

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



29 June 2020

Dear Sir

107-111
Fleet Street,
London,
EC4A 2AB

Re: Proposed Claim for Judicial Review

Our Ref:

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 two Public Supply Contracts within the meaning of Regulation 2 of the Public Contracts Regulations 2015 to Clandeboye Agencies Limited of Unit 30 Rathenraw Industrial Estate, Antrim, BT41 2SJ (“Clandeboye”) for the supply of Personal Protective Equipment (“PPE”) for use by NHS frontline staff. The DHSC failed to take any or any sufficient steps to procure PPE in February and March 2020, at a time when the need to procure PPE had become clear and pressing. From the information available to us, it appears that, as a result of this failure, DHSC felt compelled to award the contracts to Clandeboye on 28 April 2020 and again on 18 May 2020, without any prior advertisement or any competitive tender process. The urgency of these direct awards was entirely of the DHSC’s own making.

More particularly, these contracts are, between them, worth approximately £108 million. What is remarkable about these particular direct awards is that the contracts have been let to a company that is engaged – according to the SIC code on Companies House – in the business of wholesaling sugar and chocolate and sugar confectionary. As far as the Claimants can discern, Clandeboye 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. It is also a small company permitted to file unaudited / exempt accounts under the small companies regime of the Companies Act 2006. In the circumstances, its financial and technical standing make it wholly unsuited to the delivery of such large and important contracts as those which have been let. Below, the Claimants propose steps that DHSC can immediately take both to remedy the unlawfulness inherent in this award, while maintaining the DHSC’s flexibility to continue to source and supply PPE equipment to the NHS in a manner compatible with basic principles of good governance. 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 0EU

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/066
Email
Telephone:

5 The details of the matter being challenged

The Claimants seek to challenge the lawfulness of the decisions of the DHSC of 28 April and 18 May 2020 to award public contracts for the "supply of personal protective equipment for healthcare workers for the care of patients with suspected or confirmed Novel Coronavirus (Covid 19)" (as the awards are described in the Contract Award Notices published for the first time on 23 June 2020 (which is discussed further below)) to Clandeboye, the contracts 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 contracts, one of which is, to date, one of the largest contracts let by the DHSC for the supply of PPE during the current pandemic.

6 The details of any Interested Parties

Clandeboye Agencies Limited
Unit 30 Rathenraw Industrial Estate,
Antrim,

Northern Ireland
BT41 2SJ

Clandeboyne is an interested party and it has been copied in this letter. The Claimants observe that if the letting of these contracts had been open to any commercial undertaking, notwithstanding that such an undertaking had neither the requisite experience within the health sector, nor the technical or financial resources that might be expected of a contractor tasked with delivering such large contracts, then the cohort of potentially interested parties would, on that basis, be enormous. The Claimants are not presently aware of any other party that may have been approached by the Defendant in relation to the contracts in fact let to Clandeboyne.

7 The issue

Summary of facts

1. Clandeboyne is a company registered in Northern Ireland under companies number NI1617785. Its registered address is Unit 30 Rathenraw Industrial Estate, County Antrim, BT41 2SJ. Until the award of the contracts the subject of this letter, it engaged in the business of making wholesale supplies of sweets, snacks and chocolates to retailers of the same. It also supplies coffee and coffee machines. Its description in Yell.com states:

“At Clandeboyne Agencies we pride ourselves on our high customer service. We offer a range of goods and services from confectionery lines to coffee machine rentals.

Clandeboyne Agencies is a family run business based in County Antrim. We continually introduce new products to serve the requirements of our customers and distribute many well loved, quality brands as well as our exclusive own brand products. We also provide services such as coffee and slush machine rentals along with freshly roasted coffee beans. We aim to

achieve excellent customer service throughout all aspects of our business and provide our customers with very competitive prices.”¹

2. Clandeboye’s listed products and services include: sweets, popcorn, Icebudz machines and syrups, American sweets, Crunch Craving Nuts, Mrs Darlington Jam, Coffee machines and supplies, Crillys sweets and Look o look sweets.
3. Clandeboye filed ‘total exemption full accounts’ on 20 December 2019 being its unaudited financial statements for the year ended 31 March 2019. Its net assets were £291,026. The financial statements note that “The directors of the company have elected not to include a copy of the profit and loss account within the financial statements.” No explanation is given as to why. The notes also indicate that for the year ended 31 March 2019 the company was entitled to exemption from audit under s.477 of the Companies Act 2006 relating to small companies. The accuracy of the balance sheet was thus the responsibility of the directors. The notes to the statements further record that “These financial statements have been prepared and delivered in accordance with the provisions applicable to companies subject to the small companies regime.” The statements note that the average monthly number of persons (including directors) employed by the company during the year was 14.
4. There is no evidence that Clandeboye has any experience of trading in any sector or market beyond those related to the foods and drinks industry. It has, as far as the Claimants can ascertain, never been engaged to supply any equipment other than that related to drinks equipment. 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.
5. However, on or around 28 April 2020, the Department of Health awarded Clandeboye a public contract for the sourcing and supply of PPE for the NHS worth £14.28 million. Subsequently on 18 May 2020, the Department

¹ <https://www.yell.com/biz/clandeboye-agencies-antrim-1936031/> Accessed on 24 June 2020

of Health awarded Clandeboye a further contract for the sourcing and supply of PPE worth £93.24 million.

6. That that amount of money has been handed, without advertisement or competition, to a family run SME that operates as a supplier of sweets and snacks with no history in the supply of health equipment beggars belief and raises a huge number of questions that the Department must answer. It is evident from the number of PPE-related contracts that have been let by the Department that it cannot sensibly be said that there was a shortage of PPE suppliers available to central government buyers.
7. We apprehend that DHSC let the contracts to Clandeboye 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." The Claimants fully accept that that guidance was necessary in the current circumstances and could indeed have been properly and lawfully used to enable the DHSC to let contracts for the supply of PPE on the basis of direct awards. 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.
8. 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.”

9. 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.”*

10. As noted above, two Contract Award Notices were published on the Contracts Finder portal on 23 June 2020,² and on Tenders Electronic Daily (“TED”) Portal on 24 June 2020.³ The Contract Award Notices published on TED (each of which referred in their 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

² <https://www.contractsfinder.service.gov.uk/Notice/baad5d4b-bdfb-4c96-a70c-2ef3754fe68e?origin=SearchResults&p=1> and <https://www.contractsfinder.service.gov.uk/Notice/9c2282f4-ba1b-4b9e-bf1f-7a057eeb99d9?origin=SearchResults&p=1>

³ <https://ted.europa.eu/udl?uri=TED:NOTICE:293557-2020:TEXT:EN:HTML&src=0> and <https://ted.europa.eu/udl?uri=TED:NOTICE:293542-2020:TEXT:EN:HTML&src=0>

- *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 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 the previous explanations were inadequate and/or in light of justified criticism of those explanations. Specifically, the notices each seek 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 in the contracts the subject of this letter.

12. In any event, the explanations still do not satisfy the requirements under Regulation 32(2)(c). 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 Notices sought to contend that the need for PPE was still unforeseeable as at 28 April and 18 May 2020. In fact, even between the statement of Commissioner Breton about what, before then, had been unforeseeable, and the award of each of these contracts, the DHSC would have had the time to run an accelerated procedure in each case. Such a procedure can be undertaken in 25 days meaning that an accelerated competition could have taken place in respect of both awards. The need was not unforeseeable as at 28 April or 18 May 2020: the need had, as the explanation acknowledged, become abundantly clear in mid-March. The reason for the urgency was thus entirely of the DHSC's own making.

13. The Contract Award Notices each then indicated that the DHSC had received a single tender, from Clandeboye. That is consistent with an absence of any advertisement, or competition. And it is inconsistent with any approach having been made to any undertaking other than Clandeboye or, alternatively, with any other undertaking being given the opportunity to tender for this particularly valuable pair of public contracts.
14. It is simply not plausible to suggest that leading PPE suppliers would not have been interested in tendering for one of the largest – if not the largest - PPE supply contracts that has yet been let. It is understood that the Government launched a 'call to arms' via its press release to the business community on 10 April 2020. PPE suppliers would have known as at that date that they could submit tenders for the further supply of PPE. The first Clandeboye contract was awarded 18 days later. The Government has, however, indicated – by letter of 16 June 2020 from the Government Legal Department to this firm in relation to the PestFix matter - that it received expressions of interest or tender submissions from thousands of businesses 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 Clandeboye, a family-run supplier of snacks, chocolate and sweets, warranted the award of two contracts worth £108 million.

15. It is also unclear whether the award of the first contract of £14.24 million operated as a form of pre-determination in relation to the award of the second, £93.24 million contract. The DHSC is required to explain what process was followed by which the second contract awarded to Clandeboye was so awarded. The DHSC was at all times 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. In the circumstances, the DHSC is obliged to indicate whether, as at the date of the first contract, it was tacitly understood that a further contract or contracts would be awarded, such that, in effect, there was no procurement procedure at all in respect of the award of the £93.24 million contract to Clandeboye.
16. Notwithstanding these issues, DHSC made the awards, only notifying each on 23 June 2020. It has therefore violated Regulation 50 of the PCR 15 in that it failed to publish a contract award notice within the required 30 days of the contract's execution (56 days after the first contract and 37 days after the second). Moreover, it is noted both contracts were submitted to TED on 19 June and both published on the same day (23 June on the Contracts Finder website and 24 June on TED) notwithstanding that they were, at least nominally, awarded 3 weeks apart. The DHSC is required to explain why they were treated 'of a piece' in relation to their notification on both Contracts Finder and TED. The DHSC is also required to explain why these awards were published so substantially in breach of the Regulation 50 requirement. And the DHSC is required to explain the date on which the 'explanation' for each award as set out on Contract Award Notice was drafted, and explain whether the delay in their publication was connected with the drafting of the explanation which has evolved from the previous wave of Contract Award Notices in respect of contracts for the supply of PPE.
17. Of much greater concern, however, is the fact that the Contract Award Notices are silent as to why Clandeboye, a company with apparently no previous history of supplying PPE for use by frontline NHS staff was the

only undertaking given the opportunity to submit a tender, or, alternatively, was chosen ahead of numerous other seemingly more qualified businesses. And this in circumstances where, as revealed by the PPE Guidance issued by Government, very particular requirements attached to the nature and use of different types of equipment depending on the particular circumstances in which COVID-19 patients were being treated, and where the supplies of some PPE have been rejected because they do not meet the high and specific technical and safety standards applicable to PPE. Nor is there any explanation of why the DHSC, instead of approaching established PPE companies with experience of PPE supply chains and the sourcing of such equipment on foreign markets, instead let one of the biggest of all of its PPE supply contracts to a company with no obvious expertise or experience of PPE-related procurement. Therefore the awards are, for reasons further particularised below, irrational on their face.

Summary of grounds

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

18. 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.”*

19. The Claimants again acknowledge that DHSC considered that it needed to act with expedition in issuing these direct awards. However, it is evident that DHSC has simply re-stated these conditions in the Contract Award Notices, albeit with additional amplification in light of the criticism that was directed at the explanations given by the DHSC in previous Contract Award Notices. 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 28 April 2020 when the first Clandeboye contract was awarded, or between 11 March 2020 and 18 May 2020 when the second Clandeboye contract was awarded. Nor, more fundamentally, do the Notices explain why, in relation to either of these contracts, the urgent position in which DHSC found itself necessarily required it to award either of these contracts to Clandeboye without seeking to negotiate with or evaluate bids from any other established and experienced PPE supplier.

20. 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).

21. 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 28 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 those needs in fact procured under the first contract directly awarded to Clandeboye. Even more time was available between 11 March 2020 and 18 May 2020 to do the same.

22. Moreover, the DHSC has failed to explain in the Contract Award Notice why, at this relatively late stage in the development of the pandemic (and the Government's response thereto), the need for PPE was unforeseen and thus one of extreme urgency in light of the fact that it was unforeseen. The DHSC's explanation in fact reinforces the fact that, as at 28 April and, *a fortiori*, at 18 May 2020, the need for PPE was not in any way unforeseen and is confirmation that the urgency to which DHSC was subject in late April and mid-May 2020 was directly caused by its own failure to make adequate arrangements for the supply of PPE.
23. That COVID-19 was not unforeseen as at either 28 April 2020 or 18 May 2020 is clear not only from the fact that the WHO declared it to be a pandemic on 11 March 2020, but the UK entering lockdown on 23 March 2020, and, more importantly, the fact that frontline NHS staff were dying of the disease in late March. The DHSC must have foreseen this need well before 28 April 2020. On any view, the DHSC could have undertaken a 15 day open procedure, and provided a 10 day standstill, well before either contract was awarded to Clandeboye, while at the same time meeting any more urgent need by way of shorter direct awards. 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 awards to Clandeboye outside the scope of Regulation 32(2)(c) PCR 15. In the circumstances, any urgent need as at 28 April 2020 or 18 May 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"):⁴

- 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)

⁴ <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.

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”.

25. In light of those developments, the DHSC cannot contend that the need for PPE was unforeseen as at 28 April 2020 or 18 May 2020: the situation had only become acute because of its failure to seek to procure sufficient levels of PPE in February or March 2020, by which time that need was already clear and obvious. However, insofar as the DHSC still contends that such need remained unforeseeable as at 28 April 2020 or 18 May 2020, the Claimants require it to explain why it so contends. In addition, 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 mid-May; 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 refer to the further, following facts:

- a. On 24 February 2020, there was a meeting of EU officials to which the UK was invited, at which there was an update from the European Commission on the joint procurement of PPE. At that meeting, Commission officials called on countries to confirm

“their exact needs latest today ... to move forward with next steps”. No representative from the UK attended the meeting.

- b. On 28 February 2020, the EU launched its first joint procurement of £1.2m worth of gloves and gowns/overalls. The UK was not one of the 20 member states involved. That procurement failed due to a lack of suitable suppliers and was relaunched on 15 March 2020. The UK was still not involved as at the date of re-launch. However, DHSC would have been aware that that procurement had been undertaken.
- c. On 17 March 2020, the EU launched two more rounds of joint procurement for masks and goggles and ventilators. The UK was aware of this procurement but was again not one of the 25 member states involved, notwithstanding that UK officials attended a joint meeting of the Health Security Committee and the Joint Procurement Agreement Steering Group on 19 March 2020. It is understood that it was only on 19 March 2020 that the UK took up the invitation to join the joint procurement agreement steering committee, which makes decisions on mass purchases.
- d. On 24 March 2020, a statement from No 10 Downing Street stated that the UK had not joined EU procurement schemes as the UK was not in the EU and was “making [its] own efforts”. That suggested that an active choice had been made not to join the EU Joint Procurement Scheme. The Government later stated that it failed to receive an email inviting it to be part of the initiative. It has since repeated this reference to “an initial communication problem” but has never explained the same. The European Commission has subsequently indicated that while the UK was not involved in any of the joint procurements that had been undertaken as at 21 April 2020, it had not officially requested to be involved in any of them, despite being “repeatedly invited” by the EU to do so.

- e. On 25 March 2020, health officials from EU countries convened an audio meeting. Representatives of Member States raised the possibility of further procurements and were asked to inform the Commission by the following day about their requirements. The UK had been invited to join the meeting, but it is understood that no representative took part.
 - f. 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. 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, let alone mid-May.
28. In the circumstances, the DHSC has sought to take advantage of Cabinet Office Guidance without giving adequate consideration to whether the conditions for urgency were met on the facts. Had it done so, it would have been apparent that those conditions could not be met because the need for PPE had at that stage long since become foreseeable such that the delay in purchasing it was entirely attributable to the DHSC’s lack of planning. That lack of planning and engagement is no excuse, never mind a justification, for its failure to adopt either a more public or competitive alternative to the award procedure in fact used in this case, or even to make shorter-term and less valuable direct awards to undertakings with the experience and resources to be able to credibly deliver PPE to the NHS.
29. It is also incumbent on the DHSC to explain:

- a. Why it only approached and/or had discussions with and/or proceeded only to consider the proposal(s) tendered by Clandeboye and/or failed to approach or seek to engage in discussions with and/or consider awarding contract(s) to other contractors, in particular established contractors with experience of sourcing PPE for the NHS;
- b. Why it considered Clandeboye, a supplier of sweets in Northern Ireland, to be a more advantageous supplier of PPE than other contractors, in particular established suppliers operating in that markets;
- c. How it had satisfied itself that Clandeboye had the technical expertise to be able to operate in the market for the supply of PPE, including by way of hiring personnel who were sufficiently qualified and experienced to understand and operate with credibility within the relevant foreign markets in order to be able not only to deliver PPE that was fit for its very specific set of purposes, but also to ensure value for money (as is required by PPN 01/20, even in the context of direct awards let to meet urgent requirements); and
- d. How it considered that Clandeboye was sufficiently financially robust to deliver the contract given Clandeboye's available cash assets as indicated in its December 2019 financial statements.

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

30. 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. It was therefore incumbent upon DHSC to implement a fair, transparent, non-discriminatory and proportionate basis

for choosing between potential suppliers of the contracts which were, in the event, awarded to Clandeboye.

31. In this regard, the DHSC failed to conduct any such process. In particular, the Contract Award Notices suggest that the only tender received for the contract came from Clandeboye. It is not credible that no other suitable suppliers would have sought to tender for PPE contracts worth £108 million had the opportunity been made known even to a small number of undertakings in the PPE supply market. 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

32. 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.
33. The awards to Clandeboye are disproportionate because the DHSC had time to undertake accelerated open procurement for the awards of PPE supply contracts or at least some form of competitive process. No proper explanation has been given as to why it did not take either of those options.
34. The Claimants further contend that each contract may be otherwise unlawful insofar as, according to the Contract Award Notices posted on Contracts Finder on 23 June 2020:

a. The First Contract was awarded on 27 April 2020 and was said to have commenced on that day and ended on 28 April 2020.

b. The Second Contract was awarded on 17 May 2020, commenced on 18 May 2020 and was said to have ended on 19 May 2020.

35. The Claimants cannot understand how goods to be supplied under contracts worth £108 million, that are commonly sourced from international markets could be physically delivered within 24 hours such that the contracts would, as at the end of that 24 hour period, be treated as having been fully discharged. The Claimants cannot – without further information and explanation - accept that performance was fully and satisfactorily executed within 24 hours and thus have sought further information on this issue below.

Ground 4: the award is irrational

36. In the context of public procurement, an authority must seek to ensure that any contracting partner has the ability to perform the contract to be let. This entails checks on the undertaking's technical ability to perform, including whether it has qualified personnel, and on its financial position. The need for such due diligence is particularly acute in circumstances where an authority is seeking to procure in response to an emergency. A contractor who happens to have filed a positive expression of interest will not be able to meet the authority's urgent requirement if it is technically or financially incapable of performing the contract. In the present case, the taking of steps to verify technical and financial capability to perform the contracts was of particular importance given the amount of public funds that were being granted to the successful contractor and that other, more established suppliers benefiting both from experience and economies of scale may have been able to deliver the same goods more cheaply and/or more efficiently, with the consequent benefit to the taxpayer.

37. It appears that the DHSC imposed no requirements as to economic and financial standing before awarding the contracts to Clandeboye. In light of its financial standing as at 31 March 2019, the DHSC could not, without

more, have been satisfied that Clandeboye had the financial means of establishing the global supply and logistics arrangements necessary to permit it to pay for the purchase and delivery of PPE. In particular, in terms of accessible / current assets, its most recently filed accounts indicate that it had £18,586 in 'cash at bank and in hand'.

38. 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 Clandeboye and/or provided any other means by which Clandeboye was (or would be) assisted in commencing operations.
39. Nor, it would appear, did DHSC impose any requirements as to the technical and professional ability of Clandeboye before awarding the contracts. Had DHSC addressed its mind to this issue, it could not have been satisfied that a small company engaged in the business of supplying chocolates and sweets could be sufficiently experienced to be entrusted with contracts worth in excess of £100 million for the worldwide sourcing and supply of vital PPE. Nor could it have had any confidence that Clandeboye would have the knowledge and experience of the very particular PPE needs of frontline NHS staff treating COVID-19 patients in the wide range of medical settings in which such equipment would be utilized.
40. 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 contracts. But rather that it was incumbent upon the DHSC to verify Clandeboye's ability to perform the proposed contracts, in particular in circumstances where Clandeboye had no prior relevant experience, was currently engaged in fundamentally different activities and was in a precarious financial position.
41. In the circumstances, DHSC has acted irrationally in making a direct award of this contract to an undertaking which appeared manifestly ill-suited to delivering it, both in financial and technical terms, without first ensuring

that the requirements ordinarily imposed prior to the award of public contracts to ensure financial and technical robustness were put in place and could be adhered to.

Reserve grounds

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

Standing

43. This claim for judicial review is a public interest challenge to the lawfulness of direct awards in which, it would appear, no other undertaking was invited to participate or given the opportunity to submit a tender in relation to the proposed direct award, or alternatively where established and experienced PPE suppliers appear to have been passed over in favour of Clandeboye. In those circumstances, the Claimants have a sufficient interest to challenge the expenditure of £108 million of taxpayers' money with a company that happened to have filed an expression of interest with the DHSC at a time of self-inflicted inadequacies in the supply of PPE to the NHS. It is perfectly proper for litigation to be brought to seek to protect public funds from maladministration and/or to scrutinise and hold to account any maladministration which may have occurred.
44. EveryDoctor, in acting for many frontline NHS staff who are daily exposed to Coronavirus and who are put at risk absent sufficient and/or suitable PPE to enable them to care for patients safely, has the following additional interest in this proposed litigation. In particular, the procurement of PPE via a supplier that was not subject to any competition, has no or no sufficient experience or understanding of the specific health needs of doctors and the commensurate requirements this has for the nature and safety of the PPE to be purchased, is one that directly threatens the safety of all frontline NHS staff, including the more than 25,000 doctors who are members of and represented by EveryDoctor. The procurement of sub-standard PPE puts the medics that EveryDoctor represents at serious risk. It follows that had a proper, open and competitive procedure been adopted (even within the constraints of the requirements of Regulation

32(2)(c) of the Public Contracts Regulations 2015, a more experienced and knowledgeable supplier may have been awarded the contracts, with the further consequence that it would be materially more likely that PPE would be procured that complied with the relevant safety standards to the benefit of its membership.

Limitation

45. As the award of the contracts was only made public on 23 June 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

46. 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 contracts awarded pursuant to that process were *ultra vires*. As noted above, the contracts were each said to last for a single day but it does not appear likely that the goods sought to be sourced and supplied under these contracts were supplied such as to fully discharge those contracts the day after they were entered into. We require the DHSC to indicate to what extent performance has taken place under each contract.

47. 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.

48. However, 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 contracts' 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 contracts were ultra vires, discontinue any and all further performance under the contracts, and procure PPE by way of other lawfully let awards and/or an open (and accelerated) procurement procedure.
49. 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 Clandeboye. 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 Clandeboye contracts raise – are answered fully and candidly by the DHSC.

9 ADR proposals

50. 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. 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

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

- a. On what forum or platform were the opportunities to tender for the contracts awarded to Clandeboye posted and how long were those opportunities accessible to the public/tenderers;
- b. Is it the DHSC's case that expressions of interest were sought pursuant to the open "call to arms" issued by way of the press release of 10 April 2020? If the DHSC seeks to contend that these opportunities were advertised by any other means, it is required to provide full details thereof;
- c. When does DHSC contend that it became aware of the need to source PPE, bearing in mind that the PPE Guidance that had been issued in February 2020, that Joint Procurement across the EU had commenced by the end of February 2020, that Notice PPN 01/20 was issued on 18 March 2020 and the UK went into lockdown on 23 March 2020. Does it remain the DHSC's position that the need to procure PPE was unforeseen as at 28 April 2020 and at 18 May 2020, and if so, and in light of the above, on what basis;
- d. When and by what means did Clandeboye approach the DHSC as a possible supplier of PPE?
- e. On what basis was Clandeboye, a company with no experience of any previous dealings in any health supply sector, considered to be more suitable for direct awards than other experienced and established suppliers of PPE?
- f. If the DHSC did have any discussions with any other commercial undertakings in relation to the proposed supply of the PPE that was let under the Clandeboye contracts, please identify with whom those discussions took place, when they took place, and why they did not come to fruition and/or why DHSC opted to contract with Clandeboye notwithstanding that discussions with other undertakings were ongoing;

- g. What consideration, if any, was given to the running of an accelerated open competition in respect of these PPE contracts? In that regard, please explain when (if at all) that possibility was first raised, the reasons why it was decided that accelerated open competition(s) would not be run, and the date(s) on which that decision was/ those decisions were taken;
- h. What consideration, if any, was given to devising a fair, transparent, non-discriminatory and proportionate basis for choosing between potential suppliers of the contracts which were, in the event, awarded to Clandeboye? In that regard, please explain when (if at all) that possibility was first considered, the reasons why it was decided that such a basis would not be put in place, and the date(s) on which that decision was/ those decisions were taken;
- i. What requirements did the DHSC impose in order to satisfy itself of the financial standing and technical capabilities of Clandeboye; if none were imposed, on what basis (including confirmation of any upfront payments, loans or other financial support from Government) was the DHSC satisfied that such requirements did not need to be imposed in the circumstances; if no such requirements were considered, why not;
- j. Whether it had been determined as at 28 April 2020 that Clandeboye would be awarded a second and more lucrative contract at some later date and if so, explain the reasons why the contracts were separated and confirm that no further procedure was pursued leading to the award of the second contract;
- k. Detail whether any consideration was given to making a direct award on such basis as would have enabled the DHS to conduct an open competition, on an accelerated basis, for the medium to longer term supply of PPE, and which would still have enabled the DHSC to address the situation of urgency that had arisen, albeit as a result of its own failings. If so, please indicate when such consideration was given to such a course and the reasons why it was not adopted. If not, please indicate why such consideration was not given;

- l. Explain the terms relating to the period of performance of each contract relative to what is said to be its one day duration and indicate to what extent each contract has been performed and remains to be performed (including in particular how much PPE has been delivered by Clandeboye to date under each contract and what sums have been paid to it in respect of those supplies or otherwise);
- m. Details of the dates and values of all PPE contracts awarded since the beginning of the crisis, the identity of the procedure by which each was let, the identity of the suppliers and the value of each PPE contract

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

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

- a. Provide all communications to and from Clandeboye from the first initial approach to the signing of the second contract on 18 May 2020, as well as any subsequent communications in relation to payments made or supplies delivered under each contract;
- b. Provide copies of the information publicly posted about the contracts which were subsequently awarded to Clandeboye and which set out what bidders needed to submit and by when;
- c. 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 Clandeboye contract;
- d. Provide any documentation demonstrating that a “separate assessment” of each of the tests of urgency and foreseeability set out in Notice PPN 01/20 was carried out such as to support the decision to utilise the emergency procedure both at all, and in the context of the decisions to award contracts to Clandeboye;

- e. Provide the contracts as entered into with Clandeboye, accepting that any genuinely commercially confidential information may need to be redacted.

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 13 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