

Note on implementation of the Third Edition of Standardisation of PFI Contracts, Northern Ireland (“SoPCNI 3”)

SoPCNI 3 updates the guidance in essentially the same manner as SOPC4 does for the remainder of the UK, to take into account new legislation and developments in the PFI market together with providing further guidance on, among other areas:

- Price and Payment Mechanisms (Section 7);
- Changes in Service (Section 13);
- Price Variations (Section 15);
- Change of Ownership (Section 18);
- Authority Break Points (section 21.5.4);
- Information Provisions (Section 26.2);
- Contractor Distress (Section 35);
- Bond Finance (Section 36); and
- Corporate Finance (Section 37).

Additionally, and specific to Northern Ireland, Annex 1 (providing drafting for Criminal Damage Events) has been amended to reflect experience on recently completed deals. Further details of the main changes made from SoPCNI 2 are set out in the accompanying draft summary paper "Standardisation of PFI Contracts, Northern Ireland Version 3 – An Outline of Principal Changes".

Additionally, SOPCNI 3 incorporates the revised guidance on Refinancing provisions issued by HMT in October 2008.

The application of the revised guidance is mandatory for all PFI projects that are still in competitive procurement (i.e. where final bids have not yet been received or the competitive dialogue not yet been closed) on or after January 2009. The guidance is therefore not mandatory for those PFI projects at preferred bidder or where final bids are received before January 2009. However, adoption of the revised guidance and adherence to the principles contained therein is encouraged for those projects where its use is not mandatory.

The approval and derogation process is set out in the Appendix to this note.

Authorities should note in particular the amendments to Section 13 (Change in Service) of SOPCNI 3. Further guidance on variations has been provided. The required drafting in SOPCNI 2 relating to Change in Service at clauses 12.4, 12.5 and 12.6 is no longer required. Instead, Authorities must develop a project specific Change Protocol that complies with the principles set out in Section 13 (Change in Service). These contractual principles constitute a "Core Area" for the purposes of the derogations process, and therefore each project to which SoPCNI 3 applies must include a Change Protocol.

Appendix – Approval of contracts and derogations from Standardisation of PFI Contracts Northern Ireland Version 3 ("SoPCNI 3").

This Appendix sets out the Strategic Investment Board Limited ("**SIB**") guidance on how SoPCNI 3 should be used by public bodies procuring projects through the Private Finance Initiative ("**PFI**").

Application of SoPCNI 3

1. SoPCNI 3 is based on Standardisation of PFI Contracts Version 4 published by HM Treasury in March 2007 ("**SoPC4**") and applies to all PFI Contracts in Northern Ireland. PFI is not suitable for projects with a capital value of less than £20 million, nor should it be used for IT projects.
2. As stated above, all PFI projects still in competitive procurement (i.e. where final bids have not yet been received or the competitive dialogue not yet been closed on or before January 2009 must comply with SoPCNI 3.
3. It should be noted that as the terms PFI and PPP are often used as synonyms that whether a project is badged as a PFI or PPP is not important. The key is whether it has the characteristics of a PFI transaction. Examples of the characteristics of a PFI transaction are that, although they tend to involve some form of construction or supply of assets, the project is almost always one for the supply of services and payment is made over a period of years by way of a unitary charge for those services. If there is any doubt as to whether a project has PFI characteristics or not, advice should be sought from SIB.

Definition of Compliance with SoPCNI 3

4. In order to comply with SoPCNI 3, each PFI Contract must include all required drafting, as referenced in paragraph 1.4.1 of SoPCNI 3. In addition, there are a number of clear contractual principles (without specific contractual drafting) set out in SoPCNI 3 which must be complied with.
5. As is current practice if a project wishes to derogate from a Core Area, it must submit a derogation request to the SIB for approval.
6. Where permissible derogation language is provided in SoPCNI 3, specific derogation approval is not required when using this language, subject to compliance with all relevant conditions.
7. Where SoPCNI 3 sets out suggested drafting or approaches, individual procuring bodies and sponsoring Departments will continue to be responsible for assessing whether the approach taken in a specific contract is reasonable and compliant with the overall approach of SoPCNI 3.

Individual Contract Derogations

8. SIB believes that derogations from SoPCNI 3 should only be made in exceptional circumstances on project-specific grounds.
9. SIB appreciates that for some projects this may create extra work in implementing SoPCNI 3 at a relatively late stage in the procurement process. However, there has been consultation with the public and private sectors and the SIB and the DFP believe that it is important that the PFI community should begin to work from a single SoPCNI text as soon as possible so that the significant benefits of standardisation can be felt throughout the system. If there are existing cases where the procuring body considers that it would not be feasible to comply with a SoPCNI 3 requirement because the relevant point has already been negotiated and agreed, advice should be sought from the SIB as soon as possible.
10. If a procuring body believes that it is not possible or feasible to amend an individual contract so that it is compliant with SoPCNI 3, it will need to seek the advice of SIB. The procuring body is expected to reduce its requests for derogations to a bare minimum before presenting them to the SIB. Procuring bodies should avoid approaching with a finalised list of derogations without having first convinced themselves through a detailed assessment that

there is an exceptional need for such derogation, which may be project specific or sector specific. If the SIB is presented with extensive derogation reports it is likely to revert back to the procuring body to challenge this position. It should also be borne in mind that the more extensive the derogations requested the longer it is likely to take to reach an agreed position. Such timing concerns should be taken into account in timetables for closing deals. Whilst the SIB will make every effort to be responsive to the needs of procuring bodies and Departments the last minute provision of extensive derogations will be likely to extend the procurement process.

11. Subject to the above, PFI procuring bodies should seek derogations approval once contractual drafting is settled. In the case of a procurement using the competitive dialogue procedure, as there can be no significant changes to the PFI contract following final tender, approval for any necessary derogations should be sought in respect of each bidder prior to conclusion of the dialogue.
12. The SIB would not normally expect to engage directly in contract discussions relating to derogations with private sector parties such as lenders and equity providers. The SIB's contact would normally be through the public sector bodies responsible for the contract. This is to ensure that there remains a clear line of communication and responsibility in such discussions.

Consequences of Non-Compliance

13. Given the important benefits which will flow from embedding standardisation across the public sector, projects which are non-compliant with SoPCNI 3 should not expect to have its the Final Business approved and before the Final Business Case is signed off all procuring bodies should now provide written confirmation to the SIB and DFP that their contract is SoPCNI 3 compliant.

Monitoring Compliance

14. In order to monitor compliance with SoPCNI 3 and to obtain a better understanding of the nature of PFI deals being undertaken, procuring bodies should forward an electronic copy of all PFI contracts as signed from January 2009 to SIB at gregor.hamilton@sibni.org