

‘Direct award of government contract to “Public First” unlawful’ (R (Good Law Project) v Minister for the Cabinet Office (Defendant) Public First (Interested Party))

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Public Law analysis: The court found that a decision by the Minister for the Cabinet Office to directly award a contract for research to inform the government’s communications strategy during the coronavirus (COVID-19) pandemic to the interested party, Public First, was unlawful. Public First had personal and professional connections to both the Minister himself and to Dominic Cummings (then special adviser to the Prime Minister). The judge accepted that the defendant had been entitled to rely on the truncated procedure under regulation 32(2)(c) of the Public Contracts Regulations 2015 (PCR 2015) to make the award, and accepted that the term of six months was not disproportionate. However, the use of regulation 32(2)(c) did not relieve the defendant of the requirement to conduct the procurement so as to demonstrate a fair and impartial process of selection. In the circumstances, the failure to consider any other research agency by reference to objective criteria gave rise to an appearance of bias. Written by Siân McGibbon, barrister at 4-5 Gray’s Inn Square.

R (on the application of Good Law Project Ltd) v Minister for the Cabinet Office [\[2021\] EWHC 1569 \(TCC\)](#)

What are the practical implications of this case?

The judgment is significant for the recognition that the use of PCR 2015, [SI 2015/102, reg 32\(2\)\(c\)](#) (which was held to be lawful in the circumstances of this case) ‘did not exonerate the defendant from conducting the procurement so as to demonstrate a fair and impartial process of selection’, by ‘producing evidence that objective criteria were used’ to select the contractor. The personal connections between the decision-maker and the contractor did not in principle require recusal or prevent the decision-maker from carrying out an objective assessment of the merits of the award. Rather, the appearance of bias arose because on the facts of this case the defendant had failed to show that such an objective assessment had taken place.

The ruling will also attract interest for the judge’s comments on standing. In holding that the Good Law Project had sufficient interest to establish standing to bring the claim, the court noted that the organisation had ‘expertise and experience’ as well as ‘sincere interest’ in good administration; that it was unrealistic to suggest that any economic operator might have brought the claim in circumstances where there had been no competition and thus there were no ‘disgruntled bidders’ (as might be expected under the standard procedure); and that the gravity of the issues raised justified the scrutiny of the courts. The decision on this point will have implications in a number of similar outstanding challenges to contracts awarded under PCR 2015, [SI 2015/102, reg 32\(2\)\(c\)](#) during the pandemic.

What was the background?

The claimant applied for judicial review of the defendant’s decision to award a six-month contract to public policy research agency ‘Public First’ for the provision of focus group and other services to support the government’s communication strategy in response to the coronavirus pandemic. The contract was awarded on 3 March 2020 without public notice of competition, under PCR 2015, [SI 2015/102, reg 32\(2\)\(c\)](#), on the basis that the circumstances were changing rapidly and the services were required urgently. Both the defendant and Dominic Cummings (at the time special adviser to the Prime Minister) had personal and professional connections to the founders and directors of Public First. A total of £564,393.67 was ultimately paid to Public First under the contract.

The claimant argued that the award was unlawful on three grounds:

- there was no basis for making a direct award as the conditions of urgency and strict necessity were not met in relation to focus group and communications support
- the contract period of six months was disproportionate to any urgency which did exist, and the defendant should have awarded a shorter contract to provide services only until it had had opportunity to carry out a full tender process
- the award gave rise to an appearance of bias contrary to principles of public law, having regard to the connections between the decision makers and the directors of Public First

What did the court decide?

The court held that the defendant had been entitled to use PCR 2015, [SI 2015/102, reg 32\(2\)\(c\)](#) and that the contract awarded was proportionate in the circumstances. However, when making an award under PCR 2015, [SI 2015/102, reg 32\(2\)\(c\)](#) the defendant was required to demonstrate that the procurement was fair and impartial notwithstanding the absence of a tender competition. This could be achieved by evidencing that objective criteria were applied when selecting Public First over other potential candidates.

The application was granted on the third ground only, that the award gave rise to an appearance of bias. The judge accepted that a fair minded and informed observer would have taken into account the need to procure urgently and the benefits of drawing on Mr Cummings' contacts and previous experience in order to do so. She further accepted that Mr Cummings' professional and personal connection to the contractor did not in principle prevent him from making an impartial assessment of Public First's ability to deliver the required services; she rejected the claimant's argument that this required his recusal, particularly as his relationship with Public First was a matter of public record. However, the judge found that an appearance of bias was created by the failure to consider any other potential candidate for the contract by reference to objective criteria such as experience, expertise, availability or capacity; in the circumstances this failure would cause a fair minded and informed observer to conclude that there was a real possibility or real danger that the decision maker was biased.

The court accepted that the Good Law Project had standing to bring the claim, recognising the organisation's expertise and genuine interest in good administration, the importance of the issues raised, and the fact that challenge by an economic operator was unlikely in circumstances where there had been no competition.

Case details:

- Court: Technology and Construction Court, Queen's Bench Division, High Court of Justice
- Judge: Mrs Justice O'Farrell DBE
- Date of judgment: 9 June 2021

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