

Frequently Asked Questions (FAQs) - Supporting vital service provision in PFI/PF2 (and related) contracts during the COVID-19 emergency

June 2020

These questions and answers follow on from, and are further to, the Guidance Note *Supporting vital service provision in PFI /PF2 (and related) contracts during the COVID-19 emergency* found at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/878059/2020_04_02_PFI_and_COVID19_final.docx.pdf

In summary, the Guidance Note sets out that:

- **PFI contractors should consider themselves to be part of the public sector response to the current COVID-19 emergency.**
- **PFI contracting counterparties should co-operate to ensure the continued delivery of public services (the COVID-19 emergency is not, and is not to be, regarded as an event of force majeure).**
- **PFI contractors should ensure contingency plans are up to date and have been reviewed and discussed with contracting authorities to enable continuity of full services as far as possible to respond to the emergency and maintain vital public services, particularly across the NHS.**
- **Contracting authorities should work closely with PFI contractors to use all available options to maintain public services during the emergency period. This will include maintaining unitary charge payments (enabling PFI contractors to pay their workforce and suppliers), revising contract requirements/ standards (including scope changes where necessary) and moderating payment and performance mechanism regimes where appropriate.**

The PFI/PF2 Guidance Note should be read alongside, and is consistent with, the Cabinet Office *Procurement Policy Note - Supplier relief due to COVID-19* and *Guidance notes on Model Interim Payment Terms - Procurement Policy Note 02/20*. Both documents can be found at:

<https://www.gov.uk/government/publications/procurement-policy-note-0220-supplier-relief-due-to-covid-19>

You should also refer to the note *Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency* found at

<https://www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency>

Purpose of the FAQs

IPA has published guidance to support public bodies in their response to COVID-19 which is consistent with Cabinet Office's PPN 02/20 on supplier relief. This document brings together a set of frequently asked questions (FAQs) regarding the scope and application of the guidance. The FAQs will be updated regularly and published on GOV.UK.

Contact

Enquiries should be directed to the Infrastructure & Projects Authority at ipa_finance_team@ipa.gov.uk

Q1. What is the status of the PFI guidance note?

A. This document is for information and guidance and applies to all PFI and PF2 contracts in England. The final decision as to how to apply the guidance is for the accounting officer concerned.

Q2. From what date should the guidance be applied?

A. From the date of issue of PPN 02/20 which was 20 March 2020.

Q3. When will it be reviewed?

A. The PFI and COVID-19 guidance was reviewed on 24 June 2020. Guidance on the Recovery and Transition from COVID-19 has now been published by the Cabinet Office for all contracts, including PFI, in Procurement Policy Note 04/20. The guidance is effective from 1 July 2020. No separate PFI guidance will be produced and authorities and contracts should refer to this general guidance.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891154/PPN_04_20- Recovery and Transition from COVID-19.pdf

Q4. Why have you produced a separate PFI guidance note?

A. To make it clear that PFI contracts are also covered by the approach set out in PPN 02/20.

Q5. Does the PFI guidance apply to the devolved administrations?

A. No. PPP policy is a devolved matter and therefore this guidance only applies to PFI/PF2 contracts in England. The Scottish Government has published guidance for PPP projects in Scotland.

<https://www.scottishfuturestrust.org.uk/storage/uploads/guidanceonoperationalpppprojects6april2020.pdf>

Q6. Is the PPN and the specific PFI guidance intended to protect PFI suppliers from unavailability risk claims arising directly from the impact of COVID-19?

A. Yes. The guidance is that the PFI provider should be protected from unavailability risk claims arising directly from the impact of COVID-19.

Q7. Has this guidance been agreed with the private sector?

A. No. This note is for information and guidance and is compliant with PPN 02/20.

Q8. What is the classification impact of this guidance?

A. There is no effect on classification. Please see the guidance on COVID-19 related relief on the classification of PPP projects at

https://ec.europa.eu/eurostat/documents/10186/10693286/PPPs_methodological_note_COVID-19.pdf

Q9. Does it apply to wider forms of PPP such as student accommodation?

A. PPN 02/20 applies to all public bodies:

“This PPN is applicable to all contracting authorities, including central government departments, executive agencies, non-departmental public bodies, local authorities, NHS bodies and the wider public sector (excluding Devolved Administrations).”

However, the PFI guidance is specific to PFI and PF2 contracts. It does not apply to wider PPP type arrangements but other forms of PPP may choose to take the same approach.

Q10. IPA has made it clear that the COVID-19 emergency is not, and is not to be, regarded as an event of force majeure. Is this in response to force majeure claims that you recently received from PFI sponsors and/or contractors? Did you receive quite a lot of force majeure claims since the COVID-19 outbreak?

A. No. This statement follows the same statement in PPN 02/20. It is simply repeated in the PFI guidance for clarity, with reference to the quite specific definitions of force majeure in PFI contracts.

Q11. Does this note imply that Contracting Authorities should enter into Deeds of Variation?

A. No. This may be unnecessary in the majority of cases - for example, the authority may already contractually have the right, but not the obligation to, apply deductions.

Q12. Should the contract management and reporting process be put on hold during the Covid-19 emergency?

A. No. Contract management and reporting should take place as usual with careful consideration as to record keeping.

Q13. Can the other contractual remedies for poor performance be followed (e.g. accumulation of rolling points that triggers subcontractor replacement or SPV termination) where not impacted by Covid-19?

A. Yes. This guidance does not apply to non-COVID-19 related failures of performance. Where disputes occur, authorities may require legal advice but both parties should bear in mind the need to cooperate to ensure the continuity of the delivery of public services. See in particular the Guidance on Responsible Contractual Behaviour published on 7 May.

Q14. Can contracting authorities and PFI suppliers pursue new/continue to pursue historic disputes not related to Covid-19 during the application of the Guidance?

A. Yes, but parties should act responsibly and fairly in pursuing disputes during this period. See in particular the Guidance on Responsible Contractual Behaviour published on 7 May.

Q15. Please can you confirm what the position should be in relation to projects where deductions have been calculated and notified but not yet made from the unitary charge over the last few months and where such deductions are in dispute?

A. Deductions notified but not yet made are included when calculating the average performance. Where deductions are in dispute they should not be applied to the 3 month average. There should be a reconciliation once the dispute has been settled. Parties should behave responsibly and fairly.

Q16. Should the PFI contractor be given a blanket moratorium over all deductions or just on Covid-19 related ones?

A. The PFI contractor should not be given a blanket moratorium over the whole payment and performance regime but should be given relief on deductions and/or performance failures that are due to Covid-19 issues.

Q17. Should contracting authorities meet extra staffing costs of the PFI contractor (for example agency staff) where directly caused by COVID-19?

A. Yes, if evidenced via open book accounting.

Q18. Demand based PFIs - will the public sector cover losses due to decreased ridership or traffic?

A. PPN 02/20 and the PFI guidance note do not directly address issues of revenue protection but are about supply chain continuity. There are a limited number of these types of contracts, however, the contractor should enter into discussions with the contracting authority and consider all other support mechanisms that may be available to it.

Q19. Where the PFI contractor receives third party income should the contracting authority make the PFI contractor good for any reduction?

A. PPN 02/20 and the PFI guidance note do not directly address issues of revenue protection but are about supply chain continuity. The contractor should enter into discussions with the contracting authority and consider all other support mechanisms that may be available to it.

Q20. Can you confirm whether specific guidance will be issued for PFI projects still in their construction phase?

A. It is not currently intended to issue specific construction guidance for PFI projects. Further guidance can be found in [PPN 02/20's Additional guidance, FAQs and model terms for construction](#).

Q21. How should contracting authorities ensure that a supplier receiving relief under PPN 02/20 does not also receive equivalent relief from the Coronavirus Job Retention Scheme (CJRS) or other COVID-19 support schemes from the Government?

A. In general, the payments to be made under PPN 02/20 are for *continuity and retention*; the supplier must be able to deliver in full as set out in the contract when required by the contracting authority. Suppliers cannot be paid in full under the contract and claim for some or all of the same employees working on the contract under the Coronavirus Job Retention Scheme (CJRS).

However, please also see the full answer in the PPN 02/20 FAQs (Q.13):

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879956/PPN_02_20_FAQs_09_04_20.pdf