

Procurement Policy Note 02/20 - Supplier Relief due to Covid-19 in a school setting

Procurement Policy Note 02/20 (PPN 02/20) is asking contracting authorities within England to play their part in keeping businesses up and running, by continuing to pay suppliers.

11 May 2020

Please note: the information contained in this legal update is correct as of the original date of publication

Procurement Policy Note 02/20 (PPN 02/20) is asking contracting authorities within England to play their part in keeping businesses up and running, by continuing to pay suppliers, even where, in some cases, the services, goods or works being delivered will not be the same. The PPN is asking for emergency changes to be made to contracts, where necessary, to ensure sensible payment arrangements are made.

The PPN came into effect in March 2020 and, for now, runs until 30 June 2020, but that will be kept under review. The PPN is guidance that all contracting authorities in England, including academy trusts, are asked to consider.

A link to the [guidance is here](#).

Application of the PPN

Set out below are some practical ways in which Trusts may apply the PPN.

Triage your contracts to see which ones are being run by suppliers that may be “at risk”. The PPN does not include detailed guidance on what “at risk” means but we can assume that it is suppliers who are already known to have finely balanced financial positions or who may be providing services to the private sector that will now be stopped. Basically, suppliers who may not be able to continue to perform all of their contractual duties but should not be allowed to fail as companies because their services/supplies will be needed as soon as “normal” life resumes. These suppliers who are “at risk” should be contacted and reassured that they will still get paid.

Trusts should then assess the payment provisions of those contracts and see how a reduced performance would impact payments. For example, if a contract is payment by results, then could those payment provisions be changed so that until the end of June they are paid a monthly (or weekly) payment based on an average of the last three months payments? The advice in the PPN is that they should.

The PPN suggests reviewing business continuity for the at-risk suppliers and ensure that wherever possible business continuity is supported and encouraged over the use of other contractual provisions that would allow the supplier to either permanently or temporarily suspend performance. If the latter happened then there is the knock-on effect on the supply chain of lack of payment. So Trusts should be discussing business continuity of some sort with their suppliers and looking to amend contract terms to allow for continued service provision wherever possible.

Payments due should be “accelerated”, meaning that invoices should be paid quicker than the usual contractual timescales wherever possible. In particular, high value invoices should be targeted to ensure they are paid as soon as possible. Potentially, suppliers should be asked to invoice on a weekly, rather than monthly, basis to keep cash flow going. Our experience is that Trusts are under pressure in so many different ways just now that accelerating the payment of invoices is very hard to do. Don't worry, there is no absolute requirement for you to do this and if suppliers are pressing for it, stand firm. It's better to get it right than rush it and get it wrong.

Case-by-case Analysis

It is not incumbent on Trusts to make payments to suppliers in every scenario. PPN 02/20 is advisory only. It does not bind Trusts to do anything other than what they feel is appropriate in these challenging and complex circumstances. These decisions will need to be made on a case-by-case basis by the Trust.

For example, where a supplier has been underperforming and is subject to an existing improvement plan, the Trust should give careful consideration whether or not to continue to make payments. Similarly, despite receiving payments a supplier may still become insolvent and the Trust will need to manage the risk of potential insolvency when deciding whether or not to continue to make payments.

There are instances where suppliers may be seeking payments from Trusts, which do not obviously fall within the ambit of the PPN. In these grey areas Trusts will need to exercise their discretion carefully when considering what sums should be paid, keeping in mind their duty to obtain best value for the use of public funds.

There may also be circumstances where the supplier may wish to seek other forms of government financial support. The FAQs issued in conjunction with the PPN make it clear that suppliers cannot be paid in accordance with the PPN and take advantage of the Coronavirus Job Retention Scheme as well, which would equate to double funding. A link to the [FAQs is here](#).

Difficult decisions may need to be taken in response to claims by suppliers for payment of monies that are not in line with the PPN. This is an area that is under review and the Cabinet Office is currently looking into the claims made by some catering suppliers to schools.

Contingent Workers

There is a general expectation that as schools receive government funding and have already budgeted to pay for staff, they should continue to do so. This expectation is extended to 'contingent workers' which for these purposes are supply teachers. Where agency workers are on live assignments, the guidance is that schools 'may' continue to make the previously agreed payments. As set out above, this is not a legal requirement, it is the recommended approach the government is asking schools to take. The guidance is clear that once a live assignment ends, it does not require these assignments to be extended further if the resource will not be required. At that point, it is up to the agency to make a decision as to whether to furlough the individuals

A link to the government [advice on contingent workers is here](#).

Specific [application within schools is here](#).

Recording Changes

What should amendments to contracts look like? Helpfully, on the webpage for the PPN there is also some suggested drafting. The main suggestions are:

- The onus is on the supplier to state that it is suffering "Covid Related Hardship" and propose a change to the payment terms because of this, called an Interim Payment Proposal. This needs to state clearly what it needs and why;
- The Interim Payment Proposal could include advance payment against goods or services, changes to milestone delivery dates and continuing to be paid even when performance is not meeting the thresholds in the contract;
- The Trust has three working days to review and either agree or propose amendments to the Interim Payment Proposal;
- Where possible the wording asks the parties to use other methods of relief under the contract;
- The supplier cannot include any elements of profit in the Interim Payment Proposal and it must be able to show, through the use of open book accounting what it is asking for related to Coronavirus impacts;
- The Trust retains the right to challenge the supplier against any claims for payment during this period and to review whether the supplier is still eligible for payment if it does not perform as agreed in the Interim Payment Proposal.

A link to the [Interim Model Terms \(and guidance notes\) is here](#).

Resolving Disagreements

On occasion, despite their best attempts, it is possible that the Trust and the supplier may not be able to agree upon the terms of payment, the wording of the contract variation, or whether any payments should be made at all. In these circumstances, it may be that further support is required to seek to find a way through the apparent impasse.

Further Assistance

We would be very happy to speak to you in respect of any of the issues raised in this note, or more generally and share our experiences of how clients in the education and wider government sector are managing their contracts at this difficult time.

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