

HOT TOPICS IN PFI/PPP PROJECTS

PART 4: KEY TRENDS IN PFI/PPP

6 May 2021



INTRODUCTION



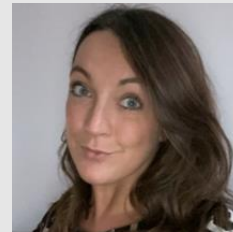
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AGENDA

- Recap of our previous instalments in the series;
- Benchmarking/Market Testing – a refresher;
- Retrospective deductions – the principles;
- Limitation and limits on liability – points to focus on;
- Questions: on today's content and other queries we have covered in the series;
- Future topics and events.

VALUE TESTING PROVISIONS

1. Background and Different Value Testing Processes
2. Practical Steps and Undertaking the Value Testing Processes
3. Trends – Issues or Problems Identified

BACKGROUND AND DIFFERENT VALUE TESTING PROCESSES

Aim or rationale for value testing:

- for the *public sector* the aim is to achieve the best price in the market or value for money; and
- from the *private sector's* perspective, it limits the financial uncertainty that it might face by giving it an opportunity to obtain a price rise when costs increases and making sure it is being paid the "market" or going rate.

WHAT IS “VALUE TESTING”?

Usually either (or in combination):

- Benchmarking; and/or
- Market Testing

Generally of a discrete service within the PFI – Soft FM Services

BENCHMARKING – PROS & CONS

Pros

- it is cheaper and quicker to implement than Market Testing
- it can be used to get better visibility of a contractor's costs
- there is stability in provider – in that there is no (initial) risk of change of provider
- it re-aligns cost to the real market value

Cons

- it is still costly and time consuming
- it can bring parties into conflict
- there is no (immediate) ability to remove poor or underperforming contractors

MARKET TESTING

Market Testing = the re-tendering of the relevant services to the market and then choosing the one that offers best value according to certain pre-determined criteria

Pros

- it is a competitive process
- it is more transparent than Benchmarking
- there is flexibility within it for reassessing service provision and performance measurement systems

TRENDS – ISSUES OR PROBLEMS IDENTIFIED

1. Can it be used to remove a Service altogether?
2. Can the public sector be a bidder?
3. Is there a market?
4. Is the relevant or required information available?
5. Can anything be done where a party is stifling or frustrating a Market Testing process?

RETROSPECTIVE DEDUCTIONS

Introduction

- What are retrospective deductions?
- “It’s not fair!”
- Seek legal advice

RETROSPECTIVE DEDUCTIONS

UC calculation example 1: health standard form

- 1.1.1 ΣD is the sum of Deductions **in respect of the relevant Contract Month** in relation to Performance Failures and Unavailability Events calculated in accordance with the provisions set out in [Part C] of this Schedule;

RETROSPECTIVE DEDUCTIONS

UC calculation example 2: health project

$\Sigma D(FE)$ is the sum of deductions in respect of the Contract Month which fell one (1) Contract Month prior to the Contract Month for which the Service Payment is being calculated, in relation to Failure Events calculated in accordance with the provisions set out in Part 2 of this Schedule; and

$\Sigma D(QF)$ is the sum of deductions in respect of the Contract Month which fell one (1) Contract Month prior to the Contract Month for which the Service Payment is being calculated, in relation to Quality Failures calculated in accordance with the provisions set out in Part 2 of this Schedule.

RETROSPECTIVE DEDUCTIONS

UC calculation example 3: BSF standard form

The Monthly Unitary Payment in respect of a Payment Period, being Contract Month (n), shall be calculated by adding to the Monthly Unitary Charge for Contract Month (n) the Monthly Utility Services Payment for Contract Month (n), the Pass Through Costs for Contract Month (n) and the Eligible Meals Reimbursement for the preceding Contract Month (n-1) and by deducting the Total Deductions relating to the pre-preceding Contract Month (n-2) (other than Reporting Deductions, which shall be those agreed or determined in the preceding Contract Month (n-1)) and the Step-In Adjustment for the preceding Contract Month (n-1) and any Other Set Off Amount for the preceding Contract Month (n-1) and, if applicable, the Annual Utility Adjustment and the Annual Service Plan Reimbursement, in accordance with the following formula:

$$\text{MUP}_n = \text{MUC}_n - \text{TUD}_{n-2} - \text{SPD}_{n-2} - \text{CD}_{n-2} - \text{RD}_{n-1} + \text{MUSP}_n + \text{PTC}_n + \text{EMR}_{n-1} - \text{SIA}_{n-1} - \text{OSOA}_{n-1} + \text{ASPR} +/- \text{AUA}$$

RETROSPECTIVE DEDUCTIONS

Cap on deductions example: BSF standard form

The Authority may not, in respect of any Contract Month, make Total Deductions which are greater than the Monthly Unitary Charge. Deductions which, but for this clause, could have been made by the Authority will be permanently disregarded for the purposes of this Schedule 6.

RETROSPECTIVE DEDUCTIONS

Helpdesk example: social housing project

Contractor to Monitor

- 3.4. The Contractor shall monitor the Availability of Dwellings and within one Business Day of becoming aware of the Unavailability of any Dwelling log the following information:
- (a) the time and date when the Helpdesk was notified of the instance of Unavailability of any Dwelling;
 - (b) whether the Dwelling is, in the Contractor's opinion, Unavailable or Repeatedly Unavailable;
 - (c) the apparent cause of the Unavailability or Repeated Unavailability; and
 - (d) the estimated date by which Unavailability or Repeated Unavailability will be remedied.

Calculation of Deductions

Commencement and Duration of Unavailability

- 3.5. If the Contractor does not remedy any Unavailability within the relevant Rectification Period then that Unavailability will be deemed to have commenced on the date that such Unavailability was notified in accordance with paragraph 3.4. Where any Unavailability is notified after 12.00 noon, the Unavailability Period shall be deemed to commence on the following day.

RETROSPECTIVE DEDUCTIONS

Reporting deductions: BSF standard form

Part IX Reporting Deductions

- 9 Any error or omission in the information to be provided by the Contractor pursuant to paragraph 2.4 of this Schedule 6 or clause 37.2 of this Agreement as agreed by the parties or determined pursuant to clause 68 (Dispute Resolution) of this Agreement shall attract a Reporting Deduction equivalent to a Service Performance Shortfall with a Low Service Priority Category for a Periodic Non-Area-Based Performance Standard. Such Reporting Deductions shall be taken into account in the invoice and report provided pursuant to clause 37.2 of this Agreement in the Payment Period following that in which they are agreed or determined.

LIMITATION - WHAT IS LIMITATION AND WHY DOES IT MATTER?

- **What is a Limitation Period** - The period of time within which a party to a contract can bring a claim
- **Why does it matter:**
 - If a claim is brought outside of the limitation period this is a complete defence against the claim and the claim will be said to be time barred.
 - In the PFI sphere the basis of disputes is increasingly a fundamental problem with the initial construction of the building.

LIMITATION – WHAT IS THE RELEVANT LIMITATION PERIOD?

- **Check the Contract**
- **If not - Limitation Act 1980 (LA 1980) governs Limitation Periods**
- **Claim for breach of contract or in tort:**
 - simple contract - within 6 years from the date on which the cause of action accrued (**s.5 LA 1980**)
 - deed - within 12 years from the date on which the cause of action accrued (**s.8 LA 1980**)
 - action in tort - within 6 years from the date on which the cause of action accrued (**s.2 LA 1980**)
- **action for negligence** - 3 years from the date of knowledge if the three year period expires more than the 6 years after accrual of the cause of action (s.14A LA 1980)

LIMITS OF LIABILITY – WHEN DOES THE LIMITATION PERIOD RUN FROM/ WHAT IS THE DATE OF ACCRUAL OF THE BREACH

- **The date of accrual for defect claims for breach of contract:**
 - Design – when the design is issued or revised
 - Workmanship – upon practical completion

- **Negligence** – once physical damage occurs

LIMITATION – LATER ACCRUAL DATES

- **Defects arising in the defects liability period** - the cause of action will accrue on breach of the obligation to remedy defects, which may be within a specific time set out in the clause, or after a reasonable time following notification of the defects
- **Continuing obligations** – If a party had a continuing obligation to inspect or return to site to test
- **Indemnity** - if the contract contains an indemnity against loss, the cause of action on the indemnity does not arise until the loss has been established
- **Services/ Maintenance** – accrual upon the failure to carry out the maintenance, inspections, lifecycle obligations
- **Defects are deliberately concealed** – From the point of discovery

LIMITATION – HOW DO YOU STOP TIME RUNNING?

- **On the Commencement of Proceedings:**
 - Court – receipt by the Court of the Claim form
 - Arbitration – notice of appointment to the arbitrator

- **Adjudication and mediation– does not stop time running for limitation!**

LIMITS ON LIABILITY – IMPACT ON THE PROJECT

- Liability for defects is regularly limited to a certain sum or % of a sum in the construction contract
- There may be different limits for different types of claim
- Be aware of the interrelationship between limits of liability under the full suite of project documents

TOP TIPS

1. Identify limitation dates at the earliest opportunity
2. Understand your defect – workmanship/ design
3. Know your Dispute Resolution Process
4. If necessary, take steps to stop time running by issuing proceedings or extending time by agreeing a standstill
5. Know your limits!



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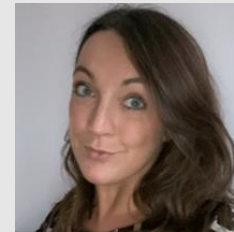
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