

# Apparent bias in award of procurement contract to Public First Limited under regulation 32 PCR

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An article by Simon Taylor of Keating Chambers discussing the case of *R (Good Law Project Ltd) v Minister for the Cabinet Office [2021] EWHC 1569 (TCC)* which was handed down by O'Farrell J on 9 June 2021. The case, which is the latest instalment in a series of challenges to COVID-19-related government procurement brought by campaigning group the Good Law Project, makes some interesting points about claims of apparent bias in procurement.

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## Background

*R (Good Law Project Ltd) v Minister for the Cabinet Office [2021] EWHC 1569 (TCC)* related to the grant of a contract to Public First Limited (Public First) for focus group services at the start of the COVID-19 pandemic in March 2020 (formally awarded by decision of 5 June 2020) without an advertised tender process. It was brought by way of judicial review in the Administrative Court but transferred to the Technology and Construction Court (TCC). The challenge was based on regulation 32(2)(c) of the Public Contracts Regulations 2015 (*SI 2015/102*) (PCR 2015) and the common law doctrine of apparent bias.

## Facts

Regulation 32(2)(c) of the PCR 2015 allows the use of the negotiated procedure without prior publication to the extent necessary where, for reasons of extreme urgency brought about by unforeseeable events, the authority is unable to comply with the stipulated time limits. The Good Law Project (claimant) relied on three grounds of challenge. These were that:

- There was no basis under regulation 32(2)(c) of the PCR 2015 to make the direct award as other existing suppliers (such as Britain Thinks) could have been used or the duration ought to have been restricted to a few weeks to allow for a competitive procurement (ground one).

- The six-month duration of the contract to Public First was disproportionate. The claimant's case was that even if regulation 32 applied, 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 (ground two).
- The decision to award the contract to Public First gave rise to apparent bias given the personal connections between the decision-makers (Dominic Cummings in particular) and the directors of Public First (ground three).

The defendant disputed these grounds and claimed also that the claimant had no standing to bring the challenge.

## Ruling

On 9 June 2021, judgment was handed down by O'Farrell J who found as follows on the grounds of challenge.

### Grounds one and two

The issue for the court to decide in relation to ground one was whether the defendant was entitled to rely on regulation 32(2)(c) of the PCR 2015 to make a direct award of the contract without any competition. O'Farrell J rejected ground one for the following reasons:

- The defendant was entitled to decide that it needed focus group-related services to inform its communications policy in response to the COVID-19 pandemic.
- There was extreme urgency due to the COVID-19 pandemic and it was not disputed that this was unforeseeable.
- The time limits for a fresh procurement exercise could not have been complied with in the circumstances.
- The work was needed from a different provider than Britain Thinks and other existing contractors were not suitable.
- The required duration of the service was unclear and the argument that it was too long was based on hindsight.
- The court was not prepared to interfere with the scope of the contract which was a matter for the defendant.

Given the substantial overlap between ground two (proportionality) and ground one (which the parties recognised), O'Farrell J held that ground two failed for the same reasons as set out in ground one.

### Ground three: apparent bias

In relation to ground three, O'Farrell J was satisfied that the claimant had established its case that the circumstances in which the contract was awarded to Public First gave rise to apparent bias. Therefore, the claimant was entitled to a declaration that the decision to award the contract to Public First gave rise to apparent bias and was unlawful.

The test for apparent bias was stated by Lord Hope in *Porter v Magill [2001] UKHL 67* at paragraphs 102 to 103: "The question is whether the fair minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal was biased." This is an objective test based on all the factual circumstances. Those included the fact that Dominic Cummings had personal and professional connections with the directors of Public First. It was held that this was not of itself a ground for his recusal from the decision-making process but made it incumbent on those involved to ensure that there was a clear record of the objective criteria used to select Public First over other research agencies.

O'Farrell J referred to the provisions on conflicts of interest in regulation 24 of the PCR 2015 as a useful indicator of the sort of circumstances in which a conflict may arise ("any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure"). Regulation 24 requires public bodies to "take appropriate measures to effectively prevent, identify and remedy" those conflicts. However, O'Farrell J stated at paragraph 149 that regulation 24 is "primarily

concerned with the avoidance of actual conflicts” rather than apparent bias.

She further held that the permitted departure from the normal procedural requirements also made it incumbent on the defendant to be able to show that the process followed was nonetheless fair and impartial.

Evidence was given on why Public First were chosen (Dominic Cummings: “as a result of my suggestion I expected people to hire Public First”) and why there was no suitable alternative. However, it was found by O’Farrell J that the defendant’s view that other companies did not have the relevant experience was not part of the decision-making process at the time and was not supported by evidence. No one identified the objective criteria against which Public First would be determined to be appropriate or contacted alternative agencies to assess their experience and capability. It was this factor which, on the court’s finding, would lead the fair-minded and informed observer to conclude that there was a real possibility or a real danger that the decision-maker was biased.

The (uncontested) evidence that there was no actual bias was not a defence to the allegation of apparent bias.

Finally, it was held that the Good Law Project had standing to bring the claim. First, the claimant had a sincere interest in promoting good public administration. Second, the finding that the current claim was not one that an economic operator could be relied on to bring given the absence of a procurement and the difficulty in showing financial loss. Third, the gravity of the issues raised justify the scrutiny of the court and where appropriate the grant of a public law remedy. The learned judge adopted with approval the analysis of Chamberlain J in *R (Good Law Project Ltd and others) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin).

## Commentary

In another COVID-19-related challenge brought by the Good Law Project to a direct award (*R (Good Law Project Ltd) v Secretary of State for Health and Social Care* [2020] EWHC 3609 (TCC)), a ground for which permission was given (by Jefford J) was that, even if the direct award (in that case for a personal protective equipment contract) was permitted under regulation 32(2)(c), the defendant failed to conduct a fair and transparent process which applied equally as between prospective suppliers. This does not appear to have been raised as a ground in this claim, perhaps on the basis that it was not needed due to the apparent bias claim.

However, the court’s main objection to what happened was not Dominic Cummings’ involvement, but the failure to carry out and record a process for assessing the experience and capabilities of alternative prospective suppliers. It is certainly arguable that the regulation 32 “negotiated procedure without prior publication” requires this process before the direct award is made and, even if it does not, regulation 18 (which is not excluded by regulation 32) imposes a general requirement of transparency and equal treatment.

Additionally, regulation 24 appears to be sufficiently broad to cover apparent bias in the circumstances of this case as it applies to a “personal interest which might be perceived to compromise ... impartiality”.

Grounds based on the PCR 2015 might therefore have been enough for a declaration of unlawfulness. As it turned out, the claimant did not need these PCR 2015 grounds as it succeeded on apparent bias and obtained the declaration sought. The relief did not include the set aside of the decision but possibly this was not sought because the contract had expired by the time the case came to trial.

This case is clearly precedent for a successful judicial review challenge based on common law principles of apparent bias in a procurement case. There are two potential difficulties with this.

First, if it is correct that the PCR 2015 provides an equivalent basis for the claim, it would seem more consistent with the statutory intent to rely on the PCR 2015 rather than common law principles to challenge a procurement decision. Indeed, an economic operator may well be refused permission to bring a judicial review based on apparent bias if a suitable alternative remedy is available under the PCR 2015.

Equally, if apparent bias goes beyond the PCR 2015, it is subject to the potential defence that the public body is not required

to comply with the full gamut of public or common law principles when taking a procurement decision which is subject to the rule framework in the PCR 2015. A similar argument succeeded in *Ryhurst Ltd v Whittington Health NHS Trust* [2020] EWHC 448 (TCC) at paragraph 58 (see [Legal update, NHS trust's decision to abandon procurement exercise did not breach EU principles of transparency, equal treatment and proportionality \(TCC\)](#)).

Second, the usual remedy for apparent bias in common law is to disqualify the tribunal or set aside the decision affected by apparent bias (*R (Al-Hasan) v Secretary of State for the Home Department* [2005] UKHL 13 at paragraph 43). The position may be different under the PCR 2015 where there is a causation requirement (regulation 91 requires a claimant to show that it has suffered or risked suffering loss or damage), damages are available as an alternative to set aside of the decision and, once entered into, a contract is only set aside if the grounds of ineffectiveness are met.

This could matter in judicial review cases where the remedy is at issue and the apparent bias is found not to have had any impact on the outcome. For example, in this case, if the evidence that there were no suitable alternative providers had been accepted, the court might have found that the same decision would have been taken even if potential providers had been contacted before the direct award was made. That finding could potentially defeat a claim brought by an economic operator under the PCR 2015 on causation grounds or at least be sufficient to avoid a set aside remedy. But it is less obvious that it would defeat a claim based on apparent bias and it is difficult to see why a non-economic entity given standing to bring a judicial review claim should be in a better position than an economic operator under the PCR 2015.

One solution may be that in those judicial review claims, the court would exercise its discretion and decline to set aside a procurement decision affected by apparent bias unless there was some indication either of actual bias or a causative effect on the decision. Another could be to grant standing for claims such as this on condition that the procurement challenge is brought under the PCR 2015 and that its rules on causation and remedies are followed.

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