

WESTMINSTER CITY COUNCIL
ERDF FUNDING APPLICATION – SME BROADBAND CONNECTIONS
ADVICE NOTE

1. BACKGROUND

- a. We are instructed by Westminster City Council (the **Council**) in connection with the proposed application for funding from the European Regional Development Fund (**ERDF**), the primary purpose of which will be to offer grants of up to £2,500 to small to medium sized enterprises (**SMEs**) within the City of Westminster and the West End Partnership of Camden to enable them to connect to super-fast broadband networks.
- b. The proposed scheme (**Scheme**) is broadly similar in nature to the BDUK connection vouchers scheme, which ran from December 2013 until its close in October 2015. The proposed scheme would be demand-led, meaning SMEs would apply for a grant from the Council having first obtained quotes from an approved list of suppliers. Once the SME had chosen the supplier, WCC would pay for the relevant works (being the connection between the distribution point and the SME premises) up to the value of £2,500. Any cost above this figure would be borne by the SMEs themselves.
- c. The Council seeks answers to a series of questions in relation to the Scheme, particularly in respect of procurement and State aid. The answers to these questions are set out below.

2. ADVICE

- a. *Would the provision of a micro-grant of £2,500 be acceptable under the De Minimis regulation?*
 - i. Articles 107 and 108 on the Treaty of the Functioning of the European Union contain a general prohibition on the granting of aid by member states to undertakings (broadly, private businesses) as such aid is deemed to create unfair competition between businesses across the EU, which in turn has a negative effect on the functioning of the European common market. Four criteria must be present in order for aid to constitute State aid:
 - it must be granted by the State or through State resources;
 - it must favour certain undertakings or the production of certain goods;
 - it must distort or threaten to distort competition; and
 - it must affect trade between Member States.
 - ii. If all four criteria are satisfied – and unless an appropriate exemption applies or a pre-existing approved scheme exists – the aid must not be granted until it has been notified to (and approved by) the Commission of the European Union (the **Commission**). If it is granted in breach of these requirements it constitutes unlawful State aid and can be challenged either by (or on complaint to) the Commission itself or in the UK domestic courts. Aid which is found to be unlawful must be repaid by the recipient to the State with interest from the point at which it was granted.

- iii. In our view, the Scheme does satisfy all of the above criteria and would, in the absence of a suitable exemption, constitute unlawful State aid. However, the De Minimis exemption allows small amounts of aid that would otherwise be classed as unlawful State aid to be granted to undertakings (in this case, SMEs) on the basis that the sums involved are too small to distort competition.
- iv. Our view is that it would be acceptable, subject to the recipient concerned not having exceeded its permitted €200,000 rolling three year threshold, to use the De Minimis exemption. Whilst De Minimis aid does not require notification to the Commission, it does come with record-keeping requirements. To ensure compliance, we would advise that each recipient signs a declaration confirming the amount of the aid and also their receipt of the aid, and a statement that it would not result in the €200,000 threshold being exceeded. This declaration should be made yearly, with confirmation of the amount of aid received in the previous two years. A copy of this declaration must be kept safely as records by the recipient.

b. What are the procurement requirements of the SMEs on the scheme?

- i. The Scheme envisages that SMEs will themselves procure the supplier. SMEs, not being contracting authorities, fall outside the scope of the Public Contract Regulations 2015 (PCR 2015). Indeed, the sums involved would also place the scheme outside the scope of the PCR 2015 even if the SMEs had been contracting authorities). However, as the voucher will be ultimately funded by ESIF grant monies, the SMEs are not free to procure services entirely at their discretion (the funding is defrayed).
- ii. In situations where the PCR 2015 does not apply, the SME recipients must demonstrate that the selection process used to determine the supplier is consistent with treaty principles. These treaty principles are:
 - Equal treatment
 - Transparency
 - Non-discrimination
 - Mutual recognition
 - Proportionality
- iii. SMEs must also adhere to the Interpretive Communication, a document that sets out how the Commission expects certain organisations to demonstrate compliance with the treaty principles. As such, each SME needs to demonstrate a procurement process that opens up the market to competition. The Interpretive Communication does not, however, set out how the opportunity for the supply of connection services is to be advertised, but it does need to be “appropriate”. The following is issued as a guide:

Value of contract ⁴⁸	Minimum Procedure ⁴⁹	Advertising Required
£0 - £2,499 ⁵⁰	Direct award ⁵¹	None
£2,500 - £24,999 ⁵²	3 written quotes or prices sought from relevant suppliers of goods, works and services	None
£25,000 – Relevant Public Contracts Regulations threshold	Formal tender process in line with the Interpretative Communication and the relevant guidance set out in this chapter.	1) Advertised on Contracts Finder . and 2) the opportunity is advertised on the ESIF grant recipient's website for a reasonable time period ⁵³ .

- iv. As the maximum proposed grant is £2,500, which does edge into the second category above, we suggest that (save where applications are pooled – see below) each SME should for consistency be required to obtain three written quotes from suppliers.
- v. The SMEs should also be made aware that they will need to put in place a process which assesses the merits of each of the bids on an impartial basis. This involves:
- a contract description that is non-discriminatory;
 - designing the process so there is no direct or indirect discrimination;
 - making available the same information to all interested suppliers;
 - putting in place appropriate time limits;
 - managing potential conflicts of interest;
 - ensuring the rules of the bidding process are communicated to potential bidders;
 - applying the rules in the same way to all applicants; and
 - awarding the contract to a bidder on the merit of their bid and in line with the procedure communicated at the start of the process
- c. *Joint schemes – where suppliers aggregate demand amongst multiple SMEs and pool vouchers would there be a requirement for each SME to get three quotes if that value to that SME does not exceed £2,499?*
- i. The primary goal of pooling vouchers is to achieve efficiencies in the supply of the connection services, which will result in a lower overall cost to that supplier (enabling them to offer a better price to the pooled group as a whole). Where a building with multiple tenants (as an example) has pooled vouchers, we do not believe that it would be incumbent on all individual recipients to each obtain three quotes, regardless of the value for that particular recipient.
- ii. In our view, such a requirement would largely offset the benefits countered with the pooling and the procurement should occur on the basis of the pool itself seeking three quotes from suppliers (providing the total value of the vouchers would not exceed £25,000, at which point a formal tender process would be required).
- d. *Minimum connection speed: Based on the ERDF output guidance is it possible to have a minimum speed of 20Mbps as long as the solution has the potential to be increased to 30Mbps subject to the SME's needs?*

- i. In our view, the ERDF guidance is clear in that networks should be capable of providing at least 30Mbps. The emphasis is certainly on capability and not the initial speed so we would contend that providing the connection was capable of achieving at least (note the 'at least' element) 30Mbps then this should be sufficient.
- e. *Supplier registration process*
- i. The process set out in your email to me of 13 September at 23.08 is, in our view, the most appropriate approach to take. This would see a registration process being opened for a period of one month during which time suppliers can register interest providing they agree to an appropriate set of terms and conditions. Suppliers would also be required to demonstrate membership of an industry body and have experience of operating a similar public sector funded scheme.
 - ii. We cannot see that any formal procurement is required here given it is not WCC who will be in receipt of the works. It would be prudent, however, to require the suppliers to follow a robust registration process, not least from a PR perspective. WCC will not want its name attached to a scheme where suppliers have not met acceptable installation standards.
 - iii. As suggested, we would also recommend a set of terms and conditions are put together that govern the relationship between WCC and each of the suppliers. Care would need to be taken in drafting these terms and conditions

We trust the above is sufficient for your purposes, but please do not hesitate to get in touch should you have any additional questions.



PETER COLLINS

for and on behalf of Sharpe Pritchard LLP

26 September 2016