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Your ref: Claim No. CO/2144/2020
Our ref: Z2006669/AHJ/CLGA

16 June 2020

Response to application for interim relief

Dear Sirs

Re: Claim No. CO/2144/2020

The Queen on the application of (1) The Good Law Project (2) EveryDoctor Limited v Secretary of State for Health and Social Care and Crisp Websites Limited (trading as Pestfix)

We act on behalf of the Secretary of State.

We refer to the above-referenced application for judicial review, issued yesterday in the Administrative Court. The application seeks to challenge the award of a contract (the “**Contract**”) for the supply of Personal Protective Equipment (“**PPE**”) by the Defendant, the Secretary of State for Health and Social Care (the “**Secretary of State**”) to the Interested Party, Crisp Websites Limited.

The application for judicial review has been accompanied by an application for urgent consideration.

The Secretary of State was first made aware of a proposed challenge by the First Claimant, the Good Law Project, by means of a letter before action (the “**LBA**”) dated and received on 10 June 2020. The LBA contained a proposed deadline for response of 4 p.m. on 17 June 2020, i.e. seven days rather than the 14 day-period which the Pre-action Protocol for Judicial Review indicates is “*a reasonable time to allow in most circumstances*”.

At section 10 of the LBA, the Good Law Project sought a considerable amount of information concerning the award of the Contract, while at section 11 it sought five wide-ranging categories of document.

The following day, solicitors for the Good Law Project wrote again to the Secretary of State indicating that in accordance with CPR r.54.5(6), they considered they would have “*no option but to issue protective proceedings by no later than 16 June 2020*”. They proposed a timetable whereby the Secretary of State should have until 24 June 2020 to respond to the LBA. Thereafter, they proposed to file amended statement of facts and grounds within seven days, with the Secretary of State to file his Acknowledgment of Service by 15 July. They

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then proposed that the application for permission should go to a judge as soon as possible thereafter. A draft consent order in these terms was attached.

We responded on behalf of the Secretary of State on 12 June 2020 rejecting the terms of the draft consent order.

As that letter explains, given the broadly-framed requests for information and documents and the extraordinary pressures upon the Department of Health and Social Care in the light of the coronavirus pandemic, it is not possible to reply to the LBA by its deadline of 17 June 2020. Neither would it be possible to provide a reply by the alternative deadline of 24 June 2020, as proposed in the letter from the Good Law Project's solicitors dated 11 June 2020. Instead, we have committed to providing a response to the LBA by no later than 1 July 2020.

In so far as the Good Law Project's threatened claim was concerned, we indicated that we saw no reason why the Secretary of State was not entitled to the period of 21 days provided in CPR r.54.8(2). Furthermore, we indicated that we considered it objectionable as a matter of principle that our client should be required to agree to the service of an amended statement of facts and grounds without having the opportunity first to consider whether it would consent to any such amendment, failing which the Good Law Project would require the permission of the Court.

The Good Law Project has now proceeded to issue its application for judicial review. A further party, EveryDoctor Limited, has now joined as a claimant, albeit one that only sent its letter before action a few moments prior to commencing proceedings.

By way of its application for urgent consideration, the Claimants now seek an order in essentially the same terms as that in its proposed (and rejected) consent order, save that it specifically asks that the application be stayed until 24 June 2020.

In their stated reasons for urgency (Section 1 of the application), the Claimants indicate that the application is essentially founded on an allegation of breach of the Public Contracts Regulations 2015 ("**PCR 2015**"). However, there has been no challenge by any economic operator affected by any alleged breach of duty under that legislation. The Claimants cannot themselves bring a challenge under PCR 2015 because neither is an economic operator within the meaning of regulation 2. That should be a highly relevant factor in determining how best to proceed.

The application for urgent consideration is also made on the basis of asserted factual matters that are incorrect.

First, there was no "*secrecy*" surrounding the conclusion of the contract. A contract award notice was published in the Official Journal of the European Union ("**OJEU**") on 18 May 2020. Publication in the OJEU is the mandated method of announcing the conclusion of a public contract and the relevant date for a number of the limitation provisions in PCR 2015. There is no requirement under PCR 2015 for any further or additional form of publication. In circumstances where the award of the Contract was published in the OJEU it cannot plausibly be suggested that there has been any "*secrecy*" surrounding its award.

Second, it is incorrect to suggest that "*no other existing or prospective supplier of PPE was made aware of the possibility that the Defendant was seeking to let that contract...*".

On 10 April 2020, the Government issued a press release alerting to a "national effort on PPE". Around the same time, that call to arms was echoed by the Secretary of State in one of the Government's daily coronavirus up-date briefings.

Applications to supply PPE were then made through the website <https://www.gov.uk/coronavirus-support-from-business>. After businesses has registered they were contacted as necessary. Around 16,000 offers from suppliers were registered. It cannot therefore plausibly be suggested that actual or potential PPE suppliers were unaware of the opportunity to supply to the Government. Whether or not already active in the PPE market, a supplier was able to register and was then taken through the case management system, with suppliers being prioritised on the basis of volume offered, price and lead time.

Third, in so far as the Claimants seek to focus on the fact that the Interested Party has not previously sourced or supplied PPE, they overlook a key part of the Government's efforts in the circumstances of this

unprecedented national emergency, namely (and as widely reported in the press) to achieve the re-purposing of businesses so as to assist in dealing with the coronavirus pandemic. In the light of that objective, prior supply was not a criteria for qualification. That was an entirely legitimate and necessary approach.

Fourth, the suggestion that there has been maladministration of public funds because the Contract has been awarded to a company that has not supplied PPE for medical use before runs contrary to the principles of equal treatment and non-discrimination that lie at the heart of PCR 2015 (and the EU legislation that it implements). It also fail to recognise the overwhelming need for a re-purposing of existing businesses so as to deal with a national emergency so as to widen the pool of potential suppliers for PPE and other equipment.

Fifth, although the term of the Contract is for 12 months, it is for a defined amount of product, not an open-ended 12-month supply.

Sixth, the Interested Party provided the specification of the product to be supplied and it was evaluated and found to meet the published specification (see <https://www.gov.uk/government/publications/technical-specifications-for-personal-protective-equipment-ppe>). This specification reflects the clinical standards which are required.

In response to the application for urgent consideration we also respectfully repeat the points made in our letter of 12 June 2020. The Secretary of State is entitled to a reasonable opportunity to address the contents of the LBA and the serious allegations that it raises. Furthermore, as we have already explained, the Department for Health and Social Care currently faces unique and challenging circumstances which have obvious resource implications.

In the light of the Secretary of State's many competing priorities, it is respectfully submitted that the process set out in our letter of 12 June 2020 is appropriate and should be adopted and that the Claimants' application for urgent consideration should be refused. In particular, it would be an abuse of due process for the Claimants to be given permission now to amend their statement of facts and grounds without the Secretary of State being given an appropriate opportunity to consider and make representations regarding the proposed amendments.

Finally, we note that whereas correspondence has been copied to the Interested Party, it has not yet responded nor had any opportunity to respond to the application for urgent consideration. Its interests are clearly engaged and must be taken properly into account.

We stand ready to assist the Court with any further information it may require to determine the application.

Yours faithfully

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For the Treasury Solicitor

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