

REFINANCING OF EARLY PFI TRANSACTIONS

CODE OF CONDUCT

1. **Purpose**

This Code of Conduct (the “Code”) sets out the basis upon which individual Authorities will approach the refinancing by private sector contractors of early PFI transactions. It is a voluntary Code to enable private sector contractors to share refinancing gain with the public sector on a consistent and equitable basis.

2. **Government’s View**

The Government recognises that Refinancings can bring benefit to Authorities and the PFI market as a whole. It wishes therefore, to create a climate for mutually beneficial refinancing of PFI projects to take place, provided such refinancing also offers value for money for the public sector.

3. **Government Support**

The Government will provide Authorities and the private sector with a central resource, to be located in Partnerships UK, which will be available to help Authorities and the private sector interpret and implement this Code.

4. **Definitions**

The definitions used in the Code are the same as those used in the OGC Revised Guidance on the Standardisation of PFI Contracts – Revised General Volume – published in July 2002, in particular Section 35. Refinancing, referred to hereafter, together with OGC Guidance Notes on Calculation of Authority’s Share of a Refinancing Gain, also published in July 2002, as “OGC Revised Guidance”.

5. **Transactions under the Code**

This Code applies to all PFI transactions signed up to 30th September 2002 (the “Relevant PFI Transactions”). Refinancing of PFI transactions signed after this date will be subject to the ‘OGC Revised Guidance’. The Code also applies to any collective refinancings of Relevant PFI Transactions.

6. **Applicability of Code**

This Code will apply to all Qualifying Refinancings of Relevant PFI Transactions implemented after 30th September 2002, the date of publication of this Code (the “Effective Date”) and will not be limited to just the first refinancing undertaken on a project after this date. The Code will not be applied retrospectively to Qualifying Refinancings implemented prior to the Effective Date. This Code will not be subject to future revision.

7. **Private Sector Commitment**

The Private Sector participants in PFI transactions will:

- (i) consult with their counterpart Authorities about the terms of any proposed refinancings in advance of any decision to proceed and their implementation;
- (ii) undertake all refinancings on an open and transparent basis with full and timely provision of information to relevant Authorities and their advisers; and
- (iii) give an Authority a share of gains, in accordance with clauses 8 and 9 below, arising from such a refinancing.

8. **Refinancing Gain Sharing**

Gains from refinancing of Relevant PFI Transactions (whether Qualifying or not) will be shared according to the following principles:

(i) No Existing Sharing Formula

Where there is no existing contractual entitlement for an Authority to share in Refinancing Gains, the Authority will be given a 30% share of the Refinancing Gain¹ arising from Qualifying Refinancings. These calculations are to be performed in accordance with OGC Revised Guidance, substituting 30% for the Authority’s share.

(ii) Existing Formula

Where there is an existing entitlement under the Contract or other project documentation for an Authority to share in refinancing gains (either specifically or as part of a wider profit sharing agreement) – which may not necessarily be limited to Qualifying Refinancings - both parties will abide by such an agreement, even in circumstances where the percentage share due to the Authority is less (or more) than 30%, subject to clauses 9(ii) and (iii) below.

¹ OGC Revised Guidance provides for any sharing of refinancing gain to be after Base Case returns have been achieved by the PFI contractors.

(iii) Sharing

Both parties should investigate the merits of the Authority accepting its share of any gain in the form of an increase in the scope of services, subject to suitable tests of value for money and relevant procurement rules.

9. **Increased Termination Liabilities and other Authority Consents**

Where to facilitate a refinancing (whether Qualifying or not) an Authority is requested to make or agree to any increase in termination liability, amendment to project documentation, waiver, formal or informal consent or similar action under the terms of any of the project documentation, or is required to give notification to the appropriate public sector Accounting Officer in respect of the refinancing on a Relevant PFI Transaction (a “Consent”), the Authority will follow the following provisions.

- (i) An Authority will not be obliged to accept increased termination liabilities in its agreement with the Contractor as part of any refinancing, except to the extent that the Contract already provides.
- (ii) However, if an Authority does agree to increase termination liabilities (or to provide any other Consent) to facilitate a refinancing under 8(i) or (ii), it should do so without seeking or obtaining any higher share of any refinancing gain than that set out in clause 8(i)², unless the Contract or other project documentation already provides for higher.
- (iii) Should it agree to increase termination liabilities (or grant any other Consent) to facilitate a refinancing under 8 (ii), Authorities should seek, and the private sector should give, a higher share than stipulated in the original Contract, subject to 9 (ii) above.

10. **Authority Amendments and Financier Notification**

In order to optimise the value gain for both parties and in exchange for sharing, the Authority will subject to value for money and other relevant considerations, amend certain terms of the original documentation or, subject to 9. above, give certain Consents. The Authority will act reasonably and without delay in order to facilitate this process.

Authorities should be willing to confirm, on a timely basis, to lenders and other parties supporting refinancings whether or not the terms under which a refinancing is proposed to be implemented are in accordance with this Code.

² In other words, when calculating the Authority share of Refinancing Gain in these circumstances, the provisions of OGC Revised Guidance will be used (substituting 30% for 50% Authority share) rather than the calculation formula within the Contract.

11. Overall Effect of the Code

It is expected that as a result of applying the Code, Authorities will generally receive a share of refinancing gain which is at least equal to a 30% share as determined under OGC Revised Guidance