



It's quiet – but is it too quiet?

Construction briefing

May 2007

It's odd, says Steven Williams, but even though PFI schemes are invariably complicated and expensive, few seem to end up in court. So why is that? And how long will it last?

The investment by the private sector in the PFI since its inception has totalled many billions of pounds over the past 15 years or so. Yet despite the flow of complex, high value projects, surprisingly few disputes have reached the courts (the litigation over the *Midland Expressway and Emcor Drake & Scull -v- Sir Robert McAlpine* being two notable exceptions).

Disputes, however, do clearly arise – the National Physical Laboratory is probably the most infamous, but anecdotal evidence suggests that others pop up on a regular basis during the construction and operational phases. But in contrast with disputes on traditional construction projects, PFI wrangles appear much more likely to be resolved by commercial negotiation or some form of alternative dispute resolution. So what is so different about PFI disputes?

Clearly the long-term relationship between the parties to a PFI acts as an incentive to resolve differences without going to court. The project company (the special purpose vehicle or SPV) is often owned, at least in part, by its building and facilities management contractors, and they have a direct interest in sorting out claims given that their goal is to secure a 25-30 year revenue stream. Moreover, risk allocation is often clearer and better understood because of the lengthy tendering process.

Typical construction disputes over time and money are less common owing to “equivalent project relief”, which restricts the building contractor’s delay compensation and time relief to that obtained by the SPV.

Although these are undoubtedly driving factors, the widespread use of escalating dispute resolution procedures (DRPs) has played an important role in reducing formal disputes by putting in place a road map for dispute resolution. PFI has been heavily criticised over bid costs but the amount of time spent drafting and negotiating bespoke DRPs appears to have been valuable.

Parties to PFI contracts have been more willing to acknowledge that over the lifetime of the project there will inevitably be disputes and differences that need to be resolved. The response has been to put in place a “tiered” DRP to allow the parties to continue to work together amicably while the dispute is resolved, before it affects the parties’ working relationship.

Typically the process begins with good faith negotiations and mediation then moves to rights-based processes such as expert determination and adjudication. Only if those fail will the dispute move on to the courts or arbitration.



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It is also common to carve out certain types of dispute for special treatment. In relation to design development, where speedy decisions are required during the construction phase, reference is often made to an expert for a final and binding decision within a matter of days.

Dispute boards and panels are frequently used. These are made up of neutral members with particular experience of the type of project and contract, who are kept abreast of developments and can produce speedy recommendations.

The frequency of multiparty disputes has led to the practice of allowing the building contractor to use procedures such as rights of representation or “name borrowing” to claim against the authority, but have stopped short of allowing the joinder of all party disputes in a single forum.

The PFI sector can fairly claim to have led the way over the past 15 years in pioneering project-specific DRPs. However, although the latest suite of JCT contracts (including the Major Projects Form) include a tiered regime, more often than not little time and effort is spent adapting the procedures to suit the particular project at hand.

It remains to be seen whether DRPs will be able to deal with complex disputes that may arise out of the operational phase of PFI contracts. Many are coming up for their three to five-year review and some SPVs may find that inflation on labour costs has made the balance of the contract unprofitable and want out. Others may be involved in constant battles with the authority and the service provider over the level of deductions from the monthly unitary charge where the authority believes the SPV has not delivered.

In summary, when parties have spent many months negotiating and drafting complex documentation on any project (traditional JCT, PFI or PPP) they are missing an opportunity if they do not give proper consideration to the procedures needed to remedy future disputes at a time when the parties are still talking.

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