

The Secretary of State for Health and Social Care  
Houses Of Parliament  
LONDON  
SW1A 0AA



13 July 2020

Dear Sir

107-111  
Fleet Street,  
London,  
EC4A 2AB

**Re: Proposed Claim for Judicial Review**

Our Ref: AIR/096

We act for the Good Law Project (“GLP”) and EveryDoctor Ltd (“EveryDoctor”) which seek to challenge the lawfulness of the decisions of the Secretary of State for Health and Social Care/the Department of Health and Social Care (hereafter collectively referred to as “DHSC”) to award a Public Supply Contract within the meaning of Regulation 2 of the Public Contracts Regulations 2015 (“PCR 15”) to Ayanda Capital Limited (“Ayanda”) for the supply of Personal Protective Equipment (“PPE”) for use by NHS frontline staff.

More particularly, the contract, worth £252 million for the supply of facemasks, has been let to a company whose website describes it as “a London-based family office focused on a broad investment strategy”. It is said to specialize in currency trading, offshore property, private equity and trade financing. It is owned by the Horlick family through an entity in Mauritius. As far as the Claimants can discern, Ayanda has never before engaged in the business of sourcing or supplying PPE, whether for the Department of Health or any other public health service provider.

The Claimants contend the award of this contract was unlawful, it having been let in manner that breaches the PCR 15 and violates fundamental EU Treaty principles of equal treatment and transparency, pursuant to a process that was and remains entirely opaque. The Claimants have no desire to divert DHSC’s resources in the midst of the current crisis. They therefore propose a form of relief that will obviate the need to issue proceedings but which is dependent on the DHSC adhering fully and frankly to its duty of candour in its response to this pre-action letter.

**1 Proposed claim for judicial review**

To:

Secretary of State for Health and Social Care  
Department of Health and Social Care  
39 Victoria Street  
London

SW1H OEU

## **2 The claimants**

The Good Law Project  
3 East Point High Street,  
Seal,  
Sevenoaks,  
Kent, United Kingdom,  
TN15 0EG

EveryDoctor Ltd  
Suite 1-3, 24 Southwark Street  
LONDON  
SE1 1TY

The Good Law Project is a not-for-profit membership organisation that is dedicated to bringing public interest litigation.

EveryDoctor is a doctor-led organisation that campaigns for a better NHS for every doctor and every patient.

Please direct all correspondence to the proposed Claimants' solicitors whose details are set out in section 4 below.

## **3 The defendants' reference details**

Unknown

## **4 The details of the claimants' legal advisers dealing with this claim**

Alex Rook  
Rook Irwin Sweeney LLP  
107-111 Fleet Street  
London  
EC4A 2AB

Reference: AR/096

Email:

Telephone:

## **5 The details of the matter being challenged**

The Claimants seek to challenge the lawfulness of the decisions of the DHSC of 29 April 2020 to award a public contract for “the supply of personal protective equipment (masks) to protect health and care workers from contracting the Covid-19 disease” (as the award is described in the Contract Award Notice published for the first time on 2 July 2020 (which is discussed further below)) to Ayanda, the contract having neither been advertised nor competed. The Claimants are unclear as to the details of the process, if any, that was followed in relation to the letting of the contract, which appears, to date, to be the largest contract let by the DHSC for the supply of PPE during the current pandemic.

## **6 The details of any Interested Parties**

Ayanda Capital Limited  
Unit 12.08<sup>1</sup>  
One Lyric Square  
London  
England  
W6 0NB

Ayanda is an interested party and it has been copied into this letter. The Claimants are not presently aware of any other party that may have been approached by the Defendant in relation to the contract in fact let to Ayanda or any other party that was considered by the DHSC in respect of the award of the contract ultimately let to Ayanda.

## **7 The issue**

### **Summary of facts**

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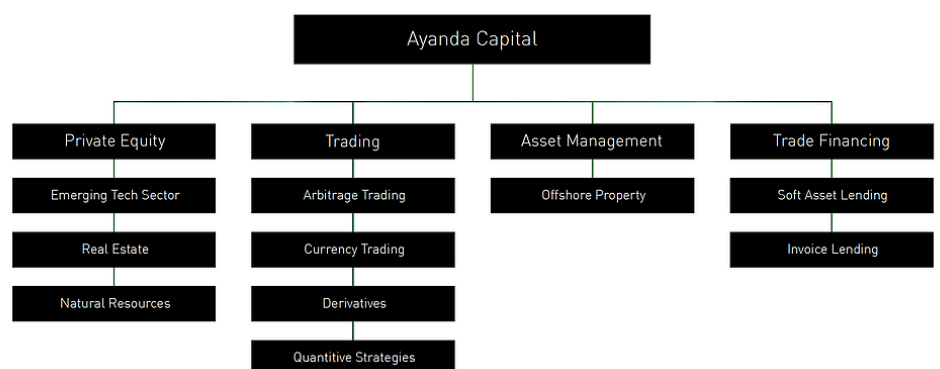
<sup>1</sup> Although in its filed accounts, the address appears as Unit 6.09

1. Ayanda is a company registered in England under companies number 11014884. Its registered address is Unit 12.08, One Lyric Square, London W6 0NB. Until the award of the contract the subject of this letter, it engaged in the business of private equity, trading, asset management and trade financing. Ayanda’s website states:

*“Founded by Tim Horlick and Nathan Engelbrecht, Ayanda Capital’s experienced team of finance, investment and technology specialists is based in London.*

*We focus on currency trading, offshore property, and private equity and trade financing.”*

2. Ayanda’s business lines are represented on its website as follows:



3. Ayanda filed unaudited financial statements accounts on 11 February 2020 for the period 1 July 2019 to 31 December 2019. Those accounts showed substantial (nearly £3 million), but unidentified, intangible assets. It is not clear what those assets are, how they have been valued, or the extent that they can be liquidated.

4. The Claimants note that Andrew Mills has, since March 2020, been a Senior Board Advisor to Ayanda. Andrew Mills has also been an adviser to the UK Board of Trade within the Department for International Trade, since October 2017. The Board of Trade is chaired by the Secretary of State for International Trade, the Rt Hon Elizabeth Truss MP.
5. There is no evidence that Ayanda has any experience of trading in any sector or market beyond those related to financial sectors listed above. It has, as far as the Claimants can ascertain, never been engaged to supply any equipment to central Government, let alone technically suitable PPE for use by frontline NHS staff treating patients suffering from the Coronavirus. There is no evidence that it has any experience in relation to the supply of PPE to any health facility, public or private. It has never previously been awarded a public contract by any central government department.
6. However, on or around 29 April 2020, the Department of Health awarded Ayanda a public contract for the sourcing and supply of PPE for the NHS worth nearly a quarter of a billion pounds.
7. That that amount of money has been handed, without advertisement or competition, to a family office specialising in private equity and asset management, with no history in the supply of health equipment raises a number of serious questions. It is evident from the number of PPE-related contracts that have been let by the DHSC that it cannot sensibly be said that there was a shortage of PPE suppliers available to central government buyers. The Department has indicated that within two weeks of opening the Coronavirus Support from Business scheme, it had 24,000 offers from 16,000 suppliers. Many of those suppliers will have been manufacturers capable of repurposing their manufacturing equipment to produce PPE, or of availing of existing contacts to obtain supplies of PPE. But Ayanda manufactures nothing and it does not, so far as the Claimants can ascertain, engage in the business of procuring goods or equipment of any sort, still less the specialist goods and equipment capable of use in the health sector.

8. We apprehend that DHSC let the contract to Ayanda purportedly pursuant to the emergency guidance issued by the Cabinet Office in March 2020 under Information Notice PPN 01/20 in relation to the use of public procurement in response to the COVID-19 emergency. That notice stated: "...in these exceptional circumstances, authorities may need to procure goods, services and works with extreme urgency. Authorities are permitted to do this using regulation 32(2)(c) under the Public Contract Regulations 2015." However, as the guidance itself made clear, contracting authorities could not rely on the emergency provisions where the urgency that had arisen was due to the Authority's own lack of proper planning. Were it otherwise, contracting authorities would be perversely incentivised to delay procurements in order to avoid the need to undertake open competitions.

9. Regulation 32 of the Public Contracts Regulations 2015 ("PCR 15") governs the use of the negotiated procedure without prior publication, the procurement procedure that, exceptionally, permits the award of a public contract without the need for advertisement or a competitive tender process. Regulation 32 of the PCR 15 materially provides:

*"(1) In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication.*

*(2) General grounds The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:—*

*(..)*

*(c) 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."*

10. PPN 01/20 informs contracting authorities that: *"You should ensure you keep proper records of decisions and actions on individual contracts, as this could mitigate against the risk of a successful legal challenge. If you*

*make a direct award, you should publish a contract award notice (regulation 50) within 30 days of awarding the contract.”*

11. As noted above, a Contract Award Notice was published on the Tenders Electronic Daily (“TED”) portal on 2 July 2020.<sup>2</sup> The publication of the Contract Award Notice has also violated Regulation 50 of the PCR 15 which requires public contracts to be published within 30 days of award. The award should have been published by 31 May 2020; no explanation is provided in the Notice as to why it took a further month to give notice of the award.
12. The Contract Award Notice published on TED (which referred in its heading to the “results of the procurement procedure”) explained the ‘type of procedure’ that was adopted in the following, generic terms:

*“Award of a contract without prior publication of a call for competition in the Official Journal of the European Union in the cases listed below*

- *Extreme urgency brought about by events unforeseeable for the contracting authority and in accordance with the strict conditions stated in the directive*

*Explanation:*

*1) The Coronavirus disease (Covid-19) is a serious infectious respiratory disease and its consequences pose a risk to life. The Covid-19 outbreak is a public health emergency of international concerns as declared by the World Health Organisation on 30 January 2020. The WHO Director General characterised Covid-19 as a pandemic on 11 March 2020, by this stage Europe was the centre of the pandemic.*

*2) The use of Personal Protective Equipment (PPE) is critical in safeguarding the health and lives of the care professionals treating patients with Covid-19. Delays in procuring the PPE, in this case, gowns, poses a risk to life of*

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<sup>2</sup> <https://ted.europa.eu/udl?uri=TED:NOTICE:309303-2020:TEXT:EN:HTML&src=0>

*those on the front line and the likelihood of significantly increased death toll.*

*3) In March the NHS experienced severe shortages of PPE, modelling based the trajectory of other European countries forecast the need for significant and extremely rapid increase in the UK PPE capacity. Similar shortfalls in PPE stocks were identified globally. There was immense demand for PPE, requiring the UK government to actively seek and create new supply chains rapidly to meet that demand. In these circumstances, a procurement following the usual timescales under the PCR 2015, including accelerated options, was impossible. PPE manufacturers and supply chains were under immediate and unprecedented global pressure to provide products. A delay in engaging with the market by running a usual procurement process ran the risk of failing to acquire the necessary stock of PPE equipment and presenting a significant risk to life.*

*4. The Department for Health and Social Care ('DHSC') is satisfied the tests permitting use of the negotiated procedure without prior publication (Regulation 32(2)(c)) were met:*

*A. As far as is strictly necessary:*

*PPE was identified as strictly necessary to meet anticipated demand on the NHS during the first wave of cases in the UK.*

*B. There are genuine reasons for extreme urgency:*

*DHSC are responding to Covid-19 immediately because of public health risks presenting a genuine emergency.*

*C. The events that have led to the need for extreme urgency were unforeseeable:*

*As the commission itself confirmed: 'the current coronavirus crisis presents an extreme and unforeseeable urgency – precisely for such a situation our European rules enable public buyers to buy within a matter of days, even hours, if necessary.' (Commissioner Breton, Internal Market, 1 April 2020).*

*D. It was impossible to comply with the usual timescales in the PCR:*



*Due to the urgency of the situation there was no time to run an accelerated procurement under the open, restricted or competitive procedures with negotiation that would allow DHSC to secure delivery of products, particularly in light of the corresponding delays to timelines associated with securing supply of the PPE equipment.*

*E. The situation is not attributable to the contracting authority: DHSC has not caused or contributed to the coronavirus crisis, which justifies the need for extreme urgency.”*

11. The ‘explanation’ given in the Contract Award Notice has altered from that given in previous Contract Award Notices published on TED. We anticipate that those explanations have expanded either because the DHSC has recognised that the previous explanations were inadequate and/or in light of justified criticism of those explanations. Specifically, the notice seeks to explain why it was impossible to utilise the accelerated procedure. We will require the DHSC to explain why, and by reference to what considerations, it revisited and amended the content of the explanations that have been given for the contract which is the subject of this letter.
12. In any event, the explanations still do not satisfy the requirements under Regulation 32(2)(c) of the PCR 15. They acknowledge that (i) COVID-19 was formally designated a pandemic on 11 March 2020; (ii) there was already a need for and shortage of PPE in the NHS in March 2020; albeit that (iii) the Notice sought to contend that the need for PPE was still unforeseeable as at 29 April 2020: the need had, as the explanation acknowledged, become abundantly clear by at the latest mid-March. The reason for the urgency was thus entirely of the DHSC’s own making.
13. The Contract Award Notice then indicated that the DHSC had received a single tender, from Ayanda. That is consistent with an absence of any advertisement, or competition. And it is not inconsistent with no other approach having been made to any undertaking other than Ayanda or, alternatively, with any other undertaking being given the opportunity to tender for this particularly valuable public contract.

14. The Claimants also do not understand how or why the DHSC came to spend this sum of money on facemasks, which were the goods to be supplied under the contract. For Type IIR medical single use masks, the market unit prices at the time of the Ayanda award was between 39p to 46p per mask. The Claimants have been provided with information from other prospective suppliers of these masks, that they offered a unit price within that range in April 2020. By mid-May the unit price had reduced to 26p per mask and by mid-June the unit price had further reduced to 20p per mask. As of today, and depending on quantity of masks sought to be purchased (albeit noting that the greater the volume, the greater the likely discount per unit), masks could be purchased for as little as 11p each. A contract for £252 million solely for the purchase of these masks would have provided a supply for the NHS for many years to come. The same points can be made about the KN95 mask.
15. Ayanda's offer is required to be disclosed as a matter of priority as the Claimants cannot understand the decision to spend this amount of money on facemasks at a point in time at which prices were at a historic high, and pursuant to an urgency procedure, especially when many other public contracts for the supply of facemasks have been let under regulation 32.
16. Moreover, it is not plausible to suggest that leading PPE suppliers would not have tendered for one of the largest – if not the largest - PPE supply contract that has yet been let, or that they could not have potentially obtained a much better unit price than that apparently obtained by a company with no experience of buying PPE at all.
17. The Government launched its Coronavirus Support from Business Scheme ("the Scheme") on 27 March 2020 and then issued a general 'call to arms' via its press release to the business community on 10 April 2020. PPE suppliers would have known as at those dates that they could submit tenders for the further supply of PPE. The date on - and method by - which Ayanda approached the Department with an Offer to supply PPE is required to be disclosed in the Department's reply to this letter. The Ayanda contract was awarded 30 days after the launch of the Scheme. The Claimants anticipate that the Department had thousands more offers to supply PPE from business in the interim, making it all the more

important for the Defendant to explain the process by which the Department triaged those offers, grouped them into cohorts of comparable offers, and the criteria adopted and applied in order to select between those offers.

18. In that regard, the Department has, by letters of 16 June and 1 July 2020 from the Government Legal Department to this firm in relation to the PestFix matter - that it received over 24,000 offers from 16,000 suppliers further to the launch of the Scheme and further to the press release of 10 April 2020. The DHSC is obliged, therefore, to explain what procedure it followed in determining that, of those thousands of responses from businesses, including, it is assumed, established suppliers of PPE, that Ayanda warranted the award of a single contract worth £252 million.

## Summary of grounds

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

19. PPN 01/20 states that:

*“...in responding to COVID-19, contracting authorities may enter into contracts without competing or advertising the requirement so long as they are able to demonstrate the following tests have all been met:*

- 1) *There are genuine reasons for extreme urgency, eg:*
  - *you need to respond to the COVID-19 consequences immediately because of public health risks, loss of existing provision at short notice, etc;*
  - *you are reacting to a current situation that is a genuine emergency - not planning for one.*
- 2) *The events that have led to the need for extreme urgency were unforeseeable eg*
  - *the COVID-19 situation is so novel that the consequences are not something you should have predicted.*
- 3) *It is impossible to comply with the usual timescales in the PCRs, eg:*

- *there is no time to run an accelerated procurement under the open or restricted procedures or competitive procedures with negotiation;*
  - *there is no time to place a call off contract under an existing commercial agreement such as a framework or dynamic purchasing system.*
- 4) *The situation is not attributable to the contracting authority, eg:*
- *you have not done anything to cause or contribute to the need for extreme urgency.”*

20. The Claimants again acknowledge that DHSC considered that it needed to act with expedition in issuing these direct awards. The DHSC has failed to explain why, on the particular facts, a competitive procedure could not have been run between the time the WHO declared COVID-19 to be a pandemic on 11 March 2020 and 29 April 2020 when the contract was awarded. In particular, £252 million at a standard unit price equates to many years of supply of facemasks for the NHS such that there is no justification for using the urgency procedure where an open or accelerated procedure could have been run to get a competitive price. Nor does the Notice explain why, given the size of the contract, the urgent position in which DHSC found itself necessarily required it to award the contract to Ayanda without seeking to negotiate with or evaluate bids from any other established and experienced PPE supplier.

21. Regulation 32(2)(c) is required to be interpreted very narrowly. In this regard, the CJEU has stressed that recourse to direct awards need to be subjected to a strict assessment of whether the contracting authority “acted diligently and whether it could legitimately hold that the conditions [for recourse to this procedure] were in fact satisfied” (*Fastweb*, C-19/13, EU:C:2014:2194, para 50). That clearly indicates that use of Regulation 32(2)(c) will be exceptional (*Fastweb*, para 106).

22. As PPN 01/20 points out, the minimum time limits for the conduct of an open competition vary depending on the procedure adopted (see regulations 27(5), 28(10) and 29(10) of the PCR 15 respectively). For procurements under the open procedure, timescales can be reduced to 15 days for receipt of tenders plus the minimum 10 days for the standstill

period. The DHSC plainly had time between 11 March 2020 and 29 April 2020 to undertake an accelerated competition as envisaged in PPN 01/20. That would have enabled the DHSC to conduct an open and accelerated competition for all, alternatively the vast majority of the need for which a contract of £252 million would have delivered.

23. The need for substantial numbers of facemasks was foreseen in February and certainly no later than 11 March when the WHO declared COVID-19 a global pandemic. The DHSC's explanation in the Contract Award Notice reinforces the fact that, as at 29 April, the need for PPE had long since become obvious and foreseeable and is confirmation that the urgency to which DHSC was subject in late April 2020 was directly caused by its own failure to make adequate arrangements for the supply of PPE.
24. As PPN 01/20 observes (reflecting the need for Regulation 32 to be construed narrowly and in accordance with the principles in *Fastweb*):

*“Delaying or failing to do something in time does not make a situation qualify as extremely urgent, unforeseeable or not attributable to the contracting authority. This is because:*

- *the PCRs expect a contracting authority to plan its time efficiently so that it is able to use a competitive procedure;*
- *competitive alternatives (eg. an accelerated open procedure) can be completed quickly;*
- *case law has held that knowing that something needs to be done means it is foreseeable;*
- *contracting authority's delay or failure to do something is likely to mean that the situation is attributable to the contracting authority.”*

24. Each of these exclusions apply on the facts of the present case taking the award to Ayanda outside the scope of Regulation 32(2)(c) PCR 15. In the circumstances, any urgent need as at 29 April 2020 can only be due to the failure of DHSC to plan efficiently, having known at least 6 weeks previously that there was a requirement for the supply of PPE. It follows that the situation of urgency that had arisen by late April was entirely

attributable to the DHSC. In this regard, the Claimants note the following chronology as set out on GOV.UK in relation to the promulgation of guidance in relation to COVID-19 and PPE (“the PPE Guidance”):<sup>3</sup>

- a. By 14 February 2020, guidance on the use of PPE had been published as part of the PPE Guidance. On 19 February 2020, the guidance was revised to add posters “for donning and doffing Personal Protective Equipment.” On 3 March 2020 it was further revised to add “quick guides and videos for donning and doffing of [PPE]”;
- b. On 6 March 2020, the PPE Guidance was revised to make changes to “PPE and mask and respiratory recommendations for different situations.” On 21 March 2020, it was further revised to (i) add guidance on when to use a face mask or FFP3 respirator and (ii) add new guidance on putting on and taking off PPE for non-aerosol generating procedures;
- c. By 2 April 2020, the PPE Guidance had been further revised to incorporate “tables describing PPE use across different clinical scenarios and settings; advice on sessional PPE use and reusable PPE; [and] change in close-contact distance;”
- d. On 5 April 2020, the PPE Guidance added Frequently Asked Questions on wearing PPE. On 12 April 2020, the guidance added a statement to clarify that the UK is currently experiencing sustained community transmission of COVID-19, while on 17 April 2020, it added “considerations for acute [PPE] shortages”.

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<sup>3</sup> <https://www.gov.uk/government/publications/wuhan-novel-coronavirus-infection-prevention-and-control#history> The Claimants note the statement that “This guidance outlines the infection prevention and control advice for health and social care providers involved in receiving, assessing and caring for patients who are a possible or confirmed case of COVID-19” and was first issued on 10 January 2020.

25. The Claimants require the DHSC to disclose when it first began to let direct awards for the supply of PPE. Self-evidently, if the DHSC was already procuring PPE by way of direct awards in March 2020, it cannot possibly contend either that (i) the need for PPE remained unforeseeable in late April; or (ii) that it had no opportunity to undertake an accelerated competition before these dates. Similarly, if the DHSC has let all of those contracts equally late in the day, that would reflect its failure sufficiently to meet a need of which it had long since been aware.
26. In this regard, the Claimants note that on 13 April 2020, Chris Hopson, chief executive of NHS Providers, accepted that gaps remained in relation to the supply of PPE and called on the government to publicly acknowledge the problem and the reasons for that problem. On the same day, the Secretary of State for the Foreign and Commonwealth Office, deputising for the Prime Minister at the daily 10 Downing Street briefing, admitted that there were supply problems, relying on the fact that there was “a competitive market out there”.
27. Moreover, whether or not the Government wished to participate in the Joint EU Procurement scheme, the very fact that procurement was being conducted on this basis across the EU from late February again makes it impossible for DHSC to contend that the need for PPE remained unforeseen as at late April 2020.
28. That the position the DHSC found itself in was of its own making is supported by the report of the Public Accounts Committee of 7 July 2020 on NHS capital expenditure and financial management. In its summary of conclusions, the PAC concluded that “*Government does not have either a clear understanding of the equipment needed for clinical and care workers, or how to distribute it.*”<sup>4</sup> Moreover, the chair of the PAC observed that the current problems in relation to the sourcing and

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<sup>4</sup><https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/news-parliament-2017/nhs-expenditure-financial-management-report-published-19-21/>

distribution of PPE arise squarely as a result of the Government's failure to prepare for a pandemic. She observed:

*"The Government conducted a large pandemic practice exercise in 2016 but failed to prepare. The previous Committee warned on the lack of plans to ensure access to medicines and equipment in the social care sector in the event of a no deal Brexit, but, again, the Government failed to prepare. There must be total focus now on where the problems were in procurement and supply in the first wave, and on eradicating them."*

29. The PAC observed as follows in relation to PPE shortages:

*"The Committee is extremely concerned by widely reported shortages of personal protective equipment (PPE) for clinical and care workers during the first wave of the COVID-19 pandemic<sup>5</sup> and says Government is still not treating this with sufficient urgency. It is "absolutely vital" that the same problems do not happen again in the event of a second wave, but uncertainty still prevails around future provision of local PPE across the health and social care sectors. "*

30. It continued:

*"The Department says that nationally it never ran out PPE stock, but that COVID-19 had put supply chains and distribution networks under unprecedented strain. It tells us that this required substantial changes to how the system managed distribution and posed great challenges getting the available equipment to the right place at the right time. The Department says that it buys the vast majority of its PPE on international markets and will continue to do so. Although the Department says it is committed to building up stocks to meet longer-term demand, we were not convinced that it was treating the matter with sufficient urgency. In particular, the governance arrangements to procure and distribute PPE across health and social care remain unclear and uncertainty prevails around future provision of local PPE across the health*

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<sup>5</sup> See also para 22 of the Report



*and social care sectors. It is absolutely vital that the same problems do not happen again in the event of a second wave.”*

31. By way of recommendation, the PAC stated that the Defendant “*should write to the Committee within two months to clarify its governance arrangements and outline at what point in the future it expects to have a predictable supply of stock and ready access to PPE supply within the NHS and care sectors. This should include detail on the roles and responsibilities for the procurement and distribution of personal protective equipment across NHS and social care settings.*” That recommendation will require the Defendant to provide to the PAC what it has not provided to the Claimants, namely, an adequate explanation of the process operated by which the Defendant translates offers made to contracts being awarded.

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

32. Even if the DHSC was permitted to make a direct award under regulation 32(2)(c) of the PCR 15, it remained bound to comply with the principles of (*inter alia*) transparency, equality of treatment and proportionality which are set out in regulation 18 PCR 15 and also flow from the provisions of the Treaty on the Functioning of the European Union as they apply to the award of Public Contracts. The fact that regulation 32(2)(c) permits the award of a contract without a full tender process does not mean that it permits an award to a supplier of the authority’s choosing, without any steps being taken to distinguish between suitable suppliers. It was therefore incumbent upon DHSC to implement a fair, transparent, non-discriminatory and proportionate basis for choosing between potential bidder for the contract which was, in the event, awarded to Ayanda.
33. In this regard, the Defendant has failed to provide any evidence that it conducted any or any fair and transparent form of negotiated process which applied equally as between prospective suppliers. This would appear to be a case where the Defendant has inverted the normal procurement process. Instead of putting a specific contract out to tender, creating a level

competitive playing field for all potential suppliers who will know precisely what is on offer and the basis upon which it will be awarded, the Defendant appears to have invited any and all tenderers to make an offer as to what they could supply. No two suppliers would (unless they are sharing information) know what any other supplier was seeking to offer; and no supplier will have been told precisely what need was required to be met. In those circumstances, no two offers are likely to have corresponded to the same specification, raising serious questions of equal treatment and transparency.

34. The Claimants submit that, in circumstances where no business was aware of what it was bidding for, it was incumbent on the Defendant to put in place procedures that not only identified the selection criteria to be used in order to assess offers being received from business, but also guidance as to how those criteria would be supplied such that those evaluating offers could properly decide to proceed with some over others, and properly evaluate the relative merits of those offers.
35. The Claimants accept that the degree of specificity as regards the applicable criteria and the guidance over how those criteria were to be applied in the evaluation of individual offers will not be as rigorous as will be the case for open or other competitive procedures that are conducted in ordinary circumstances. But Regulation 32 remains a derogation from the normal procurement rules and must be applied strictly as explained above. The Defendant must therefore be capable of explaining what the evaluation and selection criteria were and how they were applied. To date, it has wholly failed to provide any such explanation and it must be assumed that such criteria as there were did not achieve fairness, transparency and equality of treatment
36. In the circumstances, the conduct of the direct award under Regulation 32(2)(c) of the PCR 15 was unfair and breached the principles of equal treatment and transparency.

### Ground 3: The award is disproportionate

37. Given that the procedures authorised under Regulation 32(2)(c) are a derogation from the open and competitive procedures otherwise mandated in the PCR 15, the exceptional use of those procedures will only be permitted if they are proportionate. Proportionality in this context requires the contracting authority to show that there was not a more open or competitive procedure capable of being used in the circumstances faced by the authority. That will ordinarily entail that any direct award will be of short duration or limited scope in order to meet the immediate short term needs of the authority, pending a more open or competitive process being adopted to procure a longer-term supply.
38. The Contract Award Decision was disproportionate and outwith the proper bounds of regulation 32(2)(c) because the urgent need that had arisen was not required to be met through the conferral of such a valuable contract worth £252 million. As noted above, at an ordinary unit price, and with approximately the same number of staff within the NHS as there are now, that amount of money would enable a supplier to supply years' worth of masks, when in truth, a direct award could only ever have been proportionate for such number of masks as would enable the DHSC to run an accelerated or open procedure in the interim. Plainly there is no need for a direct award to be used to obtain masks that will still be available for use in 6 or 12 months' time, let alone, years from now. Further, it appears obvious that a competitive procedure would have generated better taxpayer value through a more competitive price.
39. Moreover, the Claimants are aware that, by 15 May 2020, the Government had entered into a longer-term mask production agreement with Honeywell.<sup>6</sup> Pursuant to that agreement, Honeywell has agreed to manufacture and deliver 70 million face masks for use by NHS frontline workers. The Government press release further indicated that "the production line has capacity to produce up to 4.5 million masks each month and will create 450 new jobs at the production site." The Claimants

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<sup>6</sup> <https://www.glasgowtimes.co.uk/news/18451771.hundreds-jobs-created-ppe-site/>

understand that production is to commence in July 2020. In the circumstances, where Government had planned to enter into a long term agreement with Honeywell for the supply of face masks, it is disproportionate to have entered into a contract with Ayanda, by way of direct award, for the delivery of face masks that, if supplied at anything approximating a market price, will produce sufficient masks for NHS staff for many years. And that is to say nothing of all the other PPE contracts awarded during the crisis which included purchase orders for the supply of face masks.

Ground 4: no proper reasons permitting the Court to assess the lawfulness of the procedure

40. Public law and procurement law each impose an obligation to provide reasons that are sufficient to enable a party to understand the basis for a decision or procedure. In the context of the award of public contracts, the need for sufficient reasons relating to how a process was conducted or an award made is (i) to enable parties to understand and if necessary challenge the basis of that decision and (ii) to enable a court to assess whether that procedure and the award made pursuant thereto was itself lawful. The need for reasons that are sufficient to enable challenges to be brought and which courts can properly assess was considered by the CJEU in the *European Dynamiki* litigation. Mr Justice Stuart-Smith summarised the position in *Lancashire Care NHS Foundation Trust v Lancashire CC* [2018] B.L.R. 532:

*"49. There is no substantial issue about the principles to be applied. It is conveniently summarised in two Dynamiki decisions. In Case 272/06 Evropaiki Dynamiki [2008] ECR-II 00169 at [27] the Court said:*

*"...in accordance with settled case-law, the statement of the reasons on which a decision adversely affecting a person is based must allow the Community Court to exercise its power of review as to its legality and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded"*

50. To similar effect, in Case 447/10 *Evropaiki Dynamiki* at [92] the Court said:

*"the corollary of the discretion enjoyed by the Court of Justice in the area of public procurement is a statement of reasons that sets out the matters of fact and law upon which the Court of Justice based its assessment. It is only in the light of those matters that an applicant is genuinely in a position to understand the reasons why those scores were awarded. Only such a statement of reasons therefore enables him to assert his rights and the General Court to exercise its power of review."*

41. Absent any or any proper explanation of the procedure by which the Defendant assesses offers to supply PPE and by which it decides to make awards of supply contracts, neither the Claimants nor the Court can understand the basis of these awards or fully exercise a power of review

#### Ground 5: the award is irrational

On the limited facts currently known to the Claimants, the award of such a valuable contract without advertisement, any form of competition or any discernible process as to the selection of contractors from the thousands of suppliers who have offered to make supplies of PPE, to a company engaged in offshore capital markets, private equity and asset management, and which had no prior experience in the manufacture or supply of PPE, was irrational. The irrationality of this award is compounded by the fact that the DHSC appears to have awarded a contract that was so vast that the DHSC would, on ordinary prices, have masks for the NHS for many years.

42. It is understood that the payment terms included in the PPE supply contracts that have been let by DHSC provide for substantial advance payments to contractors, as a result of which the Government will take on substantial initial risk should the contractor fail. The DHSC is thus required to explain whether the Government made advance payments to Ayanda – notwithstanding its apparent financial standing, and/or provided any

other means by which Ayanda was (or would be) assisted in commencing procurement operations.

43. Nor, it would appear, did DHSC impose any requirements as to the technical and professional ability of Ayanda before awarding the contract. Had DHSC addressed its mind to this issue, it could not have been satisfied that a company running a family office could properly be awarded a contract worth in excess of £252 million for the sourcing and supply of vital PPE.
44. For the avoidance of doubt, it is not the Claimants' case that extensive prior experience of supplying PPE to the NHS was, necessarily, an essential pre-requisite for the award of the contract. But rather that it was incumbent upon the DHSC to verify Ayanda's ability to perform the proposed contract, in particular in circumstances where Ayanda had no prior relevant experience, and was currently engaged in fundamentally different activities and given the size of the contract in monetary terms.
45. In the circumstances, DHSC has acted irrationally in making a direct award of this contract to Ayanda.

#### Reserve grounds

46. The Claimants reserve the right to expand on the grounds set out above following provision of the information and documentation sought below.

#### Standing

47. The claim is, in part, based on conventional public law principles (other than breach of the PCR 15), and the Claimants undoubtedly have sufficient standing to pursue a public law challenge to the Contract Award Decision (see, by analogy, the position of the World Development Movement in the Pergau Dam case: *R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement* [1995] 1 WLR 386, 395-396).

48. Otherwise, the Claimants complain of breach of the PCR 15. It is well-established that a breach of the PCR 15 is a public law wrong and that the right to complain of such a breach is not restricted to economic operators (see the ruling of the Court of Appeal in *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] PTSR 749, §77).
49. In *Chandler*, the Court of Appeal held that a person who is not an economic operator must have an interest in observance of the public procurement regime and must not be seeking to use that regime for a purpose for which it was not created (in that case, to prevent the establishment of an Academy school) (§78). Hence, for example, in *R (Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin), a councillor was entitled to bring proceedings in reliance upon the PCR because his motivation in doing so was to secure observance of the procurement regime, through a competitive tender process for the redevelopment of Winchester city centre.
50. Both of the Claimants satisfy the test for standing applied in *Chandler* and *Gottlieb*. Good Law Project's interest is in promoting good public administration, which includes seeking to ensure proper stewardship of public funds through observance of procurement law, and holding Government to account where this has not been done. EveryDoctor is concerned that procurement of PPE is effective in identifying competent suppliers who are able to supply, and do supply, good quality PPE to frontline NHS staff whom it seeks to represent and protect (and many of whom have become seriously ill and died as a result of inadequate PPE). Again, EveryDoctor's interest is in observance of the procurement regime, as a potential consequence of badly conducted procurement is failure to supply or poor quality of what is supplied. The present case is a good example: notwithstanding the Defendant's contention that the Contract was awarded to meet an extremely urgent, short term need, the supplies apparently to be rendered under the contract will either substantially outstrip the short-term period of urgency or is indicative that the Government has paid an extortionate mark-up for the privilege of doing business with Ayanda. Both Claimants are fully supportive of the procurement of much-needed PPE for frontline staff (in contrast to the position of Ms Chandler in her case).

51. It is no answer to say no challenge can be brought because neither Claimant is an 'economic operator'. There is no authority for that proposition and it is inconsistent with *Chandler* and *Gottlieb*. That submission is particularly inapt in the present case, where DHSC did not run a conventional tender process for the Contract in which economic operators were invited to compete and where, consequently, there is a defined group of economic operators who might bring proceedings on the strength of their interest in obtaining the contract which was awarded to Ayanda. Moreover, it would appear that economic operators were led to believe that their offers to supply could result in a contract long after the award to Ayanda and so, could not be expected to challenge that particular award. If the Defendant were correct in submitting that the Claimants are not to be permitted to challenge the award decision either, that decision would effectively be immune from review.

52. If there were any merit in such a submission as to standing, the appropriate time for the argument to be addressed is at the merits hearing, when the full context of the case is apparent to the Court. Permission should not be refused on this basis. See *World Development Movement* at 395, citing *R v IRC ex parte Federation of the Self Employed* [1982] AC 617, 630B, per Lord Wilberforce:

*"There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest can not, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest in the matter to which the application relates. This, in the present case, necessarily involves the whole question of the duties of the Inland Revenue*



*and the breaches or failure of those duties of which the respondents complain.*

#### Limitation

53. As the award of the contract was only made public on 2 July 2020 on Contracts Finder, we consider that time for the bringing of any claim for judicial review runs for 30 days from that date (CPR 54.5(6)). The Claimants are therefore well within time and are prepared to agree to the DHSC having the full 14 days to respond to this letter. If the DHSC considers that time runs from an earlier point, the DHSC is invited to respond by return setting out the basis for any such contention. The Claimants do not wish to issue proceedings until the DHSC has substantively responded to this letter (and if an adequate explanation is given may not issue at all). However, the Claimants will seek to protect their position and will issue protectively if the DHSC is going to contend that there is any pressing limitation deadline.

#### **8 The details of the action that the defendants are expected to take**

54. The Claimants would, were proceedings to be issued, seek a declaration that the use of the procedure adopted under Regulation 32(2)(c) was unlawful and that the contract awarded pursuant to that process was *ultra vires*. As noted above, the contract is for a sum that would deliver years' worth of facemasks to the NHS. We require the DHSC to indicate to what extent performance has taken place under the contract to date.

55. The Claimants will, to the extent that the obligations under the contract have not been fully discharged, seek an Order prospectively restricting the DHSC from further receiving goods that are being supplied under contracts unlawfully entered into, subject to there being other lawful sources of supply available to the DHSC and/or pending the DHSC undertaking an accelerated procedure by which replacement supplies might be sourced on a lawful basis. We anticipate that is likely to be satisfied where the Government has indicated that it is no longer seeking offers through the Scheme.

56. The Claimants recognise that the DHSC must be able to have access to and distribute PPE to frontline staff. The Defendant is therefore asked to detail why, if it is its case, any prospective declaration as to the contract's unlawfulness could not be remedied through other supply contracts through which PPE is otherwise being sourced. Moreover, the Claimants do not wish, as expressed at the outset, to divert DHSC resources to litigation that could, through taking sensible steps, be readily avoided. It therefore invites the DHSC to agree that the contract was ultra vires, discontinue any and all further performance under the contract, and procure PPE by way of other lawfully let awards and/or an open (and accelerated) procurement procedure (if any further masks are indeed necessary to be procured).
57. The Claimants will not issue proceedings if the above steps are taken. For the reasons set out in this letter, there are serious and important questions raised by the direct awards that have been made to Ayanda. The public response to the awards have – even at this early stage - been one of disbelief. The Claimants remind the DHSC of its duty of candour which the Claimants consider arises particularly acutely on the facts of this case. The Claimants' next steps will therefore depend heavily on whether the requests for information and documentation set out below – and which are raised to seek an explanation for the troubling questions which the Ayanda contract raise – are answered fully and candidly by the DHSC.

## **9 ADR proposals**

58. The Claimants would be amenable to any alternative means of resolving this matter consensually such as would avoid the need to commence a claim for judicial review so long as the public interest is served. The Claimants are therefore willing to consider any proposed ADR made by the Defendant, although the Defendant would in all likelihood need to indicate that it is amenable to taking the action it is now requested to take as set out above.

## **10 The details of any information sought**

59. The DHSC is urgently required to provide the following information:

- a. When and by what means did Ayanda approach the DHSC as a possible supplier of PPE?
- b. The nature of the Offer for the supply of Facemasks (including the model types of the masks to be supplied, and the number of units of each model to be supplied), and details of whether there were other aspects of its offer that were not taken forward (and if not, why not);
- c. The unit price which Ayanda was proposing to charge the Defendant for each type of facemask and the unit price Ayanda was being charged by its supplier (and if the latter is not known, the Defendant is required to explain how it could possible assess the value for money offered by Ayanda's proposal);
- d. Who Ayanda's suppliers were and where they were based;
- e. Details of how many contracts for facemasks had been let before the Ayanda contract was let, and how many facemasks had already been sought to be sourced under existing contracts as at 29 April 2020;
- f. Details of when the Honeywell face mask contract was executed, whether that contract was granted by way of direct award and whether the Defendant took account of that contract when considering Ayanda's offer;
- g. What was the precise process by which Ayanda's offer was vetted, evaluated and considered as against other offers (if any). If it was considered against other offers, details of those other offers and why Ayanda was selected in preference to them;
- h. On what basis was Ayanda, a company with no experience of any previous dealings in any health equipment supply sector, considered to be more suitable for direct awards than other experienced and established suppliers of PPE;

- i. What level of prepayment was made to Ayanda; how much of the contract sum has now been paid to Ayanda; and what percentage of the number of units contracted for have been delivered to the UK; and what percentage of that supply has in turn been dispatched to frontline NHS workers;
- j. What is the contract period and explain the delivery schedule imposed within the contract period;

**11 The details of any documents that are considered relevant and necessary**

60. Please, by the date set out for a response to this letter:

- a. Provide all communications to and from Ayanda from the latter's initial approach to the signing of the contract on 29 April 2020, as well as any subsequent communications in relation to payments made or supplies delivered under each contract;
- b. Provide a complete copy of Ayanda's initial offer, detailing unit price per facemask, quantity of the proposed supply, the lead-time for supply and the proposed delivery period to complete delivery of the proposed total supply;
- c. Provide a full and unredacted version of the Ayanda Contract executed on 29 April 2020;
- d. Provide the written justification that Notice PPN 01/20 requires contracting authorities to keep to support its use of the Regulation 32(2)(c) procedure that was made in respect of each Ayanda contract (is the Regulation 84 report and any other written justification relating to the letting of this contract);

**12 The address for reply and service of court documents**

Alex Rook  
Rook Irwin Sweeney LLP  
107-111 Fleet Street  
London  
EC4A 2AB

We requested all documents and correspondence are sent to us by email at

**13 Proposed reply date**

We request a reply **by 4pm on 27 July 2010.**

In the absence of a substantive response by this date in the terms requested, the Claimants intend to make an application for judicial review without further recourse to you. In the event that the Claimants apply for a judicial review, they will make an application for costs against the defendant in accordance with *M v Croydon Borough of London* [2012] EWCA Civ 595.

We hope that will not be necessary and look forward to hearing from you.

Yours faithfully

Rook Irwin Sweeney LLP