



Government Legal Department

Veale Wasbrough Vizards LLP
Bristol office
Narrow Quay House
Narrow Quay
Bristol
BS1 4QA

Litigation Group
102 Petty France
Westminster
London
SW1H 9GL

T 020 7210 1388

DX 123243 Westminster 12 www.gov.uk/gld

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Our ref: Z2005230/APM/JD3
Your ref: sr/100855/6

Dear Veale Wasbrough Vizards LLP

Re: Supplier Relief in response to COVID-19

1. We have been instructed by the Department for Education to respond to your letter of 27 April 2020 addressed to Gillian Keegan MP, Parliamentary Under Secretary of State for Apprenticeships and Skills (“the Minister”).
2. That letter was sent on behalf of the Association of Employment and Learning Providers (“the AELP”), and it relates to supplier relief to be made available by the Education and Skills Funding Agency (“the ESFA”) to certain suppliers of apprenticeship and adult education services (including registered independent training providers, further education colleges, higher education institutions and other provider types – “Suppliers”) pursuant to the Cabinet Office’s March 2020 “Procurement Policy Note – Supplier relief due to COVID-19” (“PPN 02/20”). Your letter refers, in particular, to a letter sent by the Minister to Members of Parliament on 17 April 2020.
3. The AELP objects to the relief described in the Minister’s letter on the basis that it excludes services provided by Suppliers pursuant to “apprenticeships funded from employer digital accounts where the contractual relationship is between the employer and the provider”. As we understand it, the AELP alleges that the relief scheme would be unlawful on three broad grounds:

Gilad Segal - Head of Division
Gary Howard - Deputy Director, Team Leader Litigation B5



- (1) PPN 02/20 gives rise to a legitimate expectation for all Suppliers that they will receive relief, and the relief scheme amounts to a breach of that legitimate expectation and an abuse of power.
 - (2) The relief scheme misapplies PPN 02/20 so as to fail to take into account relevant considerations, to take into account irrelevant considerations, and to be irrational.
 - (3) The relief scheme amounts to discrimination and / or unequal treatment for certain categories of Supplier compared to others.
4. Each of these grounds is addressed in further detail below, but, for the avoidance of doubt, it is not accepted that any of them has merit.

Breach of a legitimate expectation amounting to an abuse of power

5. As you will be aware, a legitimate expectation arises where a public authority makes a clear and unambiguous promise capable of applying to the person or persons complaining of a breach. Taking these factors in turn:
- (1) On any reading of PPN 02/20, it does not amount to a clear and unambiguous promise to any particular person that they will receive supplier relief. Any relief is dependent on contracting authorities reviewing their contract portfolios, determining which suppliers are at risk, deciding on the most appropriate measures to support supplier cash flow, and ensuring that suppliers act with sufficient transparency (see the first, second and fourth bullet points in paragraph 2 of PPN 02/20 (“Action”)).
 - (2) PPN 02/20 is not a promise (or anything else) capable of applying to any person in their capacity as a supplier. It is a policy document produced by a public authority for its own purposes and those of other public authorities who hold contracts under which they receive goods, services or works (i.e. “contracting authorities”). Paragraphs 1, 2, and 3 of PPN 02/20 make this clear by explaining: that its purpose is to set out information and guidance for public authorities who are contracting authorities; the actions that contracting authorities should take; and that its scope is limited to “all contracting authorities”. It could not be plainer that PPN 02/20 applies exclusively to contracting authorities.
6. It follows from the above that PPN 02/20 cannot give rise to any legitimate expectation for Suppliers, let alone the specific and far-reaching legitimate expectation contended for by the AELP. In any event, it is not accepted that the alleged breach of a legitimate expectation would amount to an abuse of power in these circumstances.

Unlawfulness on grounds of irrationality and relevant / irrelevant considerations

7. It is trite law that irrationality rising to the level of unlawfulness is a very high bar, and that public authorities have a wide discretion when making decisions in the socio-economic sphere, especially

when allocating scarce resources. It is not accepted that any of the matters raised in your letter are capable of rendering the proposed relief unlawful on these grounds. In particular:

- (1) It is not arguable that the funding agreement between the ESFA and Suppliers delivering levy-funded apprenticeships amounts to a “contract for services” within the meaning, and for the purposes, of PPN 02/20. The contract for services in this arrangement is plainly between the Suppliers and the levy paying employers who receive the training services delivered by those Suppliers. This contrasts distinctly with the position of Suppliers that support non-levy paying employers, and who deliver services specified in a contract directly with the ESFA. It follows that the ESFA is a contracting authority within the scope of PPN 02/20 with respect to Suppliers holding contracts to deliver apprenticeship provision to non-levy paying employers, but not with respect to Suppliers delivering apprenticeship provision to levy paying employers.
- (2) It is, with respect, a misrepresentation to suggest that the relief scheme has been targeted on the basis of the source and / or manner of a Supplier’s funding. The proper basis for targeting relief under PPN 02/20 is the existence of a contract between a supplier and a contracting authority procured pursuant to the Public Contract Regulations 2015 (or equivalent procurement regulations). The ESFA holds such contracts exclusively with Suppliers to deliver apprenticeship provision to non-levy paying employers, and not with Suppliers delivering apprenticeship provision to levy paying employers. Referring to these different categories of Supplier by the source and / or manner of funding is merely an incidental shorthand denoting the underlying contractual relationship.

Unlawful discrimination and / or unequal treatment

8. We do not understand the AELP to be alleging any breaches of rights pursuant to the Human Rights Act 1998 or equality legislation. It is therefore impossible to discern the basis on which unlawfulness on this ground is alleged, or what the allegation adds to the matters covered by the other two grounds addressed above.

Conclusion

9. In light of the above, it is not accepted that the relief scheme is unlawful on any of the grounds alleged by the AELP (or on any other grounds). The right to raise any other matters in response to further correspondence on this issue is reserved.
10. Further, we do not understand your letter of 27 April 2020 to be a formal letter sent under the pre-action protocol for judicial review. In the event that your client decides to pursue this matter further we would expect them to comply with that protocol.

Yours faithfully



Adam Paine
For the Treasury Solicitor

D 020 7210 1388

F 020 7210 3433

E adam.paine@governmentlegal.gov.uk