

Covid-19: managing contract disputes with catering suppliers

How to apply the Government guidance and other practical considerations when in a contract dispute with a supplier.

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The Covid-19 pandemic has challenged the normal operation of third-party service contracts within an educational setting, as school closures have prevented or interrupted delivery of many service contracts. As a result of the confusion caused by the pandemic and to encourage the parties to work together during the crisis, the Government published the following guidance on the issue:

1. [Procurement Policy Note \(“PPN”\) 02/20](#)
2. [Procurement Policy Note 04/20](#)
3. [Department for Education – Providing schools meals during the coronavirus outbreak](#)

Many of our clients' suppliers are continuing to seek payment of invoices raised between March and October 2020. As a result, the application of the PPNs and Government guidance still remains very relevant even though the PPNs have now expired. This is evidenced by the fact that we have seen an increase in our clients seeking advice about catering suppliers demanding payment of invoices that have not been raised in accordance with the contractual payment provisions. We therefore thought it would be helpful to summarise below how to apply the Government guidance and other practical considerations when in a contract dispute with a supplier.

Applying the Government Guidance

The guidance focuses on three particular areas:

1. providing schools and academy trusts with some overarching principles and guidance on how to review and respond to supplier requests within the scope of the PPNs;
2. how to work with suppliers to exit from any support before 31 October 2020; and
3. specific guidance on school food contracts.

The PPNs apply to maintained schools, non-maintained special schools and academy trusts, as these organisations are considered to be contracting authorities under the Public Contract Regulations 2015 (PCR). A multi-academy trust is a single contracting authority, individual schools within the trust should not be entering into contracts in the name of the school. Independent special schools may not be regarded as a contracting authority, although it may still be appropriate to apply the principles of the PPNs.

The PPNs only apply to contracts between the contracting authority and a supplier. They do not apply to other funding mechanisms such as grants or contracts supported by private income.

PPNs: Statutory Force?

It is important to note that the PPNs are advisory only and have no statutory force. It is not incumbent on schools to strictly adhere to the guidance although we recommend that all decisions be made on a case-by-case basis. The guidance does not bind schools to do anything other than to consider exercising their discretion to offer appropriate support to suppliers. However, it is strongly encouraged that both the schools and suppliers take note and act in the spirit of the guidance.

PPN 02/20

In March 2020, the Cabinet Office published [PPN 02/20](#) entitled “Supplier relief due to COVID-19”. PPN 02/20 applied for the period from 19 March 2020 to 30 June 2020.

The aim of PPN 02/20 was to protect the business continuity of contracting authorities’ key suppliers during and after the pandemic so that suppliers could resume delivery of the contracts when “normal” life resumes, the key purpose being to maintain cash flow in the supply chain and protect jobs so far as possible.

Whilst the PPN advised that schools should offer supplier relief where appropriate, it also set out an expectation that suppliers act on an open book basis. Schools should only be agreeing to make payments to at-risk suppliers who agreed in writing to make all cost data available and act on an open book basis. This level of transparency was essential as it enabled schools to understand their suppliers’ costs and the funding arrangements with subcontractors to ensure that the appropriate level of supplier relief was offered.

The PPN 02/20 required schools to understand how to implement the guidance and establish whether it was appropriate to offer support to at-risk suppliers.

The DfE designed the following five-stage approach ([set out here](#)) to assist with this process:

1. Alternative forms of support

Has the supplier explored and used all other forms of support available to them, such as the Coronavirus Job Retention Scheme (CJRS)?

Suppliers are not entitled to claim twice (i.e. claim through the CJRS and obtain supplier relief). Therefore, when calculating supplier relief, schools should seek confirmation of any claims made through CJRS or any other Government support schemes to ensure that suppliers are not compensated twice. If supplier staff have not been placed on furlough leave, schools should be asking why.

Again, it is essential that suppliers act on an open book basis as this allows schools to understand and critically review the extent of alternative support accessed by suppliers.

2. Critical supplier

Is the supplier a critical supplier? Schools should consider whether the supplier provides goods or services which are critical in the medium to long term.

3. At-risk supplier

Should the supplier be classified as financially “at risk” as a result of the COVID-19 pandemic? This test is usually satisfied where a supplier can show that it is unable to fulfil its contractual obligations due to the pandemic (e.g. if schools are closed) and is experiencing financial difficulties as a result.

It is likely that school catering providers would be classified as a critical and at-risk supplier given the size of these contracts and the essential nature of the service.

The PPNs set out that supplier relief is not appropriate for contracts where there is no volume commitment, such as where the supplier’s services are utilised on an ad-hoc basis. This is because generally the supplier will not be reliant on a set amount of regular business to maintain their cash flow. However, as set out above, schools should make all decisions about supplier relief on a case-by-case.

4. Commercial interventions

If steps one to three are satisfied, schools may choose to use their commercial judgment to agree variations to the contract. For example, this may include extending contractual deadlines or offering internal resources to support service delivery.

5. Financial interventions

If steps one to three are, schools may also choose to offer financial support alongside commercial interventions at step four. Financial support may include varying the payment arrangements to resolve supplier cash flow difficulties; offering payment for fixed costs; expediting payments; and/or arranging upfront contractual payments.

Offer supplier relief on a discretionary basis

We do not consider that it would be appropriate to make full payment for services which have not been delivered. However, it is in a school's interests to act in the spirit of the PPNs so that suppliers are equipped to recommence performance of their contractual duties as soon as schools fully reopen. Furthermore, schools should also be mindful of the possibility of suppliers becoming insolvent and offer supplier relief as appropriate to mitigate this risk. The level of support agreed back in the spring and summer should have been documented in writing and payments now should not exceed what was agreed unless there are exceptional changes in circumstances.

Using funding for supplier relief & working collaboratively – catering suppliers

Schools have continued to receive their core funding allocations throughout the pandemic and so should be able to offer supplier relief where necessary. Where additional funding to assist with exceptional costs incurred by schools as a result of the pandemic was claimed by the school or trust, this funding should not be used to support at-risk suppliers.

This principle is particularly relevant when considering catering contracts as, throughout the pandemic, schools have continued to receive funding for free school meals (FSM) and universal infant free school meals (UIFSM). As such, if appropriate to maintain delivery of critical services, schools should consider making payments to caterers that are assessed to be at risk, even if service delivery is disrupted or suspended. However, the DfE's guidance is clear: such payments should only cover the cost of FSM and UIFSM and not the costs of meals usually purchased by parents for pupils who are not eligible for FSM.

Schools should also consider:

- food already purchased by suppliers, including food for pupils who are attending school (for example, for the children of key workers); and
- whether the school is working collaboratively with a supplier on the provision of food parcels for FSM children learning at home.

Any relief payments for FSM and UIFSM should be based on the time period that is most appropriate, provided that the supplier agreed to act on an open book basis and make cost data available. The guidance required schools to make payments to suppliers promptly and on time. Where disputes are ongoing about invoices for the period March to October 2020 then it is advisable to retain a good audit trail of the reasons why the invoices have not been paid. This will allow the school or trust to defend itself against any improper claims for interest or other financial penalties under the contract.

Using funding for supplier relief & working collaboratively – all suppliers

Schools should work with suppliers to ensure that:

- any relief payments are used by suppliers to help cover non-furloughed staff costs and other non-staff expenses only - relief payments must not be used to cover costs associated with staff furloughed under the CJRS; and
- they did not make profits on elements of a contract that are undelivered during that period. This would include the elements of the catering contracts not delivered during lockdown.

Schools should work in partnership with the supplier to plan an exit from the agreed interventions and transition to a new sustainable operating model. The parties need to work together during this transition to ensure that contracts are still sustainable.

Document any decisions made

It is very important that schools have clearly documented: (1) any agreements made with suppliers; (2) all payments made; (3) supporting rationale of the decisions; and (4) all contract variations which were carried out in accordance with the variation clause contained in the contract. This is important as it will reduce the likelihood of a dispute arising about the agreements made and, for auditing purposes, it will show that public funds are being carefully and transparently managed.

Transitional arrangements

PPN 04/20 acknowledged that the COVID-19 pandemic is not a short-term crisis and that the supplier relief provisions set out in PPN 02/20 continued to be appropriate through until 31 October 2021. However, PPN 04/20 reiterates that contracting authorities and their suppliers also needed to work in partnership to plan an exit from any support and transition to a new sustainable operating model.

Where schools agreed to any form of supplier relief mentioned above, they should be able to demonstrate an agreed transition plan ready to be implemented as soon as possible.

This transition plan should be agreed by both parties and should include the following:

- a planned exit date for when any supplier relief will end - this should be kept under review to reflect the changing situation, e.g. local/national restrictions being reintroduced;
- if advanced payments have been made, the parties should agree if and when any outstanding goods or services are to be delivered;
- the process for reconciling payments made against costs as set out in the model interim payment terms accompanying PPN 02/20;
- an assessment of any costs associated with implementing Public Health England guidance specifically in relation to delivering the public contract - this should be considered by the schools on a case by case basis; and
- an assessment as to whether, as a result of COVID-19, the contract is still relevant and sustainable and, if not, proposals for variation or termination.

In some instances, schools might decide that a contract is no longer relevant or sustainable. In these circumstances, the parties should discuss alternative options such as varying the contract. Ultimately, it may be necessary for the parties to discuss contract termination.

Conclusion

At this point in time, schools or trusts are not entering into new arrangements with suppliers under either PPN 02/20 or PPN 04/20. However, the mechanics of what was agreed back in the period between 20 March and 31 October 2020 remain relevant to support the resolution of outstanding disputes. In a number of cases we are being asked to advise education clients on the legitimacy of invoices raised by suppliers for that period when the goods or services were not being, or only partially, delivered. If there is no paper trail of what was agreed it may be difficult to reach resolution. In all cases, the school or trust should only be paying:

- suppliers that were classed as “at risk” between 20 March and 31 October 2020 (you cannot retrospectively agree that now);
- in the case of catering contracts, those costs that relate to free school meals or universal free school meals;
- costs that are necessary to keep the supplier solvent and are not related to profit;
- costs not claimed through another support route such as the Coronavirus Job Retention Scheme.

Whatever is ultimately agreed with suppliers, these arrangements must be documented to ensure there is clarity.

We recommend that current contractual arrangements are reviewed upon receipt of any requests for supplier relief payments. Hopefully, contracts can be accessed swiftly, but if not then schools should try and obtain a copy from the supplier.

Where issues relating to the payment of supplier relief become contentious, it would be appropriate for schools to seek legal advice on their position. Our Commercial Disputes team is currently assisting several education clients with disputes relating to supplier relief payments including advising on the application of PPN, their legal position and the relevant commercial considerations. We also have a nationally recognised procurement team able to advise on the wider issues relating to the procurement and variation of contracts.

If you have any queries arising from the issues raised in this article then please contact [Amba Griffin Booth](mailto:Amba.Griffin-Booth@brownejacobson.com) at Amba.Griffin-Booth@brownejacobson.com

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