFI exit to be subject to dispute. Rather, recognising that interests are often aligned, and then maintaining good relationships with stakeholders in the PFI process, working collaboratively and seeking their contribution and support, is the best way to maximise value and benefit for the public sector.

One way to make sure everyone is on the same page would be for stakeholders to be able to participate in online training sessions being organised for the public sector.

As well as the public sector, stakeholders include SPVs, asset owners, investors and FM providers. Life cycles help to drive the behaviour of the different parties. All are trying to manage risk and uncertainty, but in different ways. There should be recognition of these risks, faced by all sides, and exploration of what can be done to minimise them in the interests of all - along with limiting factors on all sides, including capacity restraints in the public sector, and ways in which private sector stakeholders may be able to help.

The objectives and interests of all these groups first need to be considered in order to assess how each is likely to behave; then aligning these objectives must be one of the aims of the handback process. Part of this will be about turning any challenges encountered into opportunities, in particular by focusing on future needs in support of the common goal of maximising public sector benefit.



Asset use post-handback is often a key factor affecting joint actions before handback. Factors to consider include what good procurement may look like post-PFI expiry, and the social value and sustainability aspects of future asset use.

### Stakeholder Management

The guidance rightly highlights the importance of stakeholder mapping in support of this process.

This is another area where good practice working guides are useful, including project plan handover toolkit and checklists, such as those provided by the IPA<sup>1</sup>, NAO<sup>2</sup> and partnerships bulletin, and SFT<sup>3</sup>.

Stakeholders include:

- users of the building. One of the primary challenges is to ensure that the users of the facilities including patients, pupils, prisoners etc are not impacted, given the effect that negative impact could have on potentially vulnerable people's lives; and
- staff. The future and welfare of staff employed by PFI providers are central to successful handback. As the guidance states, implementation of TUPE in this context is complex, as multiple contractors as well as the authority are likely to be involved and contractual requirements often cannot simply be rolled forward. The guidance stresses that specialist advice must be sought early in the implementation phase. Another challenge is that some staff may choose to leave early in the approach to handback, which may produce skills gaps. However many service providers have substantial experience of managing handover under TUPE regulations, and can contribute advice and support to staff affected.

In some cases there may also be involvement from third party organisations, some of which are motivated by short-term fee arrangements; this involvement too needs to be optimised.

Those who have been through successful PFI expiry processes report that having a plan that all parties signed up to was an important success factor. In one case a document sign-off protocol was agreed and an action tracker put in place to ensure all stakeholders had a single reference point for the activity around the expiry process. Implementing this required time and commitment from all parties, but having a clear plan for managing the process itself was invaluable and ensured everyone knew what was happening<sup>4</sup>.

Throughout this process, a single party needs to show leadership as the driving force. The public sector will need to show strategic leadership and make sure public sector goals are achieved. However there are often capacity issues in public sector clients when it comes to day-to-day management of handback. SPVs also need to show leadership, although they will not always have a significant interest in the project at handback. In practice FM providers have often assumed a co-ordination role, although the public sector needs to make sure its interests still drive the outcomes and the process. Helping build up public sector capacity may itself be one of the objectives to be achieved.

The contract itself may specify the roles of the different stakeholders on handback. But in any event, private sector stakeholders have a responsibility to act as supportive partners in the process, with objectives agreed and roles clarified, co-ordinated and clearly defined.

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<sup>1</sup> [PFI Centre of Excellence - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

<sup>2</sup> <https://www.nao.org.uk/report/managing-pfi-assets-and-services-as-contracts-end/>

<sup>3</sup> <https://www.scottishfuturetrust.org.uk/storage/uploads/endofcontractprogrammeapproachfinalsftreporttemplate150420v11.pdf>

<sup>4</sup> [Project Expiry - British Transport Police | Vercity \(vercitygroup.com\)](http://www.vercitygroup.com)



Stakeholder management is particularly important when variations from contract are being proposed (see below). FM stakeholders once again have a keenness - and a responsibility - to work together with other parties who will rightly have an interest in such discussions, for example funders, as well as the public sector itself for example in relation to the risk profile of any changes.

### Looking to the Future

There is quite rightly in the guidance a strong focus on the need to plan for life after PFI, and the role this plays in expiry discussions.

The key question is: what are the public sector client's intentions for the use of the asset and future service provision? For example the public sector may wish to change the use of the asset entirely, to change the configuration of services there, to consolidate the asset with others it holds, or to dispose of it. This should both inform and drive all aspects of the expiry process going forward. Indeed such a focus will deliver value long before expiry.

There are various factors to be considered in approaching these questions.

First, in some cases the client may not be aware of the full range of possibilities for asset use after handover. Even where it is clear on how it wishes to use the asset, for example for a school, hospital or prison, it may not have access to the full range of information about how that use can be optimised - for example best practice on asset use elsewhere. There may be a role for the private sector to help the public sector appreciate the potential range of possibilities on future use.

Second, there is recognition in the IPA guidance that the nature of risk transfer in the specification of PFI contract services, and the operational and technical changes that have occurred since original PFI contracts were created, make it unlikely that service arrangements can be simply repackaged and rolled forward.

Third, there have also been substantial policy changes in the last few decades since the first PFI deals were signed, linked to technological changes, especially on Net Zero.

Fourth, there is the issue of the appetite and readiness of client for 'taking back control'. Do they have the infrastructure, capacity, funding, capability to do so? That may be an especially pertinent question in the case of those public sector clients which are smaller and disaggregated and which consider themselves independent of government departments.

Private sector may be able to support those public sector bodies that either:

- are ready to take on the PFI, and so private sector works in partnership for smooth handover of all documentation, records etc;
- have the desire to take back the PFI but are not in a position to do so, be that due to capability or capacity or both; or
- have no appetite to take on the risks of the PFI assets and therefore the private sector can continue running the projects, under a new form of contract once the PFI has expired or by extending the contract via variation.

The private sector can help with defining the operational/ financial / legal obligations they will be inheriting. It can then help prepare, improve, guide and support.

Playbook provisions<sup>5</sup> on business cases and options are useful, especially for more complicated services.

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<sup>5</sup> <https://www.gov.uk/government/publications/the-outsourcing-playbook>



There is a need therefore for the public sector to see collaboration with the private sector as an opportunity, not a risk. In return, private sector stakeholders must set their sights on the long term, in particular the long-term interests of the public sector.

### **‘Contract Plus...’**

The starting point - and default position - for all handback discussions is the contractual obligations. The guidance is rightly clear that ‘knowing your contract is the necessary starting point for PFI contract expiry and transition planning’. Key contract elements are listed as: expiry date; rights to future use of land, assets and information; handover process; required condition at handover; and, provisions relating to transfer of information needed to support future service provision. Getting housekeeping in order early is key.

Factors to consider in this regard include:

- Provisions in the contracts for hand-over may be open to interpretation, and the processes set out for discussing them may be inadequate. Contractual issues are likely to include end dates, definitions, condition surveys (who carries them out and the cost).
- Negotiations are likely to involve issues relating to leased assets, asset management, and possibly TUPE and who owns the data (for example that gathered by the existing service provider on budgeting and ongoing investment)
- Contracts differ widely, even those dating from a similar era, but often older projects have the least clear provisions as they were breaking new ground, so early engagement here is particularly important. Many contracts have more gaps than might be expected or assumed. An early audit is vital.

Clarity may be required in the understanding of different parties on exactly what they mean by the condition of the asset on handback. This can be a big challenge. Contracts contain provisions that are no longer relevant.

Changes that may have taken place since the contract was signed, and the likelihood of further change in the future, mean sometimes sticking to the letter of an old contract no longer aligns with the public sector’s intended asset use - and therefore its ultimate objectives and the core goal of maximum public sector benefit. Often, managing assets to original specifications is unlikely to deliver the greatest value for the public sector. However variations from contract need to be mutually agreed, and some have pointed to an alternative approach to relying on change procedures<sup>6</sup>.

The path of lifecycle expenditure is important in this regard. Replacing an asset early, in order to comply strictly with the terms of a concession, may lead to less residual life from a public sector perspective. However being contract compliant prior to any negotiations helps set the right backdrop to discussions on change.

As the IPA guidance rightly states, ‘the end of such a long-term arrangement provides the opportunity - in fact, the imperative - to rethink the future’. Handback allows assets to be looked at with fresh eyes where the public sector’s requirements may have changed. Policy goals such as Net Zero may best be achieved when contracts are based around services not capital, and this also helps with innovation.

All of these issues help to define what constitutes a ‘well maintained asset’ at the current time and how such a definition may have evolved since the original contract was signed.

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<sup>6</sup> [Guidance on pathways to net zero for assets delivered under PPP contracts: an opportunity for parties approaching handback periods? \(cms-lawnow.com\)](https://www.cms-lawnow.com/insights/public-works/guidance-on-pathways-to-net-zero-for-assets-delivered-under-ppp-contracts-an-opportunity-for-parties-approaching-handback-periods/)



## Relationships and Culture

Those BSA members who have already completed PFI handback report that building good relationships, and maintaining a positive culture, are absolutely central to achieving a successful outcome.

Therefore, we welcome the strong emphasis in the IPA guidance on the importance of positive relationships across the range of stakeholders involved. The relationship management guidance rightly aims to foster a positive, practical relationship based on trust and mutual understanding. We believe the principles that lead to good relationships, such as honesty, transparency and aligned objectives, should be explored in greater depth.

Good practice toolkits on building relationships can be signposted, such as from the Institute of Collaborative Working<sup>7</sup>.

The guidance says this should ‘minimise[s] disputes and optimise[s] contract compliance and information transparency’. In fact this should be the starting point. Mutual understanding of ‘contract plus...’ may be the best way to achieve the outcomes the public sector wishes to see. Good relationships are especially important where contracts have fewer concrete provisions, but the factors already outlined mean they remain important even where the contract seems clear - for example where mutually agreed changes may be in the public interest.

The guidance contains examples and case studies as well as sections on ‘what good looks like’. This includes a list of components of an effective joint relationship management plan. For example a transition team could manage relationships with the different parties. Whether this is a new team may depend on the quality of existing relationships. This work should start early (4 to 7 years prior to exit) at a high level. Specialist teams may then need to be involved, for example HR teams looking at TUPE and other issues.

There are several aspects of this relationship which BSA members would emphasise, including:

- the importance of relationships between all stakeholders, for example between the SPV and client as well as between the FM provider and client. These may vary significantly, and some new relationships may need to be developed from scratch and potentially quite rapidly (including with consultants, advisers and specialists). It should never be assumed that good relationships are already in place between other parties;
- recognising that cultures between stakeholders may vary significantly, and will also vary according to the nature of the asset, so lessons from one handback may not be directly transferable to another;
- the importance of transparency, openness and communication in building and maintaining good relationships, including transparency in the outcomes the various stakeholders would like to see, as well as transparency in use of data for example. This means that practical difficulties which arise can be turned into opportunities, with collaborative working and a change of mindset - for example through optimisation of assets; and
- the importance of maintaining good relationships even when personnel changes.

Issues like Net Zero are a great way to start to build relationships, and show transparency, as these are often ‘win win’ for all stakeholders. Nevertheless, there may be greater challenges in building relationships at the end of a contract than at the start, and this may vary according to the likely asset use after handback, and stakeholders’ possible roles at this stage.

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<sup>7</sup> Background on the ICW and on Affinix: <https://www.instituteforcollaborativeworking.com/> & <https://www.affinix.com/>



## The Importance of Transparency

Transparency is key to achieving good relationships. This includes:

- all parties being honest over objectives. The aims of the different parties should be put on the table from the start;
- transparency over ongoing costs, and mechanisms, so a business-case approach can inform the decisions to be made;
- transparency about asset conditions and records, performance, technology (and changes to technology) and workflows; and
- being clear over risk transfer and potential profit levels post-handback, so the latter is not over-estimated.

## Practical Issues

The IPA guidance rightly highlights the importance of many practical issues, in support of achieving the joint outcomes and good relationships highlighted above. These include:

- Aligned joint governance and escalation arrangements.
- Identification of individual objectives and any differences that exist.
- Clear roles and responsibilities.
- Identified stakeholder leads and other key decision-makers.
- Agreed communication channels.
- Multi-tiered joint working arrangements (for example, workstreams and project level).
- Joint expiry risk/issues log.
- Information sharing protocols.
- A joint repository (for example, Microsoft SharePoint site) for key documents.
- A behaviours or 'ways of working' charter, which, while legally non-binding, sets out how the parties expect to behave and engage with each other.
- Effective processes to address and resolve disagreements.

The recommendation of the IPA is that expiry and transition planning should start at least seven years before the scheduled contract expiry, not least to understand the issues and set expectations. There is broad support for this, but even earlier work on building relationships and looking to the future is also helpful. The later the process starts the harder it becomes to depart from the letter of the contract, regardless of whether this best supports optimal public sector outcomes. This is an important issue for the public sector as well as the private sector to bear in mind.

The responsibility to review handback requirements lies initially with the incumbent operator. This must include the obligations of FM, SPV, lenders / financing arrangements and legal obligations. This can then be shared with the clients so everyone is fully aware of and understand each party's obligations so they can resource and plan accordingly. The operator must also assess condition early and then secure agreement on liabilities.

Clients may differ on their willingness to engage in early conversations, depending perhaps on how much flexibility they think they have to amend contracts. A willingness to show flexibility on the part of FM providers (who often have long-term interests) and other stakeholders early in the process may help.

An early discussion about capability and capacity on all sides also ensures there is enough time to resolve any issues arising there.



Other issues to consider include:

- the fact that documents may all be paper-based, and negotiations are likely to be on the basis of less information, presented in a less useful format, than is now usually the case, unless time is taken to resolve this on the basis of negotiation. A focus on record-keeping - warranties; service history etc - is essential, but not sufficient in itself to achieve optimal outcomes if the records are in a format which do not lend themselves to doing so. Altering handover of drawings from hard copy or CD to digital format can often be made using the variation process as defined in each contract and made in agreement with all involved parties; and
- as well as physical assets, especially as technology has developed there are now more IP assets, and ownership of and claim over these too need to be considered.

Securing a best value for money PFI Exit is also more likely against a backdrop of:

- strong day to day contract management;
- good operational efficiency work. This is particularly important now, given that unitary charges are linked to RPI/CPI;
- collaborative working across the supply chain;
- the use of best practice tools and techniques - including technology enabled; and
- the recognition that there are decisions for public bodies here and the better business case approach will support this.

## **Pensions**

We note that the guidance contains only two single line references to obtaining specialist pensions support, as well as a short bullet point on data protection in the context of pensions.

Our understanding is that this is a potentially challenging area which could have a marked impact on the PFI-handback process.

We would therefore welcome further guidance to help mitigate these potential challenges and would be happy to work with the IPA on this based on members' experience in this area.

## **4. THE ADDITIONAL CONTRIBUTION OF SERVICE AND INFRASTRUCTURE PROVIDERS**

As the above sections indicate, the BSA believes there is substantial room for service and infrastructure providers to contribute above and beyond the actions referenced in the IPA guidance - providing resource and experience where these are lacking, and expertise from operating the assets and from work on other projects. Service providers are expert at scaling and replicating innovation and change, and perhaps more could be made of the positive benefits of joint working and the potential 'offer' from service providers in bringing new ideas to the table.

As already emphasised, this must always start with the common goal of the public sector receiving the maximum value possible in the future, with all decisions taken with the goal of optimising the interests of the public sector in mind.

It is important to recognise that this is compatible with private sector stakeholders achieving their objectives too, if all parties work to align objectives in support of this common goal.

In particular the private sector can offer:

- capacity and capability, where this might otherwise be lacking in support of public sector goals. Some public sector bodies, especially smaller or more localised bodies, may struggle with PFI Handback / Exit because capacity and capabilities have understandably been eroded;





- expertise. IPA guidance rightly recognises that Exit and handover is a complex process, which differs for each project. Especially for more complex scenarios, the benefits leveraging the experience of private sector partners is clear. Expertise may be required in specialist areas;
- a more informed assessment of future option for asset use, based on experience of operating the asset to date and experience of projects elsewhere. As part of this, the private sector is skilled at assessing and analysing the needs and wishes of service users across the range of service provision, including through use of data;
- innovation. There are sections in the IPA guidance on the importance of data, and of sharing of data, but there could be greater focus on the opportunities that use of such data presents in terms of innovation, and the scope for working in partnership with service providers to catalyse such innovation in future service delivery.

To take one specific example, there is minimal reference to Net Zero considerations in the guidance. These should be central to the discussions on handback, and the private sector can bring experience of innovation to the table which will help to do so.

Some, but not all, of these issues are related to the question of ongoing private sector involvement after handback. Expertise may still be required after handback: financing, designing, building and operating assets are all still essential functions which still require private sector input. The public sector needs to be fully aware of the responsibilities involved in full handback, especially when financing costs - often a cause of dissatisfaction with PFI - may no longer apply. It is also important to compare operating costs like for like.

However regardless of these issues, the private sector has a clear offer as part of the handback process, and pre-handback, in itself.