

The COVID pandemic caused a surge in emergency public procurement as government and public bodies sought to secure goods, such as ventilators and personal protective equipment, and services as quickly as possible. Subsequently, a series of legal challenges has tested whether contracts that were awarded under these circumstances were procured lawfully.

The most recent of these cases concerned the direct award of a contract by the Cabinet Office to Public First, the founders and directors of which had links to Dominic Cummings, who was then the Chief Adviser to the Prime Minister.¹ The case has attracted significant media interest. But what does it tell us about how to conduct emergency procurement lawfully? And will these principles be retained in the forthcoming procurement reforms?

Key Analysis

As explained in more detail below, the Court of Appeal found that the Cabinet Office had acted lawfully when it awarded a contract directly to Public First, without a procurement process, in circumstances of extreme urgency. The Court also found that the award was not vitiated by apparent bias.

The Court of Appeal judgment will give comfort to contracting authorities that seek to rely on Regulation 32(2)(c) of the Public Contracts Regulations 2015 (the “PCR”) to award contracts without a competition when there is an urgent procurement need. The judgment refers to the difficulties of procuring in a high-pressure, urgent situation and the need to ensure that subsequent challenges to decision-making are not based on hindsight.

Nevertheless, contracting authorities should always take steps to minimise the risk of challenge when relying on Regulation 32(2)(c). In particular, we would advise the following:

1. Consider and document the reasons why an emergency procurement is considered ‘strictly necessary’, including the scope and duration of the contract and alternative options available.
2. If the situation is so urgent that it is impossible to document this at the time of the decision, do so as soon as is practicable after the event.
3. Include provisions in the contract that allow for termination for convenience and structure payment on a pay-as-you-go basis, ensuring that the emergency contract is no longer than necessary.
4. The above steps will be particularly important if there are connections between the procuring body and the supplier to which a direct award is made, such that the relationship might give rise to apparent bias.

Facts

Public First had been engaged by the Cabinet Office in February 2020 to provide focus group services ahead of the Prime Minister’s pre-budget speech. In late February 2020, however, when the threat of the COVID-19 virus was becoming apparent, the Cabinet Office identified an urgent need for communications support and focus group testing of COVID-19 messaging. Public First was asked to provide these services. The terms on which the services were provided were negotiated in March and April 2020, and a written contract was issued in June 2020 (“Contract”). The Contract, backdated to March 2020, provided for Public First to provide services for a six-month term to September 2020. A contract award notice was published in June 2020.

Direct Award

The Contract was awarded to Public First without prior advertisement or competition using the ‘negotiated procedure without prior publication’ under Regulation 32 PCR. This procedure is only permitted in one of the specific circumstances set out in the regulation, including extreme urgency (Regulation 32(2)(c)).² These circumstances are interpreted narrowly and, if challenged, the contracting authority has the burden of proving that it was justified in using the procedure.³

Prior to the pandemic, the extreme urgency exception was rarely used and many practitioners regarded it as available only in the immediate aftermath of a life-threatening incident such as a natural disaster. However, in March 2020 (while it was negotiating with Public First) the Cabinet Office published Procurement Policy Note 01/20 ‘Responding to COVID-19’, which offered guidance on when Regulation 32(2)(c) can be used.⁴

PPN 01/20 confirmed that the pandemic was the sort of situation for which the extreme urgency exception was intended. It stated that if a contracting authority could demonstrate that its procurement need was so urgent that no competitive procedure could be completed, and the urgency was not due to any act or inaction of the authority itself, then a direct award may be possible. In such cases, the guidance recommended that:

1 *R (Good Law Project) v Minister for the Cabinet Office* [2022] EWCA Civ 21

2 Regulation 32(2)(c) PCR provides that the procedure 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.” Regulation 32(4) clarifies that “the circumstances of extreme urgency must not in any event be attributable to the contracting authority”.

3 *Commission v Italy* [1987] ECR 1039

4 Cabinet Office, Procurement Policy Note 01/20: *Responding to COVID-19*, 18 March 2020

1. Contracting authorities should keep a written record of their justification for satisfying the relevant test;
2. This justification should be revisited for each subsequent procurement; and
3. Contracting authorities should limit their requirements to those that are absolutely necessary "*both in terms of what [the contracting authority is] procuring and the length of the contract*".

High Court Decision

The Good Law Project challenged the legality of the award of the Contract before the High Court on the following grounds:

1. There were no grounds for a direct award under Regulation 32(2)(c) as the award of the Contract was not strictly necessary;
2. The award of the Contract for a six-month term was disproportionate; and
3. The award of the Contract gave rise to 'apparent bias' due to the links between the contracting authority and the directors of Public First.

At first instance, the High Court dismissed the first two grounds of challenge but allowed the third ground, principally on the basis of the Cabinet Office's failure to keep a written record of the criteria it had used to select Public First and its failure to consider alternative suppliers. The Minister for the Cabinet Office appealed this decision. The Good Law Project cross-appealed the decision on the first two grounds.

Court of Appeal Decision

On 18 January 2022, the Court of Appeal handed down its judgment. It found that:

1. Where the grounds for a direct award under Regulation 32(2)(c) were validly made out, it was not necessary for a contracting authority to run a competitive procurement procedure.
2. As to whether the Contract was 'strictly necessary':
 - (a) **Existing Suppliers:** A contracting authority may make a direct award under Regulation 32(2)(c) even if it has already engaged other suppliers who could provide the urgent services under an existing contract. The Court of Appeal found that "*It 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*".
 - (b) **Duration:** Limiting the duration of a contract awarded under Regulation 32(2)(c) to that which was 'strictly necessary' did not mean that the contract could only be for the duration of relevant notice periods under the PCR. The necessary duration of the contract should not be judged with hindsight but on the basis of what the contracting authority knew at the time. The fact that the Contract was on a pay-as-you-go basis and could be terminated on notice, for convenience, indicated that that the overall duration of the contract was not disproportionate.

- (c) **Scope:** The fact that work unrelated to the pandemic had been carried out under the Contract in summer 2020 did not mean that the scope of the Contract went beyond what was 'strictly necessary'. The original scope of the Contract was made broad in order to give maximum flexibility. If there was a challenge to the legitimacy of services subsequently provided under the Contract, that could be advanced under Regulation 72 PCR (on contract modifications). In this case, no such argument had been advanced.

3. As regards apparent bias, the Court found that:

- (a) The existence of a personal and professional relationship between Cabinet Office decision-makers and the directors of Public First had not been found by the High Court sufficient, on its own, to give rise to apparent bias. Where there is no apparent bias, there is no obligation upon the contracting authority that uses Regulation 32(2)(c) to formally document the consideration and rejection of alternative suppliers.
- (b) There is no requirement for decision-makers to document their reasons for using Regulation 32(2)(c) at the time of the contract award. It is possible for a contracting authority to adduce evidence to explain the reasons for the direct award subsequently in order to justify its actions if challenged.
- (c) The Court of Appeal doubted, but did not decide, whether the common law principles of apparent bias apply in this situation at all. This is due to the lack of adjudicative process in a case of emergency procurement. This was not, however, a subject of the appeal and was therefore not decided.

Emergency Procurement in the Forthcoming Procurement Reforms

The effect of the Court of Appeal decision and any subsequent judgment of the Supreme Court may be short-lived. The Government is pursuing a significant overhaul of the public procurement rules and new draft legislation is expected this year.

Under the Government's proposals, the negotiated procedure without prior publication will be scrapped and replaced with a new 'limited tendering procedure'. Although this would be similar to the current Regulation 32 procedure, contracting authorities will be obliged to "*document their analysis to demonstrate that their decisions are fully justified*" (in contrast to *Public First*). Further, contracting authorities will face a new requirement to publish a contract notice whenever a decision is made to award a contract using the limited tendering procedure. However, in cases of urgency there will be no standstill requirement and no automatic suspension in the case of challenge.

The Government's Procurement Green Paper proposed to introduce a new ground for emergency procurement in cases of crisis. The rationale for this was that there is some uncertainty around the use of the current emergency procurement grounds in cases such as the pandemic, where the emergency situation is prolonged or evolving.

To address this, the Minister for the Cabinet Office would be empowered to declare the start and end of a 'crisis'. However, even where a crisis were declared, the Green Paper stated that contracting authorities should not necessarily award contracts without some form of competition: "*Even if the time limits within the accelerated procedures cannot be met, when there are a number of potential suppliers and scope to undertake a degree of competition, a contracting authority should consider this and if they do not take this course, keep a record of their reasoning*". This is directly contrary to the *Public First* decision that where Regulation 32(2)(c) applies there is no requirement to conduct any competitive process.

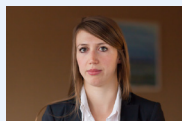
The Government's response to the consultation on the Green Paper confirmed that it will proceed with this proposal. However, the Government intends to move away from the term 'crisis' and to align the new rules more closely with Article III of the WTO Agreement on Government Procurement, which allows derogations from competitive procurement on public health grounds (i.e., narrower in scope than a crisis of any kind) and only subject to a proportionality test.

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