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CONTRACTOR INSOLVENCY POLICY

Responsible Officer
Director of Property and New Business

Aim of the Policy

The aim of this policy is to minimise the risks to the Association in the event of contractor insolvency.

The policy supports our vision *"Together we are building a better future for our Phoenix Community"* and our strategic objective Growth in New Homes.

Policy Scope

The Policy will cover the following:

- What is insolvency - Appendix 1
- The warning signs
- Best practice
- Security measures
- Procedures

Policy Statement

During any works contract there is always the possibility of an appointed contractor becoming insolvent. If the contractor becomes insolvent, there will inevitably be delays and costs to the Association. In order to minimise potential delays and costs, procedures need to be in place to be followed by the Association.

Financial checks should be undertaken prior to the appointment of a contractor to ascertain the financial status and stability if applicable.

A Policy with detailed procedures is therefore required for use on all projects to be followed in the event of contractor liquidation.

The Policy

The Policy is to be followed by the Phoenix Property and New Business and Finance teams in the event of a contractor insolvency event. The Policy is intended to minimise the financial and reputational risks to the Association of contractor insolvency.

Insolvency

A company is insolvent if it has insufficient assets to discharge its debts and liabilities. The Insolvency Act 1986 provides that a company is deemed "unable to pay its debts" where:

- The company has not paid, secured or compounded a claim for a sum due to a creditor exceeding £750 within three weeks of having been served with a statutory demand.
- A creditor has attempted execution or another enforcement process against the company

in respect of a debt without success.

- It is proven to the satisfaction of the court that the company is unable to pay its debts as they fall due.
- It is proven to the satisfaction of the court that the value of the company's assets is less than its liabilities, taking into account contingent and prospective liabilities (balance sheet test).

The different types of Corporate Insolvency are summarised in Appendix 1

The warning signs

Phoenix should be alert to the following, each of which could indicate that a contractor is in financial difficulty:

- The contractor's employees not turning up for work or a general decrease in the number of workers on site or volume of materials delivered to site.
- A slow-down in progress of the works, perhaps including revisions to programmes
- Plant, equipment and materials "disappearing" from site.
- An increase in the number of defects to the works.
- The contractor seeking to negotiate further payments or release of the retention, or any other change in payment patterns (such as an advance payment or more frequent instalments or certificates).
- The contractor raising spurious or unjustified claims or contra-charges to increase the sum payable to it.
- The contractor assigning (or seeking the employer's consent to assign) the proceeds of the building contract to a bank or other creditor.
- If the contractor is a company, late filing of accounts or annual returns at Companies House or auditor's reports that are signed off subject to a qualification (depending on the nature of the qualification).
- Unsatisfied court judgments against the contractor. These may be revealed by a business information report on the contractor from a specialist business information provider.
- Sub-contractors or suppliers not being paid, complaining of late payment or unexpected contra-charges or even seeking payment direct from the employer.
- Persistent rumours about the contractor's financial position in the press and from other sources.
- An underlying trend in the contractor's behaviour, such as an increasing aggressiveness or evasiveness in communications, suggesting it is in financial difficulty.
- The contractor's parent company (or other companies in the same group as the contractor) displaying any of the warning signs listed in this note.
- Monitor the contractor during the project and keep detailed records, for example of site meetings.

- Check the contractor's record-keeping and project reporting. It may be helpful if the contractor is contractually required to comply with a recognised quality assurance standard, such as ISO 9000.
- Pay attention to where key supplies are located and, in particular, the title to off-site goods.
- Official announcements to shareholders/the stock market.
- London Gazette insolvency announcements.
- Use an experienced Contract Administrator to manage the contractor relationship, and to monitor and report project updates.
- Ensure the site is secure (unpaid sub-contractors may seek to remove materials/equipment from the site).
- Attend the site regularly to monitor progress and quality.

Best Practice

Financial due diligence

We will use the following resources to obtain financial information on the contractor company prior to entering into a contract.

- Companies House, to obtain copies of: the certificate of incorporation; any charges registered on the charges register; notice of the appointment of any receiver, administrative receiver or liquidator; evidence that the company is in administration or other insolvency procedure; and company accounts.
- Central Registry of Winding Up Petitions and local district registry and County Court records, to ascertain: whether a company is, or is about to become, insolvent.
- Insurance evidence, to ascertain the arrangements in place; basis; limit; excess; and expiry of the contractor's cover.
- Company risk/credit assessment, to ascertain: key financials; credit risk ratings; charges etc. e.g. Dun & Bradstreet financial checks

Security measures

We will consider implementing the following security measures to assist in the event of a contractor insolvency.

- Parent company guarantee.
- Performance bond.
- Collateral warranties from sub-contractors with step in rights.
- Provisions in the Building Contract: for example obligations for providing payment notices/evidence when sub-contractors are paid; passing of title in goods and materials; increased level of retention.
- Project bank accounts.

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Monitoring and review

This policy will be reviewed every three years or sooner whenever there are changes to legislation, good practice or other learning.

Legislation

- Insolvency Act 1986
- Equality Act 2010
- Data Protection Act 2018
- Coronavirus Act 2020
- Regulator of Social Housing - Regulatory Standards for all Registered Social Housing providers

Reference to other documents and associated policies and procedures

Including:

- Phoenix Financial Regulations and Standing Orders
- Phoenix Procurement Strategy
- JCT Design & Build Contract 2016
- Contractor Insolvency Procedure

Definitions

Term/acronym	Description
Resident	Includes tenants, freeholders and leaseholders.
Phoenix	Phoenix Community Housing.
Insolvency	A company is insolvent if it has insufficient assets to discharge its debts and liabilities.

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Appendix 1 – Types of Corporate Insolvency

Insolvency - What is it?

A company is insolvent if it has insufficient assets to discharge its debts and liabilities. The Insolvency Act 1986 provides that a company is deemed "unable to pay its debts" where:

- The company has not paid, secured or compounded a claim for a sum due to a creditor exceeding £750 within three weeks of having been served with a statutory demand.
- A creditor has attempted execution or another enforcement process against the company in respect of a debt without success.
- It is proven to the satisfaction of the court that the company is unable to pay its debts as they fall due.
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Corporate insolvency processes

Rescue procedures

Administration is a procedure whereby a company is given a "breathing space" under the protection of a statutory moratorium to allow it to be rescued or reorganised or its assets realised.
An administrator is appointed and often they will sell the company's business and assets and the company will be put into liquidation or dissolved, but occasionally a company will be rescued through the process. If the administration has not come to an end before then, the administration will end automatically after one year unless its term is extended in advance.

A *Part A1 moratorium* is a procedure allowing the directors of a company to implement a moratorium on creditor action against the company. The moratorium lasts, once initially implemented, only 20 business days, but it may be extended. The company remains under the control of the directors, but their actions are reviewed by a monitor (a qualified insolvency practitioner). During the moratorium creditors are precluded from taking action against the company, and suppliers of goods and services cannot rely on contractual rights of termination to entitle them to stop supplying the company.

Administrative receivership is not an insolvency procedure in the strict sense but rather a remedy for a secured creditor who has a floating charge over the company's assets and (including that floating charge) fixed or floating security over all or substantially all of the company's assets. If the floating charge was created on or after 15 September 2003, administrative receivership is no longer available, except in limited circumstances. Instead, a qualifying floating charge holder can put the company into administration.

A ***company voluntary arrangement (CVA)*** is an arrangement between the company and its creditors which is implemented and supervised by an insolvency practitioner. A CVA becomes binding on all unsecured creditors if and when it is approved by the appropriate majority of creditors. It is used to avoid or to supplement other types of insolvency procedures. It may be used in conjunction with administration where a moratorium gives the company breathing space to agree any proposals with creditors.

A ***scheme of arrangement*** is a compromise or other arrangement with creditors (or any class of creditors) or members (or any class of members), which is binding if the appropriate majorities of each class of creditors/members agree. Unlike a CVA, a scheme of arrangement must be sanctioned by the court. When sanctioned by the relevant majority of creditors/members and the court, the scheme will bind all members and creditors regardless of whether they had notice of the proposed scheme of arrangement. A scheme of arrangement might be used in conjunction with administration, where a moratorium gives the company breathing space to agree any proposals with creditors.

A ***Part 26A restructuring plan*** is similar to a scheme of arrangement but is designed only for companies in financial difficulties. Unlike schemes, there is no requirement that the plan be approved by a majority in number of the creditors in each class. A Part 26A restructuring plan allows for what is known as "cross class cram-down". This means that a dissenting class of voters cannot block the plan if the court is satisfied on the relevant criteria.

Winding up or liquidation

The final resort, though, from an unsecured creditor's perspective, this may be the simplest and most effective way of applying pressure or forcing matters to a head, is to liquidate or wind up the company. This involves the appointment of a liquidator who collects in and sells the company's assets and distributes the resulting cash (or sometimes, in solvent situations, may distribute assets without selling them) and, at the end of the process, dissolves the company.

The company can also be put into provisional liquidation before a final winding up order is granted. There are two types of liquidation:

1. *Compulsory.* By order of the court. This is commenced by petition, often by a creditor on the grounds that the company is unable to pay its debts.

2. *Voluntary*. By resolution of the company. There are two forms of voluntary liquidation:

   - Members' voluntary liquidation, where the directors are willing to give a statutory declaration of solvency, to the effect that the company will be able to pay all its debts in full within 12 months. Shareholders are given control over the process, including as to the choice of liquidator, and less information is passed to creditors.

   - Creditors' voluntary liquidation, where the directors are not willing to give a statutory declaration of solvency. Creditors are given more control over the process, including control over the choice of liquidator.