

Direct award of Covid-related contract to Public First gave rise to apparent bias

R (Good Law Project) v Minister for the Cabinet Office
[2021] EWHC 1569 (TCC)

References in square brackets are to paragraphs of the judgment

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Imogen Proud is instructed by the Secretary of State for Health and Social Care in *R (Good Law Project) v Secretary of State for Health and Social Care* HT-2020-0002226/291/292/419, referred to in this case note.

The judgment is available [here](#).

Overview

On 9 June 2021, the High Court (Mrs Justice O'Farrell) held that the decision of 5 June 2020 of the Minister for the Cabinet Office (Michael Gove MP) to award a contract for the provision of focus group and communications support during the Covid-19 pandemic (the "Contract") to Public First Limited ("Public First") gave rise to apparent bias. O'Farrell J held that the Claimant was entitled to a declaration that the award of the Contract was unlawful.

There are longstanding and personal and professional connections between Public First's directors and owners and Dominic Cummings, who was then Chief Adviser to the Prime Minister and on whose recommendation the contract was awarded. The appearance of bias arose because of the Defendant's "*failure to consider any other research agency, by reference to experience, expertise,*

availability or capacity" [168].

Two further grounds of challenge did not succeed, namely (1) that there was no basis for making a direct award under an emergency procedure and (2) that the award of the contract for a period of six months was disproportionate.

The Facts

Prior to 2020, the Prime Minister's Office and the Cabinet Office obtained information as to public attitudes towards government policy and communication through third party research services, obtained using a framework operated by the Crown Commercial Service known as the Research Marketplace Dynamic Purchasing System (the "RM DPS"). The RM DPS allows public authorities to buy market research services by running competitions among a list of registered suppliers. Public First was one of the registered suppliers [18].

By February 2020, it had become apparent that Covid-19 had created a national emergency. The Government decided that it needed an accurate understanding of public opinion to deliver guidance that would influence public behaviour to mitigate the spread of the virus [21].

Public First had already been contracted (under an unchallenged contract) to provide certain non-Covid-19 focus group services [20]. On 27 February 2020, it was asked to repurpose an existing group as a Covid-10 focus group research [26]. The following day, Mr Cummings made a strong recommendation that Public First should continue to conduct public opinion and behaviour research focus groups, which recommendation was followed [32]. The initial focus group work was carried out in early March 2020. Thereafter, the use of further focus group services from Public First was authorised on an iterative basis.

The Defendant made the direct award of the Contract on 5 June 2020 with retroactive effect, with an effective date of 3 March 2020 and an expiry date of 2 September 2020. The services and deliverables under the Contract included (1) recruitment and delivery of focus groups; (2) same-day top line reporting and next-day fuller reporting of focus group findings and (3) on-site resource to support Number 10 Communications.

In making the direct award, the Defendant relied upon the emergency procedure under Regulation 32(2)(c) of the Public Contract Regulations 2015 (the "PCR 2015") (see 'Relevant Law' below).

In July 2020, the services provided under the Contract were extended to cover qualitative research into EU exit topics and themes, re-building the economy following the Covid-19 crisis and attitudes to the UK Union. The total sum paid to Public First under the contract was £564,393.67.

The Claim

The Good Law Project brought a judicial review challenge to the award of the contract, advancing the following three grounds of challenge [4]:

1. **Ground 1:** there was no basis for making a direct award under Regulation 32(2)(c). The direct award of the Contract to Public First was not strictly necessary. The Government already had several existing contracts with other suppliers which it could have used to commission the work; alternatively the duration of the Contract and services commissioned under the Contract should have been restricted to a few weeks, enough time to meet the Defendant's needs, while it conducted a competitive procurement of the services.
2. **Ground 2:** the award of the Contract for a period of six months was disproportionate. Even if Regulation 32 were applicable, the Contract should have been restricted to the Defendant's immediate, short term needs, pending a competitive process to procure a longer term supply of the services.
3. **Ground 3:** the decision to award the Contract to Public First gave rise to apparent bias contrary to principles of public law. The Claimant's case is that the fair minded and informed observer would conclude that there was a real possibility of bias, having regard to the personal connections between the decision-makers and the directors of Public First.

The Defence

The Minister for the Cabinet Office disputed each ground of challenge as follows [5]:

1. **Ground 1:** The conditions for making an award under Regulation 32(2)(c) of the PCR 2015 were satisfied. The immediate and continuing provision of the research services provided by Public First were necessary to address the serious public health risks posed by the Covid-19 pandemic. There was no time to run an accelerated procurement under the open or restricted procedures, competitive procedures with negotiation, or to place a call off contract under any existing framework. Other potential suppliers were not used because they could not provide the requisite services.
2. **Ground 2:** The award of the Contract for a period of six months was not disproportionate. The scale of the national emergency was unprecedented in peacetime. The provision of the research services was essential to ensure effective communications of vital health messages to the public. The Defendant could not risk the Contract expiring before the peak of the

crisis had passed, as to which there was no certainty. It would have been disproportionate to divert resources from other critical tasks to conduct a procurement exercise for these services.

3. **Ground 3:** The Defendant's case was that, in all the circumstances of the case, a fair-minded and informed observer, who had knowledge of the facts, would not conclude that there was a real possibility that the decision maker was biased. The decision to award the Contract to Public First was based on its expertise, experience and availability to undertake the required specialist services that had to be delivered at speed. Personal connections were not relevant factors in the decision, as opposed to professional assessment.

Relevant Law

When awarding public supply or service contracts which have a value that is not less than the relevant threshold, contracting authorities must comply with the procedures set out in the PCR 2015, including the requirements for publication of public procurement competitions and minimum timelines for submission of tenders. Regulation 26 sets out the general rule that there must be competition for public contracts.

Regulation 32 of the PCR 2015 provides:

“(1) In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication.

(2) The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:-

...

(c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures of competitive procedures with negotiation cannot be complied with.

...

(4) For the purposes of paragraph (2)(c), the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.”

Judgment

Ground 1

The High Court noted that as Regulation 32(2)(c) “is a departure from the normal requirement” for a competitive process “it should be reserved for exceptional circumstances which make the alternative procedure strictly necessary” [87]. The burden of proving the requisite circumstances, contained in that Regulation, is on the Defendant [89]. “In each case it is a question of fact, objectively ascertained from the oral and documentary evidence, as to whether the necessary circumstances existed” [90]. In considering whether there was sufficient time for an expedited competitive process, “the court may take into account evidence as to the minimum time needed to conduct such procurement in practice” [91]. If Regulation 32(2)(c) is engaged, a contracting authority is permitted to negotiate directly with potential contractors; there is no requirement to publish a call for competition [92].

The High Court held that the Defendant was entitled to “decide that it needed further research on effective public communications through the use of additional focus groups”, and it was not for the court to evaluate that decision [97]. The issue for the court was “whether the Defendant has established that it was faced with a situation where, having determined an appropriate response, it was required to act as a matter of extreme urgency” [97]. In O’Farrell J’s judgment, the Defendant had established that it was so required [99].

The High Court accepted the Defendant’s witness evidence that there was no time to run an accelerated procurement under the open or restricted procedures, nor to place a call-off contract under an existing framework or through the dynamic purchasing system. The Claimant’s submission that the Defendant could have used existing contracts with other suppliers to commission the work was rejected on the basis that Regulation 32(2)(c) “is not concerned with the identity of the economic operator that could provide the most economically advantageous tender” and so the Defendant was at liberty to decide to obtain services from an agency with whom it did not have an existing contract [109].

The High Court rejected the Claimant’s argument that the contract period was too long on the basis that this submission was wholly dependent on the benefit of hindsight [116]. At the time of the award of the Contract, no one could foresee the extent or duration of the pandemic [117]. The Court accepted the Defendant’s evidence that he could not risk the Contract expiring before the peak of the crisis had passed.

The Claimant’s argument was likewise rejected that the Defendant used the Contract to commission services which significantly exceeded the initial scope of research for communications to mitigate the spread of Covid-19. This

complaint did “not give rise to a legitimate ground of challenge” since the JR was limited to the lawfulness of the Contract and to scrutiny of subsequent performance [123].

Ground 2

The High Court found that there was substantial overlap between Grounds 1 and 2 and Ground 2 failed for the same reasons as O’Farrell J had given under Ground 1.

Ground 3

In order to determine the allegation of apparent bias, the High Court applied the common law test for apparent bias formulated by Lord Hope in *Porter v Magill* [2002] A.C. 357, namely whether the circumstances would lead a fair minded and informed observer to conclude there was a real possibility that the decision maker was biased [137].

O’Farrell J found that “[t]he fact that individuals at Public First were known to and had worked with those involved in the decision making, including the Defendant and Mr Cummings, is insufficient to establish apparent bias” as this “did not preclude Mr Cummings from making a lawful judgment as to whether Public First was suitable for appointment” [146]. However, due to the personal connections which existed, “it was incumbent on those involved in the appointment of Public First to ensure that there was a clear record of the objective criteria used to select Public First over other research agencies so that they could allay any suspicion of favourable treatment” [147]. Given the absence of a tender competition, it was “incumbent on the Defendant to ensure that it could demonstrate that the procurement was nonetheless fair and impartial, namely, by producing evidence that objective criteria were used to select Public First over other research agencies” [153].

The Defendant argued that there were only two companies in the market who were able to provide the required services, and that Public First were known to be capable and were already in place conducting the research so using them was the most efficient course [157]. This argument was rejected because it was not part of the decision-making process at the time and did not stand up to scrutiny because:

1. No one identified the objective criteria against which Public First was determined to be the appropriate agency [159].
2. No one undertook any assessment of whether Public First was the most appropriate agency. No alternative agency was considered [160].

3. The Defendant failed to use the RM DPS to identify potential suppliers [161].
4. No other agencies were contacted to ascertain their experience or capacity [162].
5. There was no evidence to support the view that no other agency would have been appropriate [163].

Comment

This is one of a family of related, high-profile cases which the Good Law Project has brought in relation to Covid-19 contracts and governance during the pandemic. Mr Justice Chamberlain handed down judgment in the so-called 'Regulation 50' case (*R (Good Law Project) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin)) on 19 February 2021, in which he held that, when awarding goods and services during the Covid-19 pandemic, the Defendant had unlawfully failed to comply with his obligations under Regulation 50 of the PCR 2015 and with government policy which required him to publish certain tender and contract documents. Judgment is awaited, again from O'Farrell J, in *R (Good Law Project) v Secretary of State for Health and Social Care* HT-2020-0002226/291/292/419, four challenges to the award of nine contracts for the supply of PPE to three economic operators. The judgment in 'Public First' is therefore not the last or only word on the Government's approach to the award of contracts at the start of pandemic.

This member of the family is nonetheless a significant judgment. It gives important guidance on Regulation 32(2)(c) of the PCR 2015 (see in particular [83] – [93]). O'Farrell J provided welcome clarification that the requirement of "strict necessity" in Regulation 32(2)(c) means that "[e]ven if Regulation 32(2)(c) is engaged, the scope and duration of the procurement in question must be limited to what is strictly necessary" [93]. Nonetheless, the Court was clear that "Regulation 32(2)(c) does not limit the duration of any contract falling within its ambit to the shortest period of time required to conduct a competitive procurement exercise" [117]. The judgment also helpfully delineates the role of the Court. As O'Farrell explains, in relation to what was strictly necessary "[i]t is important to emphasise that the role of the court is to assess the lawfulness of the procurement process conducted by the contracting authority. The court does not have power to carry out its own assessment on the merits as to what alternative course the contracting authority might have taken against a number of legitimate options" [93].

In relation to apparent bias, the High Court has highlighted that although Regulation 24 of the PCR 2015 is concerned with the avoidance of actual conflicts, it is a useful indicator of the circumstances that might give rise to

apparent bias. On these facts, it was the Defendant's failure to "*consider any other research agency, by reference to experience, expertise, availability or capacity*" which led to the appearance of bias. It is implicit that the judge considered the Defendant would have had sufficient time to do so, despite the unfolding national crisis. It is left for a future case to consider whether time constraints may ever be so tight that even this requirement could be displaced.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.