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Focus On Private Finance Initiative

2024

Introduction

At Ashfords, our team has in-depth experience in most private finance initiative (PFI) sectors. We advise on the status of PFI contracts, the parameters of final surveys, rights of redress, deeds of variation and re-procurement.

Ashfords advise local authorities, operating contractors, SPV project companies and funders. We have particular expertise in:

- Early termination of PFI projects.
- Variation of PFI contracts, including project managing the process, ensuring the correct consents are obtained and compliance with the procurement regime.
- Expiry of PFI contracts, and a full review of the contractual position, including advising on hand-back provisions, requirements and processes.
- Refinancing PFI projects.
- Qualifying Change in Law claims
- Construction and engineering defects issues on large-scale infrastructure PFI projects including performance issues and rectification obligations.
- Litigation and arbitration support across PFI projects (including dispute avoidance), addressing overlapping construction and projects disputes and interface issues.

Our expertise

Refinancing

The traditional approach to PFI financing was to assess the refinancing mechanics of the project agreement and require the contractor to go out to the bank market and seek terms for replacement financing of the original project finance bank debt.

Any savings on margins could in turn be shared with the local authority under the refinancing mechanics. However, some authorities have chosen more innovative options and we can advise on refinancing options appraisals.

Examples include:

- Directly purchasing the whole of the debt from the original lender group.
- Purchasing some of the original bank debt and becoming a lender alongside the other project finance lenders to the project.
- Enabling the project company to prepay the original debt and putting in place new loan terms directly from the local authority to the project company.
- Enabling the project company to prepay the original debt and reducing the unitary charge as a result.

Our expertise (cont)

Payment mechanisms

Payment mechanisms rarely make direct provision for cost savings, beyond “best value” type provisions, and there is a risk that authorities find themselves engaged in legal action where they have applied the payment mechanism too aggressively.

Key issues in the administration of a PFI payment mechanism that we can advise on include:

- The correct application of KPIs to an alleged service failure.
- Veracity of performance deductions and unavailability of asset.
- Reporting service failures .
- How service failures are logged.
- When should the contractor issue performance reports.
- Whether correct invoices are being properly issued and how they can be challenged.
- What time periods exist contractually for disputing service failures and incorrect requests for payment.

We can further provide dispute avoidance guidance and advise and assist with the dispute resolution process.

Variations

An alternative to allowing a PFI contract to expire, is to negotiate a variation. This result in cost savings by reducing the scope of services, and changing the risk allocation.

We can help achieve cost savings, by negotiating matters such as:

- Increasing occupancy of joint service centres / office accommodation.
- Reducing the frequency of non-essential services.
- Utility savings through introducing new technologies in waste, street lighting, office accommodation, leisure centres and libraries.
- Removing contractors' obligations to provide furniture, fixtures and equipment to release lifecycle provisions.
- Negotiating lower margins.

Implementing variations of this nature can be complex and for large variations the process of contract closure can almost be as involved and time consuming as the original financial close. Furthermore, close attention needs to be paid to ensuring that procurement rules are not breached.

Our expertise (cont)

Expiry

Some PFI contracts are now approaching their natural expiry dates, and consideration needs to be given to hand back of the assets. We can help to stream-line the process for local authorities.

For instance, we can prepare termination/expiry plans setting out everything which needs to happen to allow a project to be transitioned back to the authority, covering the following areas:

- A reconciliation of which assets will be handed back.
- Ensuring that existing property leases or licenses to the project company are resolved.
- Identifying permits and consents that need to be in place and transferred back to the authority.
- The condition of the site or facility on hand back and identifying repair and rectification obligations.
- Identifying the project company's obligations to ensure these are properly complied with upon termination.
- Arrangements for the transfer of employees under TUPE. Are pension contributions up to date, and are there any employment claims?
- The resolution of any existing or pending claims or litigation.

Early Termination

Early termination of a project is, in most instances, what all parties seek to avoid. While it can often be prevented through careful management and negotiation, in some instances it will be an inevitable outcome of the client's needs and/or strategy.

We can advise on the termination compensation mechanics in the project agreement, the potential termination triggers (e.g. Contractor Default or Authority voluntary termination) and the processes that must be followed for termination, as well as re-procurement.

Disputes

Whilst plans can be in place for expiry and/or variation of PFI contracts, disputes can still nonetheless arise during this process.

If all parties to the PFI are embroiled in a dispute, this occupies precious stakeholder time and resource. Ashfords assists PFI parties at the initial stages of a dispute to facilitate expeditious resolution with litigation or arbitration remaining the last resort. If it becomes necessary, we have a well-resourced and experienced litigation team with strong experience in projects PFI.

Our experience

Education

Kent Schools PFI – advising the project company and the lenders on the £100 million financing of this schools project. We have advised on negotiating many other schools PFI and BSF projects from the early 2000's onwards and we can provide more examples if required.

Emergency services

Fire and Rescue PFI - advising Balfour Beatty Capital on this project, which was a multi authority project involving 16 sites, as well as on sponsor bids for numerous other fire and rescue and police PFI projects. Further advising in respect of, and giving effect to, variations.

Leisure Centre PFIs

Advising lenders and project companies, between 2008 to ongoing, on numerous PFI variations, refinancings and Qualifying Change in Law claims across five leisure centre PFIs, as well a numerous variations in order to introduce NPDO and CIC structures.

We also advised on the initial pre-close negotiations for one of these transactions.

Hospitals

Advising Vinci in respect of variations to the Coventry Hospital PFI.

Energy & Waste

North Yorkshire Council - advising the authority on reaching financial close following the withdrawal of PFI credits and advising on interfacing the property arrangements with the wider Project in order to de-risk the land and lease elements of the project. The project achieved financial close in 2014 and we continue to advise the Council in respect of ongoing variations, Qualifying Changes in Law and queries.

Greater Manchester Waste Disposal PFI – acting for Viridor Waste Management in its capacity as O&M sub-contractor on the £3bn Greater Manchester Waste Disposal PFI.

Biffa – advising Biffa in relation to a number of PFI/PPP Waste Project bids including: Sandwell Metropolitan Borough Council; North London Waste Authority; Leicestershire County Council; Heads of the Valley; RCT; and Milton Keynes.

Somerset Waste Management PPP – advising Viridor Waste Management on its Waste Management PPP with Somerset County Council which involved a long term core services contract, a strategic partnering agreement, a PFI-style project agreement and a £25 million corporate acquisition of Somerset County Council's LAWDC.

Urbaser / Balfour Beatty (UBB) – advising UBB in respect of the Essex Waste PFI and the Gloucestershire Waste PPP, including on various variations.

Our experience

Construction & Adjudication

EPC Contractor, EFW interface and professional negligence disputes - advising a Joint Venture company on issues arising from the design and construction of an energy from waste plant, including advising on a settlement agreement (relating to defects claims) between EPC contractor and operator, and advising on a potential claim against professional advisers.

Operator, Defective MBT and AD plants - advising (post-financial close) on PFI contractual documentation and disputes relating to Mechanical Biological Treatment ('MBT') Plants and Anaerobic Digestion and In-Vessel Composting facilities.

EPC Contractor, EFW professional negligence claim - advising a Joint Venture company on issues arising from the design and construction of an energy from waste plant on a claim in relation to defects in the steelwork design and increased construction costs

Leisure Centre SPV - advising on defect and maintenance issues including advice relating to interface agreement

Local Authority - advising on end of PFI process and schedule of works to achieve hand-back condition in relation to residential care homes.

Facilities Management Contractor - acting on adjudication proceedings and without prejudice dispute resolution procedures relating to PFI hospital payment disputes.

Accommodation

Advising an Executive Agency on restructuring its accommodation PFI project in order to bring about substantial long term cost savings.

Distressed projects

Advising a market wide infrastructure fund in respect of the project companies' interests in over 20 PFI projects, in relation to transferring the Carillion sub-contractor role to replacement O&M contractors following the Carillion insolvency.

Greater Manchester Waste PFI - advising Viridor in respect of the termination and hand-back on the Greater Manchester Waste PFI, including coordination with a new incoming contractor.

Your key contacts



Brian Farrell

Partner - Commercial
Head of Energy Resource Management
b.farrell@ashfords.co.uk

Brian is a projects partner with a focus of PFI/PPP and merchant infrastructure projects and has advised on numerous projects, including in the Waste, Energy, Blue Light accommodation, Hospitals and Social Housing sectors, particularly Viridor on the settlement and termination of the Greater Manchester Waste PFI projects.



Mark Manning

Partner - Construction & Infrastructure
m.manning@ashfords.co.uk

Mark is a Partner in the Construction and Infrastructure Team with over 23 years' experience specialising in construction disputes with particular experience in the PFI sector. Mark has acted on both front end and disputes work relating to PFI projects across the country.



Lianne Edwards

Senior Associate - Construction & Infrastructure
l.edwards@ashfords.co.uk

Lianne is a contentious construction lawyer with particular expertise in PFI project. Her work involves advising on claims for delay, acceleration, defects, terminations and final account disputes.



Clare Brewer

Partner - Banking & Finance
c.brewer@ashfords.co.uk

Clare has specialised in PFI projects since their inception, including the first roads PFI, schools PFI, schools BSF, waste water PFI, hospital PFI, GP surgeries and libraries (LIFT projects), leisure centre PFI, Ministry of Defence PFI, waste PFI other accommodation PFIs. She has advised local authorities, PFI funders and sponsors in negotiating all aspects of PFI projects, covering the project agreement through to various commercial contracts and finance documents, and understanding all parties' commercial positions.



Lucy Woods

Partner - Commercial
Head of Public Sector
l.woods@ashfords.co.uk

Lucy Woods has been advising on public sector projects for 19 years, with an early training in PFI contracts. Part of the continuing work in this field has included advising local authorities on the procurement, Subsidy (State aid) and vires implications of PFI variations during their term.

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Exeter

Ashford House,
Grenadier Road,
Exeter EX1 3LH
T: +44 (0)1392 33700

Bristol

Tower Wharf,
Cheese Lane,
Bristol BS2 0JJ
T: +44 (0)117 321 8000

London

1 New Fetter Lane
London EC4A 1AN
T: +44 (0)20 7544 2424

Plymouth

Princess Court,
23 Princess Street,
Plymouth PL1 2EX
T: +44 (0)1752 526000