# FAILING TO PLAN IS PLANNING TO FAIL

MARK LUCAS

DIRECTOR, PROJECT RISK ADVISORY, UK

The Private Finance Initiative (PFI) was first introduced by the UK government in the early 1990's as its preferred procurement policy, designed to attract private investment to the public sector by creating public-private relationships where private sector organisations were guaranteed returns on investment to finance, design build and operate major public projects. The initiative sought to reduce public sector expenditure in the short-term whilst creating a commercially viable public facility in the long term. Although considered controversial in some quarters the concept behind PFI had existed since the 19th century having been used to provide essential public infrastructure such as railways and canals.

In 2018 the UK government announced it was abandoning PFI as a means of public procurement but that existing projects would remain until the end of their term. In February 2022 the IPA (Infrastructure and Projects Authority) published government practical guidance for PFI contracting authorities on managing expiry service transition. Structured in 3 parts (A, B and C), the guidance discusses:

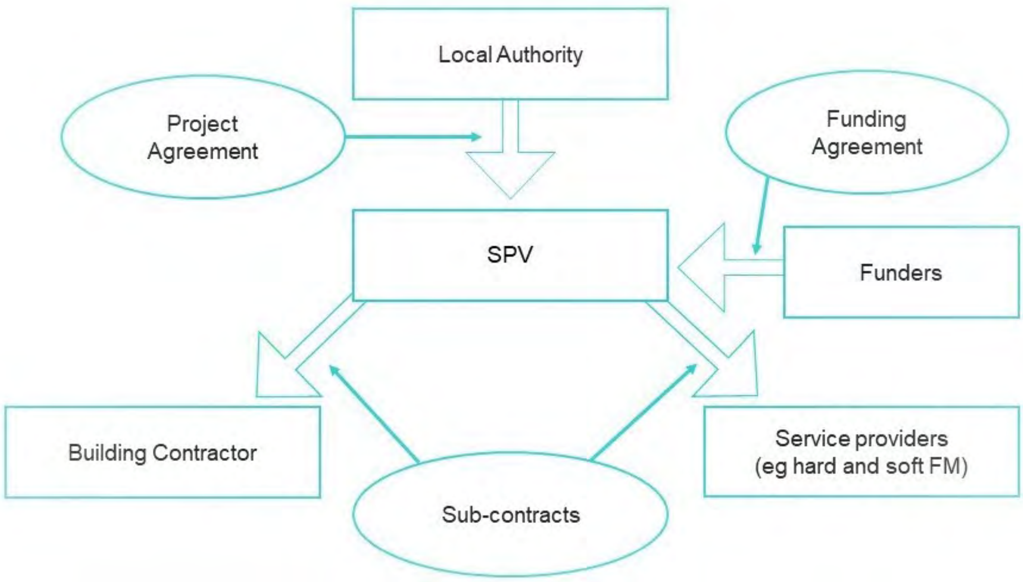
**PART A - WHY EXPIRY MATTERS AND HOW TO APPROACH IT.**

**PART B - HOW TO IMPLEMENT EXPIRY**

**PART C - QUICK REFERENCE SECTION/ "GRAB GUIDE" FOR USERS.**

Over the course of the next 20 years, some 700 PFI projects throughout the UK will expire across a wide range of the built environment including hospitals, prisons, schools and the waste industry. The IPA identifies that the risk to the public sector of failing to manage the expiry of PFI contracts is "significant". It cites operational disruption, lack of service continuity, financial loss and reputational damage as its leading causes of concern.

The typical contractual infrastructure for a PFI project is intricate and multi-faceted[i]




It's not surprising that the IPA warns that "PFI expiry is a complex process". The practice will vary from contract to contract, and it's also very likely that expiry arrangements within the contract will be inadequate and ambiguous in nature. Some of the key messages published by IPA in its guidance on PFI expiry are:

- Recognise that successful management of PFI expiry is a complex process requiring significant planning and resource.
- Be clear on underlying objectives.
- Approach contract expiry as a project not an event.
- Start early and ensure a sound base of operational contract management.
- Understand timelines.

Although published IPA guidance is primarily aimed at PFI contracting authorities, including Senior Responsible Owners (SRO's) and PFI contract management teams, the direction it prescribes applies equally to all contracting parties engaged on a PFI project and therefore should not be overlooked.

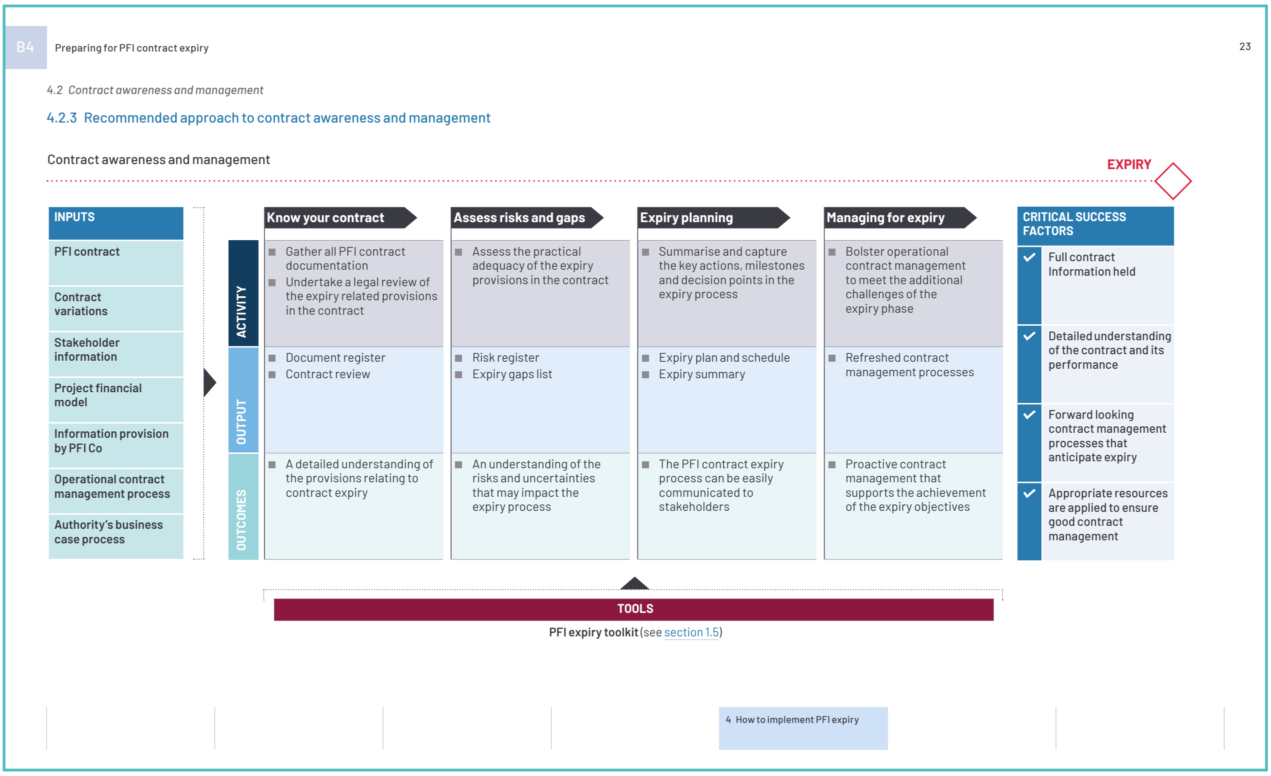
Effective contract awareness and management is a philosophy that DGA advocates as a common objective for all project stakeholders and parties to a contract as it not only provides

i Image published by ASCL and Solicitors Browne Jacobson – Guidance paper (January 2019) the cornerstone for successful project delivery but is also proven to be the prime catalyst for avoiding disputes – potentially an expensive pastime and inevitable drain on resource.

The importance of contract awareness and management is succinctly described by IPA who say:

*"Put simply, knowing your contract is the necessary starting point for PFI contract expiry"*

Helpfully, IPA has published an illustrative flow-chart for its recommended approach to contract management and awareness[ii].




With the IPA recommending that expiry and transition planning should begin **at least 7 years before the expiry date**, the exact point at which a PFI contracted organisation commits to preparing for this eventuality will be unique to them. Thus, requiring a clear understanding of the contract conditions entered into including those inherited through higher tier agreements.

By way of personal experience, I was engaged by a PFI services provider to advise on a contractual matter heading for potential dispute on one of its capital expenditure project. The service provider had a principal agreement with an authority for financing, designing and constructing certain services. In turn the service provider had entered into a separate agreement

ii IPA publication 2022; Preparing for PFI contract expiry.


with a facilities management contractor for providing specific services on its behalf. This agreement alone comprised over 700 pages of bespoke terms and conditions and was executed in 2001. The facilities management contractor for its part had entered into its own agreement with a building contractor to undertake the capital expenditure project in question.

The unravelling of this contractual conundrum took days rather than hours but was essential for my Client to properly understand its obligations and potential liabilities both upstream and downstream in the contractual infrastructure that existed. Fortunately, on this occasion my review was focused at the higher end of the contractual pyramid. For those organisations in the lower levels of the supply chain the task of "knowing your contract" should not be underestimated.

Due to the generic non-standardised nature of PFI contract conditions and the variety of agreements that exist throughout all tiers of the supply chain, it is not possible to singularly highlight where potential areas of risk and/or entitlement may exist. It is however tacitly clear, not just in our own experience, but also in the guidance published by IPA that "contractual awareness" is the essential driver for follow on good practice in expiry planning. In its simplest form IPA guidance advocates participating organisations to:

*"Undertake a clause-by-clause review of the project agreement to assess all the expiry related terms and conditions in the contract. In practice, this requires careful review of the full contract, not simply clauses titled 'Handover' or 'Expiry', as relevant information will be scattered across the contract."*

Although contract awareness should always be addressed from the outset on any contract, it can become a topic of discussion at anytime through the life-span of the agreement made. On the other hand, contractual management (certainly sound management) typically becomes less intense beyond the point of practical completion. For those readers who remain active in the contractual management and/or administration of a PFI contract, the general guidance from IPA in planning the expiry process is neither extensive, complicated nor in my view

innovative, just merely confirmation of "good practice" that is already deemed to exist.

The guidance published by IPA includes the following key contract management actions for a successful exit:

- Identifying and managing risks around expiry to ensure all contractual obligations are met.
- Tracking of information that supports commercial issues on expiry.
- Obtain the relevant contract and project information required.

These guidelines are intrinsically linked to the preceding task of contract awareness, again highlighting its importance. It also brings to light the need for collaboration and information sharing within an organisation. Some of the perceived challenges highlighted by IPA in managing expiry is the lack of information and/or its quality, together with a lack of people, skills or experience to manage the process.

One of the other aspects of the expiry process that binds contract awareness and management is commercial awareness. As with other elements of the PFI process, commercial issues are typically complex with multiple parties and numerous contractual interfaces. However, as IPA advocate developing a comprehensive commercial strategy lies at the heart of the PFI expiry process being the "glue" that binds together contract awareness, contract management, relationship management, asset knowledge and future services provision. Whilst the latter processes may not appear to be of particular or significant interest to those lower down the contractual infrastructure, it should be remembered that they are critical to the principal PFI organisations and so carry weight and meaning if these organisations are to successfully manage the contract expiry and service transition. Appreciation and understanding of this concept allow downstream organisations to utilise this awareness to protect and preserve their own contractual and financial interests.

In summary, the commercial approach set-out in the IPA guidelines discusses implementation of a baseline analysis to understand the contract and its mechanisms; the priorities of various parties; the authority's requirements for assets and services after the contract expires, and finally the history of contract changes and whether these have been fully resolved, including formal disputes.

The predicted outcome of this analysis is the identification of "commercial levers" that the authority can utilise. These include,

- the right to pay retention or withhold unitary charge payments in the run up to contract expiry;
- possibility of "early condition surveys" and potential financial leverage for the resolution of any significant issues;
- what aspects of the payment and performance mechanisms will generate the right behaviours in the run-up to contract expiry; and
- are there any follow-on opportunities that could also incentivise the right behaviour.

The above discussion and review of specific aspects of the managed expiry of a PFI contract is by no means exhaustive or complete. For the most part it really only "scratches the surface" as the nature and extent of the contractual relationships that exist and potential difficulties and problems that could arise in the expiry process are intangible. The opportunity for more in-depth commentary can therefore only arise on a specific project by project basis. As a construction professional specialising in project risk advisory services, I have deliberately focused on the key components of the expiry process that in my view are of interest to those contracting organisations, sub-contractors and members of the supply chain that are active in the PFI sector but potentially unaware of the upstream practice and procedure for Stakeholders planning the exit PFI contracts.

As with so many governmental driven practices and procedures over the past 2 years, managing the expiry of PFI contracts is unprecedented. For a seasoned professional like myself, experience tells me that the finalisation of a construction can only go one of two ways – either "with" or "without ease". The latter very often arises through failure of the contracting parties to properly understand and administer the provisions of the contract. With a portfolio of 700 PFI contracts due to expire over the next 20 years I predict there will be a very steep initial learning curve, and some time before the expiry process becomes fully developed.

In unchartered territory, safety and self-preservation is the key to survival. Whoever you are, and wherever you may find yourself on the PFI journey, I can only suggest that you take with you as much contractual awareness as you and your organisation can carry, a route plan and safe direction of travel in contract management, and a robust all-purpose commercial strategy to transport you to your destination.

A reliable Guide or Driver is also highly recommended, so whether you are seeking reassurance with initial mapping of your journey or a "tour organiser", DGA can support you in both identifying and managing the risks ahead.

For further information please contact Mark Lucas or your DGA regional office.

# DGA TRAINING SERVICES

## DGA UK IN-HOUSE TRAINING & PUBLIC COURSES

Due to DGA's expertise in the provision of contractual advice, commercial and programming services, and dispute resolution across all construction industry sectors, we have created educational training seminars on the understanding and administration of the various forms of construction contracts.

Our highly experienced course presenters are able to apply the contract to the day to day tasks and problems encountered by the delegates.

Our in-house training seminars are provided for a fixed fee at your chosen venue. The benefit of this is the ability to choose the number, position type, and experience of delegates who attend without a price increase. We appreciate that workload and training is a fine balance and, therefore, our in-house seminars minimise disruption to the delegates duties that can occur with public seminars.

### NEC3 & NEC4

UNDERSTANDING AND USING THE NEC3 ENGINEERING AND CONSTRUCTION CONTRACT

FULL DAY SEMINAR

This training seminar is aimed at novice through to professionals with experience of the NEC3 ECC:

- Introduction – The agreement

  Contract Data 1 and 2, Risk Register, Site Information, Works Information, Activity Schedule , Main Options, Secondary Options, Z Clauses, precedence of documents.

- Providing the Works

  Mutual trust & co-operation, Communication, Early Warning notifications, Works Information, Design, Instructions.

- Quality

  Defects, Defect correction, access given/ not given, assessment of cost of correction.

- Time obligations & Programming

  Start Date, Access Date, Key Dates, planned Completion, Completion Date, float, Accepted Programme, revised programme, Acceleration.

- Payment

  Activity Schedule, Price for Work Done to Date, Applications for payment, Project Manager's assessment.

- Compensation events

  Significance of Early Warning notice, notification of compensation events, time barring late notification, an overview of the assessment of the change to the Prices and/or delay (calculation of Defined Cost, Shorter or Full Schedule of Cost Components), dividing date, quotations, rejection of quotations, Project Manager's assessment, implementation.

## UNDERSTANDING AND USING THE NEC4 ENGINEERING AND CONSTRUCTION CONTRACT

### FULL DAY SEMINAR

The NEC4 seminar will follow the NEC3 training (above) format while incorporating the changes in the new NEC4 edition.

## NEC3 TO NEC4 ENGINEERING AND CONSTRUCTION CONTRACT – THE CHANGES AND IMPLICATIONS

### HALF DAY SEMINAR

This training is an ideal follow on from the Understanding & Using the NEC3 Engineering and Construction Contract. Best suited to professionals with experience of the NEC3 ECC as it solely considers the changes and the impacts from the NEC3 ECC to the NEC4 ECC:

- Why a new edition?
- New terminology
- New clauses
- Amendments to clauses of the NEC3 ECC
- Amendments to Schedules of Cost Components
- Questions

## NEC3/ 4 ECC COMPENSATION EVENTS: THE EVENTS, NOTIFICATION & ASSESSMENT

### HALF DAY

This seminar considers all of the events that are compensation events, which party is liable to notify the event, the mechanism for notification and assessment in more detail. The delegates will receive training in correctly assessing and submitting quotations for compensation events.

### FULL DAY SEMINAR

As above plus workshop

### TERM SERVICE CONTRACTS

### FULL DAY SEMINAR

Much like the Understanding and Using seminars (above), this considers the Term Service Contract, looking at Contract Data, works information and providing the service itself.

## JCT FORM OF CONTRACT

### JCT MINOR WORKS AND INTERMEDIATE BUILDING CONTRACTS 2016

### JCT INTERMEDIATE AND STANDARD FORM BUILDING CONTRACTS 2016

### JCT DESIGN AND BUILD CONTRACT 2016

### FULL DAY SEMINARS

Each of our JCT contract seminars are full day and consider the Contract Particulars, Execution of the documents, Carrying out the Works, Sub-Contracting, time for completion, delays, valuation, payment; and design (where applicable).

## CONTRACTUAL & COMMERCIAL AWARENESS

### FULL DAY SEMINAR

In this seminar, we consider issues commonly encountered during the course of a contract, including but not limited to, formation of contract, deeds, letters of intent, changes to the terms and the scope of works, authority, design liability, records and notification of events, claims for delay, loss and/or expense or damages, payment, liquidated damages, time bar clauses, exclusive remedy provisions, termination and repudiation.

## WHAT TO DO NEXT?

For more information about our training seminars, please email scott.milner@dga-group.com; or telephone 0113 337 2174

Terms & Conditions apply

## DGA GROUP CONTACT INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at DGAGroup@dga-group.com


### DGA GROUP HEADQUARTERS

25 Eastcheap
London
EC3M 1DE

Tel: +44 (0)203 961 5340

### SINGAPORE

#11-09,
Eon Shenton
70 Shenton Way
Singapore
079118

Tel: +65 62916208

### AUSTRALIA

Level 8
One Melbourne Quarter
699 Collins Stree
Melbourne
Vic 3000

Tel: +61 (0)3 8375 7620

### AUSTRALIA

Level 3
60 Martin Place
Sydney
NSW 2000
Australia

Tel: +61 (0)2 7202 3494

### UNITED ARAB EMIRATES

PO Box 6384
Dubai
United Arab Emirates

Tel: +971 4 437 2470

### CANADA

61 Legacy Landing SE
Calgary
Alberta
Canada
T2X 2EH

Tel: +1(587) 586 5502

### AFRICA

Building 2
Country Club Estate
21 Woodmead
Sandton
South Africa
2054

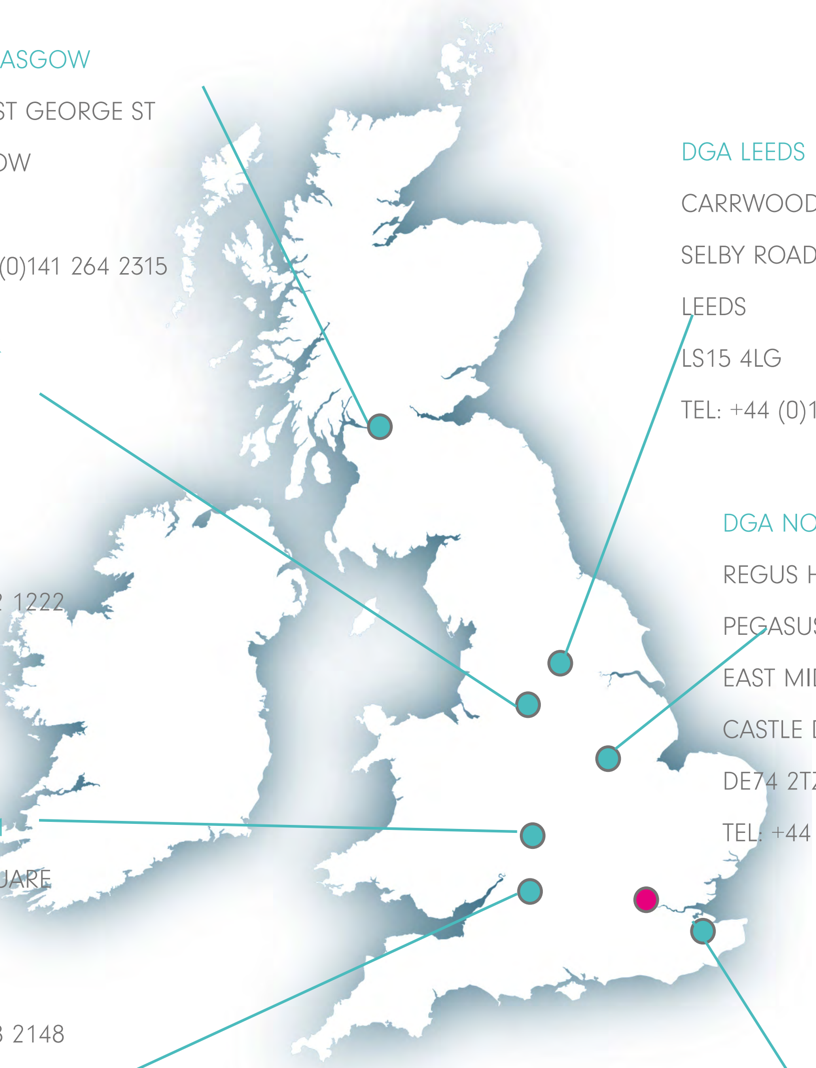
Tel: +27 (0)11 258 8703

### HONG KONG

6/F Luk Kwok Centre
72 Gloucester Road
Wan Chai
Hong Kong

Tel: +852 3127 5580

# DGA UNITED KINGDOM



DGA GLASGOW
100 WEST GEORGE ST
GLASGOW
G2 1PJ
TEL: +44(0)141 264 2315

DGA MANCHESTER
PETER HOUSE
OXFORD STREET
MANCHESTER
M1 5AN
TEL: +44 (0)161 932 1222

DGA BIRMINGHAM
ONE VICTORIA SQUARE
BIRMINGHAM
B1 1BD
TEL: +44 (0)121 698 2148

DGA BRISTOL
CASTLEMEAD
LOWER CASTLE STREET
BS1 3AG
T: +44 (0)117 917 5028

DGA LEEDS
CARRWOOD PARK
SELBY ROAD
LEEDS
LS15 4LG
TEL: +44 (0)113 337 2174

DGA NOTTINGHAM
REGUS HOUSE, HERALD WAY
PEGASUS BUSINESS PARK
EAST MIDLANDS AIRPORT
CASTLE DONINGTON,
DE74 2TZ
TEL: +44 (0)1332 638 061

DGA Headquarters
25 Eastcheap
London
EC3M 1DE
T: +44(0)203 961 5340
E:dgagroup@dga-group.com

DGA MAIDSTONE
VINTERS BUSINESS PARK
NEW CUT ROAD
MAIDSTONE
KENT
ME14 5NZ
TEL: +44 (0)1622 673 021

DGA