Browne Jacobson

How does the UK Education Sector fare amidst the energy crisis?

08 November 2022 Conor Macaire Duncan

Introduction – the energy crisis

The world is currently living through one of the most significant global energy crises that has been seen in modern times, with energy prices and bills soaring at an unprecedented rate. With the added pressures of the Russian invasion of Ukraine and the slowdown in China's economy, these soaring energy prices are continuing to strangle the global economy. The economic issues are so acute, that the International Monetary Fund (**IMF**) has concluded that one-third of the world's global economy will contract over the coming year, with leading economies in the US, China and Europe continuing to falter.

The IMF has predicted that 2023 will feel like a recession for individuals, entities and economies across the world, with the economic damage caused by the pandemic being thrown on to the pile as well.

The energy crisis in the UK

So far in 2022, the UK Government has already issued in upwards of £33bn in support to protect UK households from 90% of the forecast energy price increase and the cost-of-living crisis. The Government support has come through an assortment of rebates in energy bills, tax cuts and direct payments. Notwithstanding the £33bn in support already issued, on 23 August 2022, the Institute for Government predicted that the UK Government would need to spend an additional £23bn in support to protect homes from 90% of the energy price rises up to April 2023, with an additional £90bn to protect up to April 2024. Shortly after these striking figures were released, Ofgem announced that the energy price cap for consumers would rise by 80% in Q4 of 2022, with electricity and gas prices rising to as much as 235% and 180% of current levels in 2023, respectively. Clearly, more support was needed.

Next, on 1 October 2022, coinciding with the 'Energy Price Guarantee', Ofgem set a price cap of £1,277 for the average UK household starting from 1 October 2022. Notably, this could be more for prepayment meters or houses using more energy than the average UK household.

The energy crisis and the UK Education Sector

With bills rising steeply for individual homes, it is clear that the Education Sector is not free from this energy crisis, with reports of some education trusts seeing predicted rises in energy costs in upwards of £1m or more. This is why two letters were sent out on 7 September 2022 by the Association of Colleges and the Confederation of School Trusts to the then Chancellor, Kwasi Kwarteng, and the then Prime Minister (**PM**), Liz Truss, respectively, urging action to tackle the energy crisis in the Education Sector that could see 500% rises in energy costs this winter.

UK Government support for the Education Sector – is it enough?

In the face of the energy and economic calamity, the UK Government responded with the Energy Price Guarantee, outlining that UK households would pay "up to an average of £2,500 a year on their energy bills", a measure which is set to last until April 2023. UK households also receive an automatic non-repayable discount of £400 off their monthly energy bills from October 2022 until March 2023 under the Energy Bills Support Scheme. Following pressure from Education Sector heads, the then PM announced the new Energy Bill Relief Scheme (**"the Scheme"**), which began providing public sector entities, including schools, with energy discounts from 1 October 2022. The Scheme will, for a period of 6 months up to 31 March 2023, reduce energy rates for schools to £211 per MWH for electricity and £75 for gas. The Department for Business, Energy and Industrial Strategy (**BEIS**), who will reimburse energy sector suppliers for the reduction, outlined that, where a school pays £10,000 in energy bills per month, the reduction in costs will be £4,000 (representing a 40% reduction). However, it is prudent to note the limitations in the Scheme. For instance, the Scheme is only available to schools that are currently on fixed price contracts agreed on or after 1 April 2022, in addition to "deemed, variable and flexible tariffs and contracts".

Ultimately, many leaders in the education sector have agreed that the Scheme merely freezes the financial and energy-related woes for schools for 6 months rather than dealing with them. For instance, both Geoff Barton, General Secretary of the Association of School and College Leaders, and Leora Cruddas, CEO of the Confederation of School Trusts, have both outlined that the "glaring" issue with the Scheme is that it lasts for only 6 months, as "schools and trusts need budget security over the whole financial year". Although, BEIS have outlined that there will be an ongoing energy support system to help the most vulnerable industries, but it is unclear whether schools will be included.

Issues to be aware of in the Education Sector amidst the energy crisis

With the initial period of the Scheme only lasting for 6 months, it is crucial that **Trusts, Colleges and Schools** (**"Schools"**) are keenly aware of the issues that they may encounter amidst the energy crisis. We take you through these potential issues below.

Energy contracts existing prior to 1 April 2022

As noted above, the Scheme does not provide any benefit to energy contracts that were entered into prior to 1 April 2022. The reason being, according to the BEIS, is that contracts existing before 1 April 2022 were not subjected to the severe spikes in energy costs that we have seen since the Russian invasion of Ukraine. As such, in order to benefit from the cost reductions in the Scheme, those Schools with energy contracts pre-dating 1 April may seek legal advice to review the Terms and Conditions of their contracts to determine whether there is any provision for termination or variation of the terms and prices within the contract.

However, it is important to note that rights of termination in the contract must be conscientiously reviewed prior to exercising such rights. Wrongful termination can give rise to the energy supplier terminating for repudiatory breach of the contract, giving rise to potential liability and the risk of the School being sued for damages.

Breach of contract for non-payment of energy invoices

With energy prices soaring on a monthly basis, Schools need to be wary of their ability to cover their energy supply invoices. Non-payment of energy supplier invoices can result in Schools potentially seeing claims for damages or termination of the contract for repudiatory breach. Although the failure to pay an invoice in full by an agreed date is a breach of contract, it may not constitute a repudiatory breach. The terms of the contract with the energy supplier may determine the consequences of non-payment or late payment of invoices. It is possible, however, that persistent late payments would result in the contract being terminated for repudiatory breach, with interest accruing until the payment is made in full.

As such, where Schools are at risk of not being able to pay for rising energy bills, even where they benefit from the Scheme, it is prudent to thoroughly review the payment terms in the contract to determine the consequences of late payment. Subsequently, it would be sensible to negotiate with the energy supplier for a payment plan or a temporarily reduced rate. But ultimately, the outcome of any negotiation is not guaranteed, and it is likely that any reduced rate will be subject to back-payments being made in full at a later date.

Third party unilateral costs

Schools must be alive to third party companies that are contracted for services attempting to unilaterally pass on rising costs of energy and fuel on to the School. For instance, companies that provide services to Schools (such as transportation of students, food delivery or waste management and collection), may try to apply surcharges to their services in order to pass on the increased costs of fuel that they use. Whilst the renegotiation of prices and costs within a commercial contract is clearly not unlawful, the unilateral implementation of a surcharge from one party to another could be restricted by the terms of the contract between the parties.

Ultimately, Schools should review the terms of their service contracts to determine whether or not there are any variation clauses. Where a variation clause does exist in the contract, the School can usually rely on the clause to block any unilateral attempts by the service provider to apply surcharges, as any variation to the contract would need the express prior consent of both parties to take effect. On the other hand, where a School does not have the benefit of a variation clause in its service contract, and that contract is coming up for renewal, Schools should attempt to negotiate for the inclusion of such a clause to bolster their ability to block any purported unilateral surcharges attempted by the service provider.

Certainty in the terms of energy supply contracts entered into by agents

The vast majority of Schools will likely secure the services of energy brokers to identify, negotiate and/or enter into energy contracts on their behalf by way of a Letter of Intent/Authority (**LoI/A**). However, there are risks that come with the service. Specifically, the terms of any energy brokered deal must be scrutinised in great detail ahead of any confirmation given to the broker to proceed to enter into the contract. Notably, where a broker enters into an energy supply contract on a School's behalf as agent without authority, it can be difficult to amend the terms of that contract or to prove that the contract is void due to lack of authority.

Overall, Schools ought to ensure that its agent is acting within the remit of the LoI/A and ensure that contracts are not entered into without the School's prior consent.

What can education sector entities do to avoid these issues

Browne Jacobson is a leading national law firm with sector-specific industry leaders in the fields of commercial, education and disputes. As a full-service law firm, we are able to assist schools, colleges and trusts alike with any and all legal issues that they may encounter, whilst scanning the horizon for their next challenges or opportunities.

Specifically, our Commercial Dispute Resolution (**CDR**) team, which operates across our nationwide offices, has a host of experience in dealing with energy-related disputes in the education sphere.

For more information, please contact Paul Kirkpatrick or Amba Griffin-Booth.

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