

# Gloves, Gowns and Masks – the PPE Judicial Reviews Procurement during a pandemic

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# Introduction

- Background to the PPE Judicial Reviews
- The key legal issues
- How those issues have been decided at the permission stage
- Practical tips to reflect on when procuring in urgent situations

# Background

- March 2020 – the pandemic
- Government “Coronavirus Support from Business Scheme”
- Pestfix, Clyndeborne, Ayanda contracts
- The judicial reviews – claimants seeking a declaration that the award of the contracts was unlawful and/or a quashing order
- Permission decision – 17 November 2020 (Pestfix)

# The legal issues in the case

Issue	Permission granted?
Standing	Y
Limitation	Y
Ground 1 – application of Regulation 32(2)(c) PCR	N
Ground 2 – application of transparency, proportionality principles and whether they were breached	Y
Ground 3 – whether sufficient reasons were given	Y
Ground 4 – duration of the contract and whether it was proportionate	N
Ground 5 – whether the award was irrational	N

# Procedural issues

- Standing:

- Claimants: The Good Law Project and Everydoctor
- Jefford J: *“It is arguable that both Claimants have standing to bring these claims”*

- Limitation

- 27 March – launch of “Coronavirus Support from Business” Scheme
- 13 April – Pestfix contract entered into
- 18 May – Contract Award Notice published
- 4 June – referred to in report by the Tussell Consultancy and an article in The Times.
- 15 June – Claim issued.
- Jefford J: *“It is well arguable that the claim is in time”*

# Ground 1: Alleged no basis for making a direct award under Regulation 32(2)(c)

- Reg 32(2)(c) PCR 2015:

The negotiated procedure without prior publication may be used *“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”*.

- Reg 32(4) PCR 2015:

*“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”*.

# Procurement Policy Note (PPN) 01/20

## Genuine reasons for extreme urgency

- Public health risk, loss of existing supply/service, reacting to genuine emergency

## Events that led to need for extreme urgency were unforeseeable

- Novelty of COVID-19 situation - not predictable

## Impossible to comply with usual timescales in PCRs

- Accelerated procurement, Frameworks, DPS

## Situation not attributable to the contracting authority

- CA did not cause / contribute

# PPN 01/20 (cont)

- Extreme urgency test **not** satisfied where contracting authority delays or fails to do something in time. This is because:
  - CA is expected to plan efficiently
  - Competitive alternatives can be completed quickly
  - Knowing something needs to be done means it is foreseeable
  - A contracting authority's delay or failure to do something is likely to mean that the situation is attributable to the contracting authority.

# Ground 1 (cont)

- Jefford J:

*“It is, in my view, not arguable that the Defendant was not entitled to rely on Regulation 32(2)(c).....The Claimants’ case, in summary, is that the need for PPE was foreseeable from February 2020 and, therefore, could not have been unforeseeable when this contract was placed. The Claimants’ case identifies a factual basis on which the need for PPE was foreseeable in February but not the extent to which that need increased and market conditions radically changed and/or any basis on which a fully competitive tender process ought to have been commenced at that time or thereafter and be completed so as to meet the need for PPE. For the same reasons, the Claimants’ case that the circumstances giving rise to extreme urgency were attributable to the Defendant is not arguable”.*

## Ground 2: alleged that the direct award violated Treaty principles of equal treatment and transparency

- Jefford J:

*“It is arguable that the principles of transparency and proportionality at least apply even where there is a negotiated procedure under Regulation 32. Secondly it is arguable that the procedure was not transparent” ....*

*“...the background to the negotiated procedure was the open invitation to businesses to offer to supply PPE before individual entities were approached to tender. In those circumstances, it seems to me arguable that the Regulations and general principles relied on by the Claimants require a degree of transparency as to the criteria by which offers would be assessed and potential tenderers selected and that the procedure adopted was not sufficiently transparent”.*

# Ground 3 – alleged insufficient reasons

- Jefford J:

*“...if the Claimants’ case as to transparency succeeds, it may well follow that the Defendant has given insufficient reasons for the placing of this contract with [Pestfix]”.*

# Grounds 4 and 5

- Ground 4: alleged duration of the contract was disproportionate
  - Permission refused – claimants relied on facts that post dated the contract award
- Ground 5: alleged irrationality
  - Permission refused – not irrational to place a contract with a company offering to source PPE and with such experience simply because it had no manufacturing capability.

# Commissioning tips

PPN 01/20 - Applies to all contracting authorities

Identifies various routes, all found in the Public Contracts Regulations 2015 (PCR), for procuring swiftly:

- Direct award due to extreme urgency
- Direct award due to absence of competition
- Call off from a framework or dynamic purchasing system
- Call for competition using a standard procedure with accelerated timescales
- Extending or modifying a contract during its term.

# Summary – and top tips

- No “new” exemptions in PPN 01/20
- Direct award conditions interpreted restrictively
- Consider each situation on a case-by-case basis
- Always consider - what are your alternatives?
- Audit trail and written justification are key
- Remember requirement to publish contract award notice
- Plan ahead



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