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13 July 2020

Your ref:
Our ref: Z2007305/AHJ/CLGA

Dear Sirs

Re: Proposed Claim for Judicial Review relating to contracts awarded to Clandboye Agencies Limited

1. We write in response to your letter before action dated 29 June 2020. This response is provided in accordance with the requirements of paragraphs 20 to 23 and Annex B of the Pre-Action Protocol for Judicial Review.

The proposed Claimants

2. The Good Law Project (“GLP”), 3 East Point High Street, Seal, Sevenoaks, Kent, TN15 0EG.
3. EveryDoctor Ltd (“EDL”), Suites 1-3, The Hop Exchange, 24 Southwark Street, London, SE1 1TY.

The proposed Defendant

4. The Secretary of State for Health and Social Care (“the Secretary of State”), c/o Government Legal Department, Commercial Law Group, 102 Petty France, Westminster, London, SW1H 9GL.

Reference Details

5. Please direct all further correspondence for the attention of Ashlie Whelan-Johnson (ashlie.whelan-johnson@governmentlegal.gov.uk) at the Government Legal Department (address above) with the above reference.

Interested parties

6. The Secretary of State considers that Clandeboye Agencies Limited (“Clandeboye”) should be jointed as an Interested Party.

Details of the decision under challenge

7. Two decisions of 28 April 2020 and 18 May 2020 of the Secretary of State to award public contracts for the supply of garments for biological or chemical protection to Clandeboye (together, the “Contracts”).

Wendy Hardaker - Head of Division
James Turnill - Deputy Director, Team Leader Commercial Litigation A



Factual Background

8. The proposed claim for judicial review follows a claim already made by GLP and EDL in respect of a contract awarded by the Secretary of State to Crisp Websites Limited, trading as PestFix (issued in the Administrative Court under the number CO/2144/2020 and now transferred to the Technology and Construction Court under the number HT-2020-000226) (the “**PestFix Claim**”).
9. The general factual background to both claims is the same. As the Secretary of State has already noted in connection with the PestFix Claim, it is regrettable that your clients are proceeding to threaten and challenge the award of contracts for the provision of vital personal protective equipment (“**PPE**”) on the basis of a series of fundamental misconceptions and false assertions. All of these serve only to highlight why your clients would not be appropriate persons to challenge a contract award decision of this kind in any event (as to which see further our response on standing below).
10. Although your clients will now be well aware of the correct general factual background from the Secretary of State’s response to the letter before action in the PestFix Claim, for completeness we repeat that material in our response below.

PPE procurement in March/April 2020: market conditions

11. Prior to the current crisis, demand for PPE by NHS Trusts was partly serviced by “NHS Supply Chain” (SCCL Ltd, a company owned by the Department of Health & Social Care (“**DHSC**”)) and partly through direct buying by NHS Trusts themselves, usually through wholesalers. Other health and social care organisations were responsible for sourcing their own PPE, for example through wholesalers or directly from suppliers.
12. PPE has hitherto been in plentiful supply, with over 80% historically being manufactured in the People’s Republic of China. That situation started to change dramatically in-mid March 2020, as the Covid pandemic unfolded across the world, and developed very rapidly towards the end of March (paragraph 22 of your letter acknowledges that the UK only went into lockdown on 23 March). This led to a dramatic spike in demand for Covid-related PPE items, and rapidly altered market conditions accordingly. Existing supply chains were disrupted as prices rose, transportation links to the main manufacturing bases in the People’s Republic of China were disrupted, and the volumes of PPE required increased to unprecedented levels from across the globe.
13. The emerging problems in relation to the procuring of PPE in the UK were widely reported in the press around the middle of March and attracted considerable interest. In response to the emerging crisis, numerous approaches were made by entities offering to assist in sourcing and supplying PPE: to Members of Parliament; NHS Trusts and staff; and to Government departments and officials working within them.
14. By this stage it was already clear that established modes of procuring PPE and other critical supplies were no longer practical. Alternative strategies therefore had to be deployed instead and new sources of supply for PPE had to be identified and utilised. Accordingly, while existing suppliers continued to be handled by SCCL, potential new suppliers who had expressed interest were directed towards a central email address, subsequently replaced by a public portal, through which offers could be logged and evaluated (see further below).
15. As already noted above, the rapid rise in global infection rates during this period led to a huge surge in demand for PPE. In the NHS, for example, demand for some PPE items increased to several thousand times the normal volume; demand for gowns increased by a factor of thirteen (with a projected annualised consumption of 151 million). The scale of that demand was far in excess of anything that either had been or could have been predicted; the clinical need for PPE to address the specific challenge of coronavirus was both greater than and different from, for example, that required to deal with a flu pandemic.
16. The effect of such increased demand, which was being replicated on a global scale, led to a wholesale change in the relevant market dynamics. Market power shifted decisively in favour of the suppliers, such that the competition was no longer between suppliers to satisfy government/buyer demand, but between a range of different public and private purchasers from a large number of nations. Some countries also

responded by banning PPE exports entirely, and some suppliers were induced by more attractive financial offers to renege on existing contractual commitments (this remains an additional risk). An already complex and fast-moving situation was further complicated by the actions of some unscrupulous actors seeking to take advantage of the situation. A worldwide shortage of some of the necessary raw materials and speculative buying by some commercial purchasers served only to exacerbate the situation.

17. Once the scale of the pandemic became clear, the market for acquisition of PPE was very much a suppliers' market. Suppliers who found themselves inundated with highly attractive offers from across the world would simply have had no incentive to respond to a UK call for tenders, or to hold off from committing their product on the favourable terms available elsewhere rather than await the outcome of a UK competition. Indeed, as paragraph 26.b of your own letter acknowledges, the EU's first attempt at a joint procurement exercise for a very limited number of gloves, gowns and overalls failed precisely because of a lack of suitable suppliers coming forward.
18. In these circumstances, suppliers were able to demand significant advance payments, and DHSC understands that other countries were offering to pay substantial sums of cash upfront to overseas producers in order to secure immediate commitments. When new sources of supply did come on stream (for example, because existing facilities had been repurposed to manufacture PPE products), these offers would often only be open for a matter of hours. If negotiations were not concluded in this time, stocks would simply be lost to a purchaser from another country instead.
19. Against that background, it is wholly fanciful to suggest that DHSC could have run any kind of competitive tendering process or "market-testing exercise". The rapidly shifting availability of supply on the ground required decisions to be taken in hours, rather than days or months. The most accelerated procurement timetable under the Public Contracts Regulations 2015 contemplates that 10 days should be allowed for interested bidders to express interest. There was no practical possibility of being able to respect that time period and to be able to participate actively in the market for PPE as it then was.
20. The importance of maintaining and building up adequate stocks of PPE should not be underestimated. PPE is essential to keep health and social services running and to protect front-line workers caring for both Covid patients and others more generally. Any delay to the ordering of PPE that led to the NHS missing out in favour of other countries ran the risk of causing stock outages, which would put the lives of both patients and NHS staff at risk. The critical nature of the items in question was (and had to be) at the forefront of DHSC's procurement strategy during this period.
21. In short, in a matter of only a few days, the UK moved from a situation where it had to match predictable need with a steady and established supply of PPE to one in which demand had become unpredictable (because the scale and impact of the pandemic was still unknown), existing supply chains were incapable of meeting requirements, and new supplies had to be obtained in the face of surging and unprecedented global demand and in hostile but novel market conditions. That required an entirely new approach to procurement.

PPE procurement in March/April 2020: the Government's response

22. In order to address the crisis in supply of PPE, the UK Government utilised three main buying routes. The first comprised existing suppliers, working through SCCL. The second involved using a strengthened team of staff in the UK Embassy in Beijing to identify potential sources of supply on the ground. The third, of which Clandeboye was part, comprised new suppliers who did not currently work through SCCL. It is also appropriate to record the substantial voluntary efforts that were made within local communities both in terms of passing over existing PPE (for example, from school science departments) and of manufacturing items.
23. Part of the difficulty faced by the UK Government was that there was no single list of existing known suppliers of PPE given that some NHS Trusts chose to source supplies themselves rather than work through SCCL, while other health and care organisations made their own arrangements in any event. In order to reach a broad range of possible opportunities, the UK Government also wished to identify not just existing suppliers of PPE (whether or not to the NHS), but also entities with a record of supply to the NHS and/or the public sector and/or who could re-purpose to supply PPE, particularly where they might

have established links to manufacturers in the People's Republic of China and elsewhere in the East Asia, where the main sources of supply are located, including those manufacturers who were themselves re-purposing to make PPE. It was understood that the ability of a supplier to secure a reliable source of supplies, and to make available existing supply chain relationships could be one of the keys to achieving successful supply.

24. Accordingly, in order to address the challenge of surging demand for PPE within the NHS, it was decided to set up a new organisation to focus solely on procuring PPE supplies for the public sector: this was known as the "PPE Cell", and comprised a dedicated cross-governmental team of officials from DHSC, the MoD, Cabinet Office and NHS England. This prevented undue pressure on NHS Supply Chain's existing administrative capability, allowing it to continue to meet the need for other consumables in the healthcare system more generally and deal with existing PPE suppliers. The new task force decided to adopt an innovative "open-source" approach to procurement, calling for help from across the UK business community to help ensure critical supplies were maintained, with a view to buying the items urgently needed whencesoever it was necessary and appropriate to do so.
25. Offers of support were collated from various sources across government including via a dedicated central email address, gcfccovid19enquiries@cabinetoffice.gov.uk which had been established on 14 March 2020. The request that any offers be directed to that email was widely publicised, including in an answer to a Parliamentary Question given on 24 March 2020. On 18 March 2020, Taiwo Owatemi MP tabled a question for written response in the following terms: *"To ask the Secretary of State for Business, Energy and Industrial Strategy, what steps his Department is taking to encourage relevant manufacturing companies to switch production to the manufacture of (a) personal protective equipment and (b) hand sanitiser or its key ingredients."* In response, the Parliamentary Under-Secretary (Minister for Business and Industry), Nadhim Zahawi MP replied as follows:

"In response to the COVID-19 outbreak, the Chancellor is chairing a regular Economic and Business Response Committee with Ministers from across the Government. The Committee will respond to the impact on businesses, supply chains, and the wider economy caused by the pandemic, and will request advice and support from industry where necessary.

Secretaries of State will also hold sector-specific roundtables, including with the aviation, retail, manufacturing, food, insurance, financial services, sport, entertainment and events, and tourism and hospitality industries.

Any business who is able to help should get in touch at: gcfccovid19enquiries@cabinetoffice.gov.uk."

26. The response to the Parliamentary Question reflected the approach that had been taken, with details of the email address having been circulated by No 10 and Ministerial offices to key external business interests and a mechanism for capturing commercial offers put in place by the Government Commercial Function on 18 March 2020. A webform was subsequently made available for completion.
27. This Open Contracting approach was reinforced by the launch of the "Coronavirus Support from Business" Scheme on 27 March 2020. This initiative encouraged businesses supplying a range of products and services, including PPE, to register on a new online portal, to indicate how they might assist the government's response to the pandemic, and the scheme was widely advertised at the time.
28. Suppliers who registered with offers of PPE were asked to complete a form indicating (inter alia) the products they were offering and details of price, quantity and technical certifications (including evidence thereof). They also had to give details of their business for the purposes of vetting. Many of the suppliers who registered were new to the PPE market but some did have previous valuable experience of international supply-chain management and importing goods. As already indicated, the UK Government was particularly interested in potential suppliers who had existing strong relationships on the ground in the East Asia with companies which either manufactured PPE or were re-purposing to do so, or had good local knowledge and contacts which might assist in identifying such manufacturers.
29. Given that the entire premise of the scheme was to identify new sources of supply (the established market being no longer able to fulfil demand), it would have been perverse to narrow down the field by imposing artificial pre-qualification requirements such as a minimum turnover requirement or unnecessary prior

experience (indeed, approximately 75% of the offers that reached the closing teams came from companies who had not previously supplied medical PPE). The whole purpose of the Government's "open-source" approach was to maximise the number of offers to prevent shortages of critical products (and to impose restrictions of the kind suggested would further have entailed substantial procurement law risks).

30. Rather than focusing on the identity of the potential supplier, the validity of the offer was the key focus, thereby allowing smaller suppliers with strong contacts in PPE supply to offer the support the Government urgently needed. Equally, past experience in PPE supply was not considered a prerequisite, as other businesses (of whatever size) might also be able to leverage their manufacturing contacts to engage with foreign enterprises converting existing facilities to PPE production. While it was of course possible for DHSC to continue liaising with existing large-scale suppliers during this period (and indeed it did so, through SCCL), the nature of the changed market conditions required the development of alternative sources of supply and it was appropriate not to impose unnecessary hurdles in the way of securing that objective.
31. In this way over 24,000 offers of support were received from some 16,000 potential suppliers. The information they provided was initially assessed and verified by a cross-governmental team. Once this initial approval had been granted, offers were then passed to buying teams (some 500 staff seconded from a range of departments), who prioritised these offers on the basis, among other matters, of how urgently the particular product was needed, the quantity on offer, value for money (using existing price benchmarks), certainty of supply and lead times. Where appropriate, further financial checks were conducted prior to contracts being concluded.
32. In so far as technical requirements were concerned, specifications were provided by SCCL. These existing specifications were appropriately modified so as to make them accessible (without, for the avoidance of doubt, reducing the key requirements to meet the necessary technical standards). The relevant specifications were published online on 30 March 2020: see <https://www.gov.uk/government/publications/technical-specifications-for-personal-protective-equipment-ppe>).
33. When offers were being evaluated, the technical suitability of the products on offer was confirmed with separate teams at NHS Supply Chain. Once the closing team had finalised the commercial terms of the proposed contract, details would be sent to the senior officials at DHSC for a final decision by an appropriate Accounting Officer. For the purposes of Covid-related PPE procurement, contracts up to the value of £5m were approved by a Deputy Director; contracts between £5m and £100m by a Director in DHSC Finance; and contracts over £100m by the Second Permanent Secretary. It should be stressed that this final decision was not a mere formality and, based on HM Treasury criteria, careful assessment was given to whether the proposed purchase would represent value of money in the circumstances (prices recently paid for similar products being a key point of reference).
34. As a result of this enhanced engagement with the market, over 600 contracts for PPE have now been concluded with almost 200 different suppliers; these range in value from under £1 million to over £100 million, amounting to some £5.5 billion in total. Full details of all these awards will be published in due course.
35. However, for present purposes, we would simply note that the very strategy which your clients' Claim seeks to impugn has in fact proved successful. Over 28 billion items of vital PPE have been secured for the NHS and critical shortages have thus far been avoided. Furthermore, on the basis of our client's engagement with the market, it is clear that if such a proactive, open-market approach had not been followed the UK would have been left without PPE at a critical time, with consequent risks to public health and human life. We would also note that the whole process of increasing the supply of PPE has had to take place in wholly exceptional circumstances, not least in which unnecessary travel has been prohibited making it impossible to visit new facilities or suppliers, and which has required an extraordinary degree of commitment from staff deployed from other responsibilities at very short notice.
36. It should be noted that the pre-contractual quality assurance process did not represent the only safeguard to ensure that PPE supplied into the NHS was of appropriate technical standard. Where PPE was obtained using a new supplier, on arrival in the UK the supplies were immediately quarantined. Thereafter, they were checked and quality assured by the appropriate regulatory bodies to ensure necessary technical specifications and standards were met before being released for use. In the event

that any product fails to meet the necessary specifications, the Department can seek a full refund of any sums already paid over.

Contracts with Clandeboye

37. Clandeboye initially registered on the Government portal on 17th April 2020 offering a range of goods, including gowns (for which there was particularly acute demand during this period). In respect of gowns, Clandeboye explained that it was the UK distributor for a well-known listed PPE and medical products manufacturer in the East Asia. The FCO verified that there were no concerns about the factory in question, and further reassurance was also derived from the fact that the manufacturer had previously supplied PPE goggles via another intermediary. At this point Clandeboye had already managed to book some stocks of PPE gowns for NHS Wales (under a separate contract with NHS Wales).
38. Clandeboye's offer was accompanied by relevant certificates, indicating that the manufacturer's quality system was compliant with ISO 9001:2015 for textile manufacture for clinical use including non-sterile gowns and ISO 13485: 2016 for the manufacture of gowns, coveralls and various other PPE and medical items. It also included a test report from Intertek Testing Services Taiwan Ltd indicating that the tested garment had passed all tests relating to resistance to synthetic blood and blood-borne pathogens, and a certificate of conformity with AAMI Level 4 (equivalent to BS 13795).
39. Thereafter, the offer was carefully scrutinised and the gown's specifications were approved by NHS England on the advice of the Medicines and Healthcare Products Regulatory Agency as complying with the necessary technical standards. As NHS Wales were already buying Clandeboye's gowns (with HSC Northern Ireland showing interest too), Clandeboye's offer was marked as a priority, and passed to the closing team accordingly.
40. Following negotiations, a contract was entered into on 28 April 2020 for the supply of 3.4 million PPE gowns, with 1.8 million being collected by Uniserve by 31 May 2020 and all 3.4 million units to be collected by 28 June 2020 (the "**First Contract**"). Prior to entering into the First Contract with Clandeboye, a process of due diligence was undertaken. This showed that Clandeboye had an appropriate financial health score and that it was already providing PPE supplies to NHS Wales. The price paid was deemed to constitute good value for money and it was agreed that 50% of the contract price of £14.82 million should be paid upfront to secure the production capacity. Accounting Officer approval was granted on this basis.
41. On 1 May 2020, a further contract was entered into for the supply of 3.6 million PPE gowns within 60 days for a contract sum of £15.12 million (the "**Second Contract**"). The Second Contract was subsequently varied on 12 May 2020 and again on 18 May 2020, finally providing for the supply of some 22.2 million gowns at a contract price of £93.24 million. Payment for supplies made under the Second Contract was to be on collection. A new Accounting Officer approval was obtained for the Second Contract and again for each of the two variations to it as with the First Contract, the Accounting Officers were satisfied on each occasion that the proposed terms continued to provide good value for money in the circumstances.
42. The supplies under the First Contract have all now been made and paid for. The supplies under the Second Contract are being shipped on a weekly basis and are scheduled to conclude on 3 August 2020; 25.2 million gowns have been shipped so far, with only 400,000 outstanding. These will be subject to the usual quality assurance described at paragraph 36 above before being distributed to the NHS.
43. In so far as you seek to impugn Clandeboye's business and status as a supplier, we refer you to the explanations above concerning the nature of the procurement exercise that had to be undertaken to identify new sources of PPE supply and the quality assurance processes put in place. Clandeboye was using a reliable manufacturer and was already making supplies of PPE to NHS Wales.

Response to your clients' claims

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

44. Your clients case in relation to the alleged breach of regulation 32(2)(c) Public Contracts Regulations 2015 (“PCR 2015”) is both legally and factually misconceived and fails entirely to take account of the realities of the global market for PPE in the context of the unexpected coronavirus pandemic: see paragraphs 8 to 35 above.
45. As explained above, the situation of extreme urgency which obtained arises not only out of the unexpected global coronavirus pandemic but also because of the nature of the market. The UK has been forced to compete in a global market in which all of the power lies with the supplier and not with the buyer. Any attempt to rely upon a competitive process of the kind your client appears to envisage would have led to a failure to meet the critical need for supply of PPE.
46. In so far as your clients suggest that the Secretary of State was not entitled to rely upon regulation 32(2)(c) PCR 2015, that proposition is rejected and appears to be based, at least in part, on a mis-reading of that provision. It is the events giving rise to extreme urgency that must be unforeseeable, not the need as at the date of the procurement or contract award. As PPN 01/20 correctly records in this regard “*The events that have led to the need for extreme urgency were unforeseeable, e.g. the COVID-19 situation is so novel that the consequences are not something you should have predicted*”.
47. Accordingly, the fact that neither Covid 19 itself nor the need for PPE may not have been unforeseeable as at 28 April 2020 or 18 May 2020 does not address the basis for extreme urgency, which arises rather out of the nature of the relevant market and how it changed so dramatically in response to the pandemic. As PPN 01/20 correctly indicates the focus for the purposes of regulation 32(2)(c) PCR 2015 is on the consequences of the unforeseeable event.
48. In so far as it is suggested that the situation could have been addressed by the procuring of “*sufficient levels of PPE in February or March 2020*”, that proposition is also rejected. As soon as it became apparent in March 2020 that there was to be a global pandemic, the PPE market rapidly transformed into being supplier-led rather than buyer-led. Furthermore, the scale of demand for PPE was far in excess of any amount that could have been predicted given the specific clinical requirements of tackling coronavirus: see paragraph 15 above.
49. That situation continued throughout April and May 2020, and to some extent still obtains. The premise underlying paragraph 25 of your clients’ letter appears to be that if DHSC had undertaken procurement of PPE by way of direct awards in February or March 2020 there would have been no need for urgent procurement in April and March 2020. If so, that premise is wrong. Your clients appear to accept that some degree of direct awards was necessary. However, they apparently assume that in February and March DHSC would have been able (a) accurately to predict its requirements until such time as the outcome of a competitive procurement exercise under the open or restricted procedure was known (and allowing for the possibility that exercise might fail) and (b) by way of direct award obtain all of the PPE in line with those identified requirements.. As explained above, such an approach would have been unviable in the face of unprecedented global demand and competition and the specific challenge of dealing with coronavirus and the clinical demands for PPE that it created. Nonetheless, the logic of your clients’ position is that (a) DHSC could lawfully have made direct awards for PPE in March (in which case, incidentally, there is a direct contradiction with the basis of your clients’ case in the PestFix Claim and (b) it could have contracted for far greater volumes of PPE than was in fact the case.
50. The Secretary of State’s reliance upon regulation 32(2)(c) PCR 2015 was not only properly founded but also entirely in accordance with the “*Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis*” (the “**Commission Guidance**”). As the Commission Guidance correctly recognises, “*for a situation such as the current COVID-19 crisis which presents an extreme and unforeseeable urgency, the EU directives do not contain procedural constraints*”. Nonetheless, despite the flexibility which the Commission Guidance explicitly acknowledges, the Secretary of State adopted an approach which ensured that sufficient volumes of the necessary PPE could be procured in a manner which respected both value for money and adherence to the necessary technical standards to ensure the protection of health.

51. If the Secretary of State had not followed this procedure but instead sought to obtain supplies using the open or restricted procedure, even on an accelerated basis, all of the evidence indicates that DHSC would not have been able to obtain supplies of the necessary volume and quality. That in turn would have led to a clear risk to public health.
52. Your client's claim is also based upon the erroneous proposition that the Secretary of State imposed no requirements before awarding the Contracts to Clandeboye. That is incorrect. As explained above, an appropriate process of due diligence was performed before Clandeboye's offer was passed to the closing team to undertake commercial negotiations. The fact that the Secretary of State could have imposed different requirements upon Clandeboye does not indicate that it did not have either the necessary financial or technical capability to perform a contract for the acquisition and supply of PPE, particularly in the exceptional circumstances of the pandemic.
53. You client further misunderstands and/or misstates (a) the nature of Clandeboye's prior experience, including in relation to the sourcing of PPE and related supplies, (b) the nature of the market at the relevant time and (c) the processes that have been put in place to ensure that any PPE supplied will meet the necessary technical standards. There was and is no question of Clandeboye supplying PPE which is not appropriate for the use to which it will be put because there is a requirement for the PPE to meet appropriate standards and a rigorous checking process to ensure that it does before it is used.

Ground 2: the award violated Treaty principles of equal treatment and transparency

54. Your clients' claim under this ground is again based upon a series of factual errors and misconceptions. Any other tenderer who wished to be considered for the award of a contract to supply PPE was entitled and encouraged to express its interest: see paragraphs 8 to 35 above. In the circumstances, there was no breach of the principles of either equal treatment or transparency.

Ground 3: The award is disproportionate

55. Your client's allegations under this ground are again based upon factual errors and misconceptions are essentially a repackaging of the same allegations as already advanced under Grounds 1 and 2 above, as to which we repeat our responses at paragraphs 44 to 53 above. In all the circumstances of a global pandemic and a market situation of unprecedented supplier power, the procedure followed by the Secretary of State was proportionate.
56. The Contracts were further not disproportionate in terms of the overall demand for PPE. They amount in total to the supply of some 25.6 million gowns, comprising just one-sixth of annualised demand in the circumstances of the continuing Covid pandemic.
57. Unfortunately, the dates given on the Contracts Finder website as the contract end date are incorrect. The expiry dates of the Contracts are defined by reference to being upon the delivery of purchase orders, although those dates may be varied by agreement. The end dates of the two Contracts are respectively 28 June 2020 and 3 August 2020.

Ground 4: The award is irrational

58. Your clients' allegations under this ground are again based upon factual errors and misconceptions. The Secretary of State put in place a process which ensured that prospective suppliers of PPE were sufficiently financially robust, that value for money would be secured, and that the products supplied would meet the necessary technical standards: see paragraphs 8 to 35 above. It is moreover expressly denied that Clandeboye was "*manifestly ill-suited to delivering [a direct award], both in financial and technical terms...*". Clandeboye met the necessary requirements, has to date delivered products as required, and there is no proper basis to suggest that it will not meet its obligations in respect of future supplies. An appropriate process of verification was undertaken before the Contracts were awarded and that process has been vindicated through their successful performance.

Standing

59. The Secretary of State denies that GLP has sufficient standing to bring judicial review proceedings.
60. First, this is in substance a procurement challenge. GLP accepts as much because it proposes to issue its claim by reference to the time limits set out in CPR r.54.5(6). However, no challenge has been received from any economic operator. The Court should therefore be very circumspect about granting permission for a challenge by way of judicial review when there has been no challenge under the relevant legislation by a directly affected party, i.e. under PCR 2015.
61. In so far as GLP may seek to suggest that it is entitled to pursue a public interest challenge, its justification is based upon the erroneous proposition that “*no other undertaking was invited to participate or give the opportunity to submit a tender in relation to the proposed direct award*”. That is incorrect for the reasons set out above.
62. Second, even if a challenge to the award of the Contract by way of judicial review were appropriate, GLP lacks the necessary direct interest. It is merely a campaigning group with no special interest in the health sector, far less the provision of PPE and, in particular, the means by which it is procured. No other more directly affected group has sought to challenge the arrangements put in place by the Secretary of State. There is no basis upon which GLP should be permitted to intervene in arrangements which have not been challenged by any more directly affected party.
63. In so far as EDL has now sought to join GLP’s application, it is also denied that it has the necessary standing. EDL’s interest in the claim is clearly to support GLD. It is, moreover, a self-avowedly campaigning organisation. It is not a trade union or professional body for doctors.
64. Furthermore, any interest that a doctor’s organisation could properly have would be in relation to the provision of adequate quality PPE, not the route by which that PPE has been procured. Otherwise, such an organisation has no greater interest in the securing of value for money for the public purse than anybody else. Any expertise EDL may have will relate only to the use of PPE, but not to the procurement process. Again, in the absence of any challenge (under PCR 2015) from an economic operator in relation to the procurement process, the Court should not grant permission to a body which has no real interest in it.

Limitation

65. The issue of when the Claimants may have had actual knowledge of the Contracts is not determinative of when proceedings should have been issued. Rather the key is to identify when the Claimants ought to have known that grounds for starting proceedings had arisen. Given the Government’s announcements concerning the arrangements it was implementing for the supply of PPE, the deadline for bringing a claim in accordance with the time limits in CPR r.54.5(6) expired at the latest within 30 days of the opening of the Coronavirus Support from Business Scheme on 27 March 2020. Even though the contract award notices were not published until 23 June 2020, the fact of contracts being awarded for PPE through the process put in place by the Secretary of State was a matter of wide public knowledge and should certainly have been known to the Claimants, given the interest they purportedly express in relation to the procurement of PPE.
66. In this regard, it is also highly relevant that the Claimants’ proposed challenge to the award of these Contracts is self-avowedly not properly to these contracts themselves, but to the Secretary of State’s wider approach to the procurement of PPE in the context of the Covid pandemic. That is clear from statements made (on Twitter) by a director of GLP encouraging challenges to further contract awards and inviting the public to provide crowdfunding and vote upon which contract awards to pursue. The real target of this proposed challenge is the procurement process that was followed, which was clearly publicised at the latest on 27 March 2020.
67. The time limit in CPR r.54.5(6) reflects that in regulation 92(2) CPR 2015, which imposes a knowledge-based limitation period focussed on the risk to an economic operator of suffering loss or damage. It has long been held that such risk will arise on the publication of tender documents setting out the process that a contracting authority intends to follow, not when the published process is implemented: see *Jobsin Co UK plc (trading as Internet Recruitment Solutions) v Department for Health* [2001] EWCA Civ 1241.

By parity of reasoning, in this case any such risk arose (at the latest) when the Government made clear its approach to the procurement of supplies of PPE through publication of the Coronavirus Support from Business scheme. There is no basis to impose any less strict approach to a challenge brought by a non-economic operator by way of judicial review. Indeed, the time limit in CPR r.54.5(6) is even stricter because it expressly excludes the possibility (provided in regulations 92(4) and 92(5) PCR 2015) of a discretionary extension of up to three months.

The details of the action that the defendants are expected to take

68. The Secretary of State does not agree that the Contracts were ultra vires and does not therefore agree to discontinue any and all further performance under them. On the contrary, the products to be supplied under the Contracts are vital for the protection of public health. In any event, the First Contract has now been performed, so any challenge would be moot, while there has been substantial performance under the Second Contract which is likely to be completed before the Court could even consider the question of whether permission should be granted for any application for judicial review that your clients might bring following receipt of this response.

ADR proposals

69. The Secretary of State is prepared to engage in further without prejudice discussions once your clients have had the opportunity to consider the contents of this letter. We do not consider that any potentially interested parties need be involved in those discussions.

Response to requests for information

70. In Section 10 of the LBA, you have sought various information from the Secretary of State on behalf of your clients.

71. As to requests (a) to (l), we refer you to the explanations set out above.

72. As to request (m), contract award notices are in the process of being published for each of the contracts that has been awarded for the provision of PPE. Unfortunately (and to address the complaint at paragraph 16 of your letter) there has been some delay in sending them for publication given the demands currently placed upon the team dealing with procurement of PPE.

73. We also reject the suggestion that any adverse inference should be drawn from differences in the drafting of different award notices; each notice relates to an individual contract, and there is no reason why justification for the use of Regulation 32(2)(c) ought to be identical in every case. An accurate and appropriate explanation has been provided in each case, and will continue to be provided as future notices are published too.

Response to requests for documents

74. In so far as the requests for documents contained in section 11 of the LBA are concerned, we respond as follows:

- a. The Secretary of State is not required to provide these documents as part of the response to the LBA. We have set out above an account of dealings with Clandeboye. This provides your clients with sufficient information concerning the events leading up to the entering into of the Contracts.
- b. We refer you to the explanations of the procurement process conducted by the Secretary of State which are set out above.
- c. A redacted copy of the Regulation 84 report will be available in due course.
- d. See above.
- e. A redacted copy of the Contracts will be available in due course.

Correspondence and service of documents

75. We are instructed to accept service of any proceedings issued against the Secretary of State by your clients. Please note that we are currently accepting service by email.

Conclusion

76. For the reasons set out above, your clients' proposed claim for judicial review is without merit. If your clients nonetheless decide to issue a claim, the Secretary of State will invite the Court to refuse permission and/or to dismiss the claim and to recover his reasonable costs of and occasioned by defending the same.

Yours faithfully

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