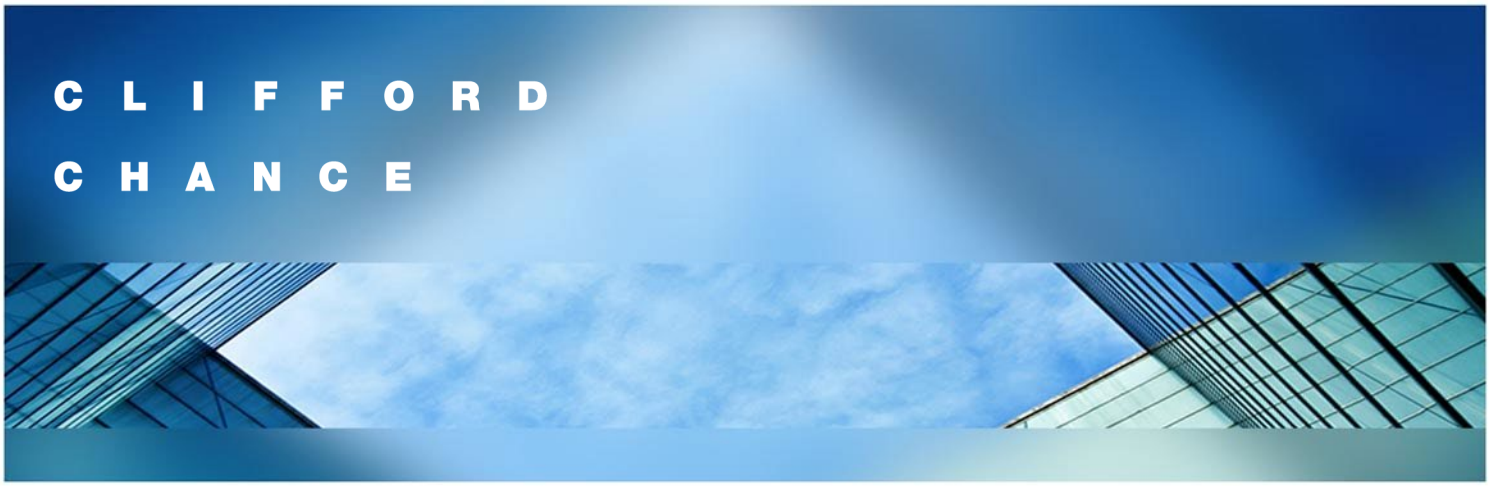

KICKING THE 'CAN' DOWN THE ROAD FALLS FOUL OF UK PROCUREMENT LAW: THE HIGH COURT'S JUDGMENT IN *GOOD LAW PROJECT*

The High Court has ruled on the legality of decisions made by the Secretary of State for Health and Social Care on the publication of details of contracts awarded for personal protective equipment in the first wave of the Covid-19 pandemic. The case gives important guidance on who has standing to challenge procurement decisions, and whether public authorities are bound by their own published guidance.

BACKGROUND

The outbreak of the Covid-19 pandemic resulted in an unprecedented demand for critical and urgent medical countermeasures and emergency care services as governments across the world scrambled to halt the outbreak and protect the health and wellbeing of their citizens.

The UK government alone had awarded more than 8,600 contracts (valued at £18 billion) in response to the outbreak by July 2020, with the vast majority (86%) being awarded by the Department of Health and Social Care ("**DHSC**") for the supply of Personal Protective Equipment ("**PPE**") and other vital goods. By comparison, the total value of all contracts awarded by DHSC during the 2019 to 2020 tax year was c. £1.2 billion. Though existing procurement rules enable the government to award contracts directly and without competition, the processes in place to ensure transparency of each award buckled under the sheer volume of new awards, not least within DHSC.

The Good Law Project, a not-for-profit public interest litigation organisation, and opposition MPs Debbie Abrahams, Caroline Lucas, and Layla Moran, brought judicial review proceedings against the Secretary of State for Health and Social Care for DHSC's alleged lack of transparency.

They claimed he had (i) breached regulation 50 of the Public Contract Regulations ("**PCR**") (requiring the publication of a Contract Award Notice ("**CAN**") within 30 days of awarding the contract) (ii) breached a common law duty to abide by government guidance (to publish contracts exceeding £10,000 in value within 20 days of award or the end of the standstill

Key take-aways

- A challenge was brought by the Good Law Project, a public interest litigation organisation, and three opposition MPs, against the Secretary of State for Health and Social Care, over Covid-19 PPE contracts
- The case clarifies that claimants can overturn procurement decisions based on failures to comply with published government procurement policies (such as PPNs): "policy" cannot be dismissed as "mere guidance"
- The case -re-confirms that challenges can be brought by non-bidders who are not "economic operators"

"[We] found specific examples where there is insufficient documentation on key decisions, or how risks such as perceived or actual conflicts of interest have been identified or managed. In addition, a number of contracts were awarded retrospectively, or have not been published in a timely manner… While we recognise that these were exceptional circumstances, there are standards that the public sector will always need to apply if it is to maintain public trust."

National Audit Office, 26 November 2020

period), and (iii) unlawfully adopted a policy of "de-prioritisation" of compliance with applicable procurement rules and guidance.

The Court refused the three MP Claimants standing in the case, and granted standing to the Good Law Project on the grounds that its interest in the matters in dispute and the gravity of the alleged breaches justified it.

The average time for publication of CANs from the date of contract award was 47 days for COVID-related contracts, compared to 29 days for non-COVID-related contracts. The Secretary of State did not seek to argue that the workload or resources of the DHSC, nor the unprecedented public health emergency facing the government, provided justification for non-compliance with the 30 day requirement under PCR regulation 50. The Secretary of State conceded that DHSC was in breach of regulation 50, but disputed that it had a common law duty under the government's published transparency guidance.

The Court gave declaratory judgment that the Secretary of State had breached both regulation 50, and his duty to abide by applicable government transparency guidance absent good reason to the contrary. He found in favour of the government in relation to the allegation of "de-prioritising" compliance, and held that no evidence provided a basis to find there was such a policy.

GUIDANCE CAN CREATE LEGAL OBLIGATIONS

The Court held that the Secretary of State had failed to comply with the policy and principles set out in the government guidance note *Publication of Central Government Tenders and Contracts: Central Government Transparency* and *Procurement Policy Note – Update to Transparency Principles* (together the "**Transparency Policy**"), which require publication of the provisions of any contract with a value over £10,000, and advised that contracts should be published within 20 days following the award of the contract, or the end of the standstill period.

Applying precedent allowing the Court to enforce published guidance against public authorities, Mr Justice Chamberlain observed that the 20-day time limit is a precise one, and noted that publication of contractual terms is an important element of the government's policy commitments to transparency, which served to uphold "the functioning of competitive, innovative and open markets by providing all businesses with information about public sector purchasing and service providers' performance". That aim would be significantly undermined if the 20-day time limit had no legal constraint at all on government, even in the absence of good reason for departing from it. The government offered no evidence that it had considered modifying the 20-day time limit.

Transparency: a new policy on the horizon

Among the furore of the Court's finding that the Secretary of State had "breached his legal obligation" by failing to publish CANs on time, the Court also concluded that the Secretary of State had a common law duty to comply with government policy to publish the contract (and therefore, in essence, the award decision) within 20 days following the end of the standstill period (or from the contract award date when there is no requirement to hold a standstill period such as direct awards). This presents a conflict of duties for contracting authorities, in light of the PCR regulation 52(3) requirement that no information contained in CANs is published prior to the 30-day time limit to publish CANs.

We expect that Cabinet Office will be publishing updated guidance shortly.

As such, the Court held that the Secretary of State had unlawfully failed to comply with the Transparency Policy.

MEMBERS OF PARLIAMENT DENIED STANDING IN COURT

As is becoming increasingly commonplace in judicial review cases, three opposition MPs joined the Good Law Project as claimants. The Court denied the MPs standing in the dispute, meaning that they were barred as parties to proceedings. The most common claimant in a procurement challenge are rival economic operators who have lost out on contracts. However, the Court held that in this instance, a challenge alleging breach of the transparency obligations imposed by the PCR 2015 and associated policies is not one that an economic operator can realistically be relied upon to bring.

Mr Justice Chamberlain stated that *"[n]o doubt, the addition of politicians as parties may raise the profile of the litigation. It may make it easier to raise funds. But these are not proper reasons for adding parties. In a case where there is already a claimant with standing, the addition of politicians as claimants may leave the public with the impression that the proceedings are an attempt to advance a political cause, when in fact their sole legitimate function is to determine an arguable allegation of unlawful conduct*."

The Court reiterated that being personally “affected in some identifiable way” by the challenged decision was not a precondition of standing, and held that the Good Law Project was a better placed Claimant to bring the challenge than the MP claimants. The test set out in *Chandler* [2009] EWCA Civ 1011, permits standing to challenge a procurement decision if: (i) despite not being an economic operator, a claimant "has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way", or (ii) the gravity of a departure from public law obligations justifies the grant of a public law remedy. Applying this rationale to the Good Law Project, Mr Justice Chamberlain held that:

> *"It has a sincere interest, and some expertise, in scrutinising government conduct in this area. There is no allegation (and no evidence) that it is seeking to use the public procurement regime as a tool for challenging decisions which it opposes for other reasons. There is no dispute about the importance of the transparency obligations it claims have been breached. As to the “gravity” of the alleged breaches, they relate to contracts worth (at least) several billion pounds; and there is a pleaded allegation (in respect of which permission has been granted) that they result from a deliberate policy on the part of the Secretary of State. To my mind, there is a powerful public interest in the resolution, one way or the other, of the issues raised. "*

This case follows in a long and recently growing line of judicial review challenges brought by MP claimants seeking to pursue political causes in the courts, perhaps most notoriously in the case of the SNP MP Joanna Cherry QC in Miller No.2 [2019] UKSC 41.

This judgment is unlikely to dissuade MPs from seeking standing in future judicial reviews: no additional ground of challenge was made available in this case by their addition as claimants, and the Good Law Project was held to be better placed. The outcome on standing would likely have been different if the Good Law Project had not been a claimant, or if the MPs had added a legal avenue of challenge to those already available to the Good Law Project.

Look beyond competitors for potential challengers

This judgment confirms that public authorities must look beyond solely competitor businesses in assessing judicial review risk, and take into account the political sensitivity of their decisions as they shape their decision-making. A review of judicial review law in the UK is underway by government, however this is unlikely to narrow the scope of the standing rules – which remain potentially generous following this decision.

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