

# Negotiating contracts under PPN04-20 Webinar with Browne Jacobson

## FAQs

The below questions were asked by participants at Bishop Fleming and Browne Jacobson webinar, 'Negotiating contracts under PPN04-20', which took place on Wednesday 15<sup>th</sup> July 2020. The answers are correct as at the day of writing, up until 17<sup>th</sup> July 2020.

## Financial Questions (Bishop Fleming)

**We are working on the basis that PPN02 only covers until 30 June and PPN04 just talks about winding down support and does not extend the Contingent Worker support specifically. We are therefore ending support for ad-hoc supply staff at the end of June. Is that correct?**

It would be correct under PPN04 to review the requirement for contingent workers, and if there is no longer an operational need for them, to plan an exit. If the role is still required, the guidance in PPN02 remains.

**What records should I be keeping of our decision making on each contract?**

You should have documentation on all of the reasons and rationale behind each decision, how it complies with applicable guidance, and also what the approval process for the decision was.

**What decisions should I be taking to the board of trustees?**

This will depend on your individual scheme of delegation, but we would suggest that any decision that could have a risk of being challenged under value for money, or potentially novel/contentious it would be best practice to ensure the board of trustees are aware.

**What role should the Accounting Officer be playing in respect of the PPN guidance?**

As Accounting Officer (AO) they will be ultimately responsible for all financial decisions in the Trust. Therefore we would expect them to have a good understanding of the guidance, and how it has been applied in their Trust. It would be good practice for the AO to approve the documentation behind each decision.

**Would increased risk from not having a legal arrangement be consider from an audit materiality point of view. If payment is relatively small is it still an issue?**

It may be an issue for the regularity audit. As auditors we will consider all the details of the transaction, including size of the payments in forming our decision. It is also worth noting that we would not necessarily expect all payments under the PPN's to have formal legal advice or payment terms. If it is relatively simple, it may be appropriate to use model interim payment terms.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/877260/PPN02\\_20\\_Model\\_Interim\\_Payment\\_Terms\\_v1.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877260/PPN02_20_Model_Interim_Payment_Terms_v1.pdf)

**How do we satisfy ourselves that a supplier is "at risk". One of our suppliers (catering) is saying they are at risk but have raised £2bn in funding during COVID and are using this to fund M&A activity.**

There is no one size fits all, but my advice would be to ask the supplier to prove to you that they are at risk. Depending on the client, they will have different ways to demonstrate this to you, but it may include items such as:

Management accounts, bank statements, details of loans received under COVID19, evidence of their sector being heavily hit by COVID19.

It is also worth reminding that the at risk categorisation should be because of COVID19, not because they were at risk previously.

**To what extent is there capacity or expertise within the ESFA to challenge decisions made under the various PPN notices - that Trusts' may have made? Is there any risk of separate or dedicated audits post-hoc?**

It is very hard to say, but there is always a chance they may look at it. Decisions may well also be tested by the external auditor, and therefore we would recommend all decisions are made under the assumption that they will be subject to external review.

**Exceptional costs- the DfE have said that we could claim any other costs that don't fall under the 3 key areas. Would additional cleaning (not COVID case related) be able to be claimed? And can include PPE costs as exceptional costs? (Antibac Gel, masks etc)**

It is unlikely that additional cleaning could be claimed – the exceptional costs are to be claimed for costs incurred as a result of COVID19.

Additional PPE costs, may fall under the premises costs, which specifically mention hygiene services. If you have any doubt we recommend you contact the ESFA for confirmation.

Please see full guidance <https://www.gov.uk/government/publications/coronavirus-covid-19-financial-support-for-schools/school-funding-exceptional-costs-associated-with-coronavirus-covid-19-for-the-period-march-to-july-2020>

**If a school is in deficit but managing to meet the agreed repayment this year, though ultimately remaining in deficit at the end of the year, are they able to claim any exceptional costs? What if any small surplus is unspent ring-fenced grants, e.g. PE or PP funding. Would this negate being able to claim exceptional cost support?**

The guidance is not 100% clear, however the overall aim of the funding is that if you are no longer meeting your approved budget, that funding would be available. Therefore if you are still meeting planned repayments, it is likely that you don't qualify.

With reference to if ring-fenced (restricted) grants are included within the definition of surplus for the year, the ESFA have not clarified this either way, however these grants and funds will be reported in reserves in your AAR and Budget Forecast returns, therefore it appears reasonable to include them in these calculations also.

**We have been paying costs to a sports company who usually provide sports lessons as part of Sports Premium funding, what should we do with these now as they don't really fall under the critical supplier list though we would need them to continue in September?**

If you do not consider that they are a critical supplier, then PPN will not apply. You can still make local decisions with individual suppliers, but you will need to ensure proper documentation on matters such as VFM and Academies Financial Handbook Compliance, and the business rationale for the decision.

**It was mentioned earlier that the ESFA will look at outlying academies that have furloughed staff. In the example leisure centre staff was mentioned. Would this include catering staff? Presumably academies within house caterers would all be outlying?**

It is unclear yet what the criteria for any review will be. If you have claimed any furlough of staff, it will be important to retain all documentation as to why you consider that they eligible to be furloughed.

## Legal Questions (Browne Jacobson)

### **Does a Trust have to sign new contract terms if presented by the supplier as an annual refresh of the terms?**

Some contracts will include an annual refresh of terms but this is incredibly rare. If you have not done this before then you should not be agreeing to updated terms. We have seen some suppliers present this as a standard annual arrangement where the terms offer them additional protection if there is further Covid disruption. If you are presented with updated terms you should check the terms and your existing arrangement with the supplier very carefully before signing these.

### **Our contract says that we will be bound by the supplier's terms as available on their website, what happens if they change these?**

If your contract simply specifies that you will be bound by these terms then you are likely to be bound by any update to these. When suppliers ask for this in a contract you can mitigate the risks to the Trust by specifying that you are bound by the terms on the website at a particular date so that they are not able to update these and diminish your rights.

### **We need to increase the cleaning services in September and our current supplier says they do not have enough people to do all the work, what should we do?**

If you are asking your service provider to resume normal service under the contract, at the same level they were providing pre-Covid, then it is the supplier's responsibility to recruit staff to meet their contractual obligations. This is usually a specific term of the contract and you should check that this is included within your contract and direct them to this if they are unwilling to increase their staffing levels.

If you are looking to increase the service beyond the pre-Covid levels, then it is unlikely you will be able to compel your current provider to meet these requirements. Your options would be to appoint a second cleaning provider to work alongside the existing provider to meet the additional demand, or you could terminate the contract with your current provider and re-procure a single service that meets your need.

When terminating a contract look carefully at your rights to do this and any formalities which must be undertaken such as giving notice.

## Legal & Financial Questions

### **What should I do if I believe the contractor has been claiming relief under the furlough scheme so has effectively had relief twice?**

Discuss this with the supplier and ask them to explain how they have complied with the rules. If you are still dissatisfied you may need to seek legal advice on your options.

**Our caterers have furloughed our catering team and issued FSM invoices. We have flagged up the issue of using 2 supplier relief schemes, but they have said the FSM invoices relate to staff that haven't been furloughed within the whole of the company - how would you proceed?**

If you are unhappy with the actions a supplier has taken, the PPN is advisory and therefore you are not bound to implement it. PPN04 says "if suppliers are in receipt of payments, suppliers should have ensured that all of the parts of the workforce identified to deliver the contract were not furloughed during this period (under CJRS)". Presumably in this case the supplier is still delivering the FSM elements, and therefore whilst your named team have been furloughed, other employees in the company are covering the work load for you. If you are in any way dissatisfied you should seek clarification from the supplier.

**Could you under PPN02/20 pay a top up to a supplier's employees (such as catering) of the 20% they were not getting as they were furloughed.**

This would be quite unusual, and you would need to document how this achieved VFM. We would recommend also contacting the ESFA to confirm that they would be happy with this approach.

**We have had a self-employed coach contact us to claim continued payment although they are unable to deliver the service or roll over the sessions to future periods. Our view is that they should be accessing self-employed support and it's not a PPN issue - any advice?**

If the service being delivered is not considered critical, it would not fall under the PPN. Additionally it should be confirmed that the PPN does not want you to pay for nothing, this would represent poor value for money. Therefore if continuing to make payments, agreeing what delivery you will get will be vital.

## Further information

For further information please visit our [Education Knowledge Hub](#) which is being updated daily with the latest insights and advice. To access useful information and further resource from Browne Jacobson visit their Education page [here](#).

If you can't find what you are looking for, please contact your usual Bishop Fleming or Browne Jacobson adviser or a member of the panel who will be happy to help you.

The contents of this document does not constitute professional advice and no action should be taken without seeking professional advice first. Therefore, no responsibility for loss occasioned by any person acting or refraining from action as a result of the material can be accepted by the authors or the firm.