Welcome clarification on emergency procurement powers

Good Law Project v Cabinet Office and Public First

Harry Gillow, Barrister, Monckton Chambers

19 January 2022

Michael Bowsher QC, Ewan West, and Anneliese Blackwood (with Sir James Eadie QC) acted for the Minister for the Cabinet Office, instructed by the Treasury Solicitor. Alfred Artley was also instructed on the Minister's behalf at an earlier stage in the proceedings.

The Facts

The facts of this case may be familiar. In late February 2020, the need for the Government to respond to the coronavirus pandemic was becoming ever more urgent and apparent, which required – in particular – accurate information on the public's understanding of Covid-19 at the time. On 27 February 2020, Mr Alex Aiken, Executive Director for Government Communication, raised with his team the need for urgent focus group testing of Covid-19 issues, the results of which could be provided to No. 10 at 15.00 the following day. Public First – the interested party in this case – was already scheduled to conduct focus groups on the evening of the 27th, and it was suggested that these focus groups be re-tasked to conduct the necessary Covid-19 research.

Public First had been appointed by the Cabinet Office in early February 2020 for the discrete task of providing focus group services to test public opinion and policies in preparation for the Prime Minister's speech planned for later that month, ahead of the budget. While the founders and directors of Public First, Rachel Wolf and James Frayne, had previously worked for Michael Gove MP, and alongside Dominic Cummings, neither had any involvement in the initial appointment of Public First.

Public First's initial Covid-related activities were carried out without a formal contract in place; the scope and value of the eventual contract were discussed between March and April 2020. Following the recommendation of a direct award to Public First by the Crown Commercial Service ("CCS"), the contract

was contained in a letter from the Minister dated 5 June 2020 and an email from Public First dated 8 June 2020, with an effective date of 3 March 2020 and an expiry date of 2 September 2020. On 12 June 2020 notice of the contract award was published on the Government "Contract Finder" website. The contract was awarded to Public First without public notice or competition, on the basis of Regulation 32(c) of the Public Contracts Regulations 2015 ("PCR"), which allows a public authority to make an award under the negotiated procedure without prior publication "*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 or competitive procedures with negotiation cannot be complied with*."

Public First initially provided recruitment and delivery of focus groups covering the general public and key sub-groups defined by demographic, life stage or other agreed criteria, same-day top line reporting and next-day fuller reporting of focus group findings, and on-site resource to support Number 10 Communications. In July 2020, the services 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 United Kingdom union.

The Appeal

Before O'Farrell J in the in the High Court, the Good Law Project had brought a judicial review on the grounds that:

1. There was no basis for making a direct award under Regulation 32(2)(c), as the direct award of the contract to Public First was not strictly necessary;

2. The award of the contract for a period of six months was disproportionate. Even if Regulation 32 was applicable, the contract should have been restricted to the Minister's immediate, short-term needs, pending a competitive process to procure a longer-term supply of the services;

3. The decision to award the contract to Public First gave rise to apparent bias contrary to principles of public law. 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.

Importantly, no challenge had ever been brought by any potential competitor to Public First – the normal route for challenge under the PCR by a disappointed bidder following contract award. The judge nevertheless ruled that the Good Law Project had standing to bring the claim and rely on the PCR, as well as the

challenge on the basis of apparent bias.

O'Farrell J rejected the first two grounds of review sought, but allowed the claim on the basis of apparent bias, based on a combination of the personal association between Dominic Cummings, the then Chief Adviser to the Prime Minister, and the directors and owners of Public First (which she found did not in itself to give rise to any apparent bias) and the Minister's failure to consider any other research agency or to keep a record evidencing that objective criteria were used to select Public First over other research agencies.

The Minister appealed against the finding of apparent bias (but not did not seek to appeal the judge's findings on standing). The Good Law Project cross-appealed against O'Farrell J's dismissal of its first two grounds in the claim.

The Court of Appeal's judgment

The Good Law Project's cross-appeal

The Court first considered the Good Law Project's cross-appeal. On the first of the Good Law Project's claims under this heading, that the award of the contract to Public First was not "strictly necessary" as required under Regulation 32(C) PCR, the Good Law Project made three submissions: (i) that the Minister already had existing contracts with suppliers which it could have used to commission this work; (ii) that the contract award was for too long a duration, as it was not strictly necessary to award Public First a six-month contract from March 2020, and to continue commissioning services from them in April, May, June and July 2020; and (iii) that the scope of the contract was not "strictly necessary" because work that was unrelated to the pandemic was carried out in the later stages of the contract.

The Court rejected the first of these on the basis that the Cabinet Office was entitled to exercise its judgment about which suppliers were capable of carrying out the services required. The requirements of Regulation 32(c) were "*not subject to artificial constraints of the sort contended for by Good Law*" and "*[i]t would be wrong in principle to find that a contracting authority in a situation of extreme urgency could only contract with existing suppliers irrespective of their judgement about who was the most appropriate supplier of the services urgently needed*."

In respect of the Good Law Project's submission on the length of the contract, the Court of Appeal noted the "*first difficulty*" that this was "*inescapably dependent on the benefit of hindsight*": at the time the contract was made, at the height of the original Covid-19 crisis, it was impossible for anyone to say that such a period was too long or more than was strictly necessary.

Furthermore, the original proposal of a nine month contract had been reduced to six, which demonstrated that that the length of contract had been actively considered by the Minister: even if "*strictly necessary*" meant "*until such time as a properly procured contract could be put in place*", there was nothing to say that six months (even under the accelerated procedure) was not a reasonable estimate of how long it might be before such a contract was placed. In any case, the contract was "pay as you go", meaning that Public First were only paid for the services that they were actually asked to provide, on a case-by-case basis. Given that there were also various termination provisions which in certain circumstances allowed the contract to be terminated sooner than six months, the Court considered that "*the overall duration of the contract was of secondary importance*."

On the third submission, the Court agreed with O'Farrell J that the scope of work was defined in general terms and that if, in June/July 2020, work was done under the contract that did not relate to the pandemic, that was a question of contract performance, rather than the terms of the contract and the procurement decision, and that there was nothing objectionable about the scope of the contract. If there had been a complaint that the contract had been unlawfully modified, then this could have been challenged by an economic operator under Regulation 72 PCR – such a challenge had never been brought, and the Good Law Project did not seek to rely on the provisions of Regulation 72.

The Cabinet Office's appeal

The Court started from the position that it was important to examine the claim of actual or apparent bias by reference to the Good Law Project's pleaded case, which argued that the "fair minded and informed observer" would have concluded there was a real possibility of bias as a result of:

> *"(i) The longstanding and close personal and professional connections between (a) [Public First's] directors and owners and (b) the Rt Hon Mr Gove, Mr Cummings and the Conservative Party…;*
>
> *(ii) The decision to award the Contract to [Public First] without any form of competition;*
>
> *(iii) The ability of other providers, such as YouGov PLC and the Kantar Group, to provide the Contract services; and*
>
> *(iv) The extremely high price of the Contract (£840,000) for only 6 months' focus group and communications services."*

O'Farrell J had ruled that while the connections between individuals at Public First and the Minister and Dominic Cummings, alongside the (permitted)

departure from the usual procedural requirements of the Regulations, did not give rise to real or apparent bias in and of themselves, they did mean that it was "incumbent" on the Minister to demonstrate the absence of bias by means of a clear record of objective criteria leading to the selection of Public First. Likewise, the difficulty with the Minister's justification of the failure to consider other providers was that it was "*not part of the decision-making process at the time that the decision was taken to appoint Public First*."

Having considered the case law on bias, the Court stated that while "[t]he judge and the parties proceeded on the premise that the common law principles of apparent bias were applicable to the facts of the instant case … [the Court was] in some doubt that the common assumption was correct." As this was not, however, under appeal, the Court proceeded on the assumption, "in Good Law's favour", that the common law principles of bias were properly engaged, and that when considering what the "fair minded and informed" observer would have thought, it was important to bear in mind that "[t]he fair-minded and informed observer is someone who reserves judgment until both sides of any argument are apparent, is not unduly sensitive or suspicious, and is not to be confused with the person raising the complaint."

The Court proceeded to note that their conclusions on the cross-appeal (see above) effectively disposed of the Good Law Project's second pleaded point above, relating to the decision to award without competition. In respect of the third and fourth points, the ability of other providers to fulfil the needs of the contract had not been established on the facts, and there were no adverse findings in relation to the value of the contract – the Judge had found this irrelevant to the question of apparent bias.

The only allegation that therefore needed to be addressed was the first, that the relationship between the directors and owners of Public First and Mr Cummings and the Conservative Party led to apparent bias.

The Court held that the findings of O'Farrell J – which led to her conclusion in favour of the Good Law Project on the apparent bias point – that the Minister had breached an unspecified obligation to carry out a process that involved a formally documented consideration of other research agencies – was at odds with the finding that the Minister was at the same time justified in using a negotiated procedure without prior publication, something which did not require consideration of any other agencies. As the Court stated, it was "*unable to accept that in these circumstances the impartial and informed observer would, in effect, require the creation of a common law "procurement regime-light" in the absence of which he would think there was a real possibility of bias. This is sufficient to determine the appeal*."

The Court also considered that there were "real problems in the approach

to the evidence": the evidence of the Government's witnesses should have been accepted in the circumstances of this case, and there was no need for a contemporaneous record of the Minister's thought processes – assessing all the relevant information, "t*he fair-minded and reasonably informed observer would not have concluded that a failure to carry out a comparative exercise of the type identified by the Judge created a real possibility that the decision-maker was biased. Equally, the fair-minded and informed observer, realising, amongst other things, that the use of a negotiated procedure without prior publication (with Public First) was strictly necessary because of the pandemic emergency, would not have found the absence of any formal record of the decision-making process indicative of apparent bias.*"

The Court therefore dismissed the cross-appeal and allowed the Minister's appeal

Discussion

The findings of the Court will doubtless come as a relief to public authorities, particularly those who have been forced to contract under considerable pressure and unusual circumstances during the pandemic. In particular, the Court's focus on the need to accept the Government's evidence and the assumption that the fair-minded and reasonably informed observer will be aware of all the circumstances, including facts ascertained on investigation by the court should reassure public authorities that the courts will, absent good reasons to the contrary, give significant weight to their evidence as to the reasons for entering into a contract.

More interesting, however, are the areas in which permission to appeal was not sought, but where the Court of Appeal nevertheless expressed strong reservations about the approach of the High Court at first instance. In particular, the Court's statement that "*[t]he question of standing for complete strangers to the procurement process with no commercial interest both under the Regulations and on public law grounds is a question ripe for review when it next arises*" will certainly be read with significant interest by procurement practitioners. As the Court noted, "*a party with no potential interest in a contract [obtaining] a declaration of unlawfulness on the basis of apparent bias in respect of a decision by a public body to grant a private law contract*" is "*an unprecedented outcome*". This will likely encourage public authorities facing a challenge by parties lacking an obvious economic interest of their own in the outcome of a procurement to take a much more confident approach in future to challenging standing, and may have ramifications beyond the procurement law field.

Furthermore, the Court's hesitation about whether the common law principles of bias applied to the case is likewise notable. The Court has signalled a

reluctance to approve the extension of these principles to situations where – due to the absence of any competition – there was no adjudicative process at all. This issue is also ripe for further exploration should it recur in future appeals.

Overall, the Court of Appeal has taken a robustly restrictive approach to the Good Law Project's challenge, which will no doubt be of considerable importance to future procurement challenges of this nature. The recognition that the extraordinary circumstances of the pandemic justified a departure from normal procedural requirements is welcome, as is the Court's doubt on whether the Good Law Project properly had standing to bring its claim. It will be interesting – to say the least – to see how these issues are handled in future cases.

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.

Monckton Chambers
1 & 2 Raymond
Buildings
Gray's Inn
London, WC1R 5NR

Tel: +44 (0)20 7405 7211
Fax: +44 (0)20 7405 2084
Email: chambers@monckton.com
www.monckton.com