

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



10 June 2020

Dear Sir

107-111
Fleet Street,
London,
EC4A 2AB

Re: Proposed Claim for Judicial Review

Our Ref:
AIR/AIR/066

We act for the Good Law Project (“GLP”) which seeks to challenge the lawfulness of the decision 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 to Crisp Websites Limited trading as PestFix (“PestFix”) 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 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 contract to PestFix on 13 April 2020 without any prior advertisement or any competitive tender process. The urgency of this direct award was entirely of the DHSC’s own making.

More particularly, the contract is worth £108 million and was let to run for 12 months. What is remarkable about this particular direct award, is that the contract was let to a company that is engaged in the business of pest control, has no previous experience of sourcing PPE for any public authority, has never previously been awarded a single public contract, and whose financial and technical standing make it wholly unsuited to the delivery of such a large and important contract as that which has been let. Below, the Claimant proposes 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 Claimant has no desire to divert DHSC’s resources in the midst of the current crisis. It therefore proposes 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 claimant

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

Please direct all correspondence to the proposed Claimant's 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 Claimant seeks to challenge the lawfulness of the decision of the DHSC of 13 April 2020 to award a public contract for the “supply of garments for biological or chemical protection” (as the award is described in the Contract Award Notice published for the first time on 18 May 2020 (which is discussed further below)) to PestFix, the contract having neither been advertised nor competed. The Claimant understands that not a single other prospective supplier was given the opportunity to submit a tender for the direct award of what, to date, is the single most valuable PPE supply contract let by the DHSC.

6 The details of any Interested Parties

PestFix
Unit 1d Littlehampton Marina,
Ferry Road,
Littlehampton,
West Sussex,
BN17 5DS

PestFix is an interested party and it has been copied in this letter. The Claimant observes that if the letting of this contract 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 a large contract, then the cohort of potentially interested parties would, on that basis, be enormous.

7 The issue

Summary of facts

1. PestFix is a company registered in England under company number 04600829. Its registered address is Unit 1d Littlehampton Marina, Ferry Road, Littlehampton, West Sussex, BN17 5DS. Until the award of the contract the subject of this letter, it engaged in the business of providing pest control services, including by way of extermination services, in particular in relation to bird, rodent and insect control.

2. PestFix filed unaudited financial statements of account on 7 May 2020 for the year ending 30 November 2019. As at that date, PestFix's net assets were merely £18,047. Those statements were filed in accordance with ss 476-477 of the Companies Act 2006, the provisions applicable to companies subject to the small companies regime.
3. There is no evidence that PestFix has any experience of trading in any sector or market beyond those related to pest control. It has never been engaged to supply any equipment other than that related to pest control. It has no 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.
4. However, on or around 13 April 2020, the Department of Health awarded PestFix a public contract for the sourcing and supply of PPE for the NHS worth £108 million. The Claimant notes from research published by Tussell that over 100 PPE supply contracts worth nearly £350 million have been let in response to the current pandemic. In the circumstances, almost a third of that amount is tied up in the contract that has been let to PestFix. It is evident from the number of PPE-related contracts that it cannot sensibly be said that there was a shortage of PPE suppliers available to central government buyers. Moreover, it cannot sensibly be maintained that it was necessary to let a contract of this value and duration to PestFix.
5. DHSC let the contract to PestFix under 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 Claimant fully accepts 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.

6. 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."

7. 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."* A Contract Award Notice was published on the Tenders Electronic Daily ("TED") Portal on 18 May 2020¹ but the award only came to wider public attention on or around 4 June 2020. The Contract Award Notice published on TED

¹ https://ted.europa.eu/udl?uri=TED:NOTICE:230683-2020:TEXT:EN:HTML&WT.mc_id=RSS-Feed&WT.rss_f=Defence+and+security&WT.rss_a=230683-2020&WT.rss_ev=a

(which referred 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:

Covid-19 is serious and its consequences pose a risk to life. Cabinet Office published PPN 01/20: Responding to COVID-19 on procuring with extreme urgency in March 2020 which states that contracting authorities may enter into contracts without competing or advertising the requirement where certain tests are met.

1) There are genuine reasons for extreme urgency as there is a significant public health risk requiring immediate action as a result of Covid-19;

2) The Covid-19 situation is novel and the contracting authority could not have reasonably foreseen these events;

3) It is not possible to comply with the timescales of another procedure due to the urgent requirement to obtain the [supplies]being contracted for. Additionally, there are many buyers competing for the same supplies. It is imperative that security of supply is maintained. Demand for equipment is high and there is little or no incentive for suppliers to participate in competitive procurement procedures;

4) The situation is not attributable to the contracting authority.”

8. The Contract Award Notice then indicated that it had received one single tender, that from PestFix. 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 PestFix, alternatively any other undertaking being given the opportunity to tender for this

particularly valuable public contract. In this regard, Mr Daniel England, a director and founder of PestFix, has publicly stated that he had filled in a form on the DHSC website and was contacted by DHSC “a week later”. He went on to say: “some of the bigger players that would normally be supplying this were perhaps not as quick to react,” acknowledging that there would be wider market interest. It is simply not plausible to suggest that leading PPE suppliers would not have been interested in tendering for the single largest PPE supply contract that has yet been let. Even if PestFix had filled in the DHSC form sooner than others, it beggars belief that DHSC would not have engaged in a limited market testing exercise by contacting other known and established suppliers to ask whether or not they were interested in tendering for the contract. That simply required DHSC to make a number of phone calls. But that does not appear to have been done. Had the wider market been aware of the opportunity and the fact that DHSC was proposing to award on 13 April 2020 (the date, according to the Contract Award Notice, on which the PestFix contract was executed), there is little doubt that the established end of the PPE supply market would have quickly submitted expressions of interest to DHSC and sought to enter into negotiations.

9. Nevertheless, DHSC made the award, only notifying it on 18 May 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 much greater concern, however, is the fact that the Contract Award Notice is silent as to why PestFix, a company with no previous history of supplying PPE for use by NHS Doctors and Nurses (and 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 patients were being treated, and where the supplies of some PPE are now being rejected because they do not meet the high and specific technical and safety standards applicable to PPE), was the only undertaking given the opportunity to submit a tender. 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 by far the biggest of all of its PPE supply contracts to a company with no expertise or experience of procurement, let alone

PPE-related procurement. Therefor the award is, for reasons further particularised below, irrational on its face.

Summary of grounds

Ground 1: Irrationality / error of law

10. In the context of public procurement, an authority will wish 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. It is one thing to award a contract on an urgent basis; but it does not follow that the contractor who happens to be the only entity to have filed a positive expression of interest will be able to meet the urgency if it is technically or financially incapable of performing the contract. The contracting authority must satisfy itself that the proposed contractor is able to supply in a manner that meets the urgency. If not, the need is likely to be exacerbated, or at least not met to the extent that it could have been had a procurement been undertaken in such a manner as to identify which potential contractors might be expected to reliably deliver the authority's requirement.
11. For those reasons, regulation 58 of the PCR 15 sets down general principles relating to the selection criteria to be deployed in awarding public contracts, including by way of the negotiated procedure with prior publication (including for reasons of extreme urgency). Regulation 58(1) provides that *selection criteria may relate to—*
 - (a) *suitability to pursue a professional activity;*
 - (b) *economic and financial standing;*
 - (c) *technical and professional ability.*"
12. Regulation 58(3) of the PCR provides that contracting authorities shall limit any requirements to those that are appropriate to ensure that a tenderer has the legal and financial capacities and the technical and professional

abilities to perform the contract to be awarded. The imposition of such criteria is the means by which the authority can undertake due diligence as to the capability of the proposed contractor. In relation to economic and financial standing, Regulation 58(7) provides that “contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract.” It appears that the DHSC imposed no such requirements before awarding the contract to PestFix. In light of its financial standing as at July 2019 – with a net asset position of merely £18,000 - the DHSC could not, without more, have been satisfied that PestFix had the financial means of even establishing the global supply and logistics arrangements necessary to permit PestFix to pay for the purchase and delivery of PPE. It is understood that the payment terms included in the PPE supply contracts that have been let 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 PestFix and/or provided any other means by which PestFix was assisted in commencing operations. In any event, DHSC does not appear to have imposed any requirement that the successful contractor should:

- a. have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract;
- b. provide information on their annual accounts showing the ratios, for example, between assets and liabilities; and/or
- c. have an appropriate level of professional risk indemnity insurance.

13. In this regard, Regulation 58(9) is indicative insofar as it provides that the minimum yearly turnover that economic operators are required to have shall not exceed twice the estimated contract value, except in duly justified cases. In this case, that would have permitted the DHSC to impose turnover requirements in excess of £200 million. Having had less than £20,000 of cash at bank, it is doubtful (the abridged company accounts do not provide the detail) that PestFix’s turnover is anything approaching the levels that the DHSC could otherwise have insisted upon.

14. In relation to technical and professional ability, Regulation 58(15) provides that “contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.” Regulation 58(16) goes on to provide that “Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past.” The Claimant contends that it is clear that the DHSC could not have been satisfied that a small company engaged in the business of supplying pest control solutions could possibly be sufficiently experienced to discharge a contract worth in excess of £100 million in respect of the worldwide sourcing and supply of PPE equipment. It has no previous experience that would have enabled it to supply any references from any contracting authority. Nor could it have had any confidence that PestFix would have had the knowledge and experience of the very particular PPE needs of Doctors and Nurses treating Covid patients in the wide range of medical settings in which such equipment would be utilised.

15. In the circumstances, the DHSC could not have been satisfied that PestFix could have met the financial and technical capability requirements of the sort that would be appropriate for a 12 month contract as valuable as that in the present case, and certainly not when compared with larger and/or established PPE suppliers actually operating in that market. If it so satisfied itself, such a decision would be irrational on its face. If DHSC failed to impose such requirements as set out in Regulation 58, that could only have flowed from the fact, as the DHSC would have been well aware, that PestFix could not have complied with them or alternatively, not nearly to the extent that an established and experienced supplier of PPE could have complied. In either event, the DHSC has acted irrationally or erred in law in making a direct award of this contract to an undertaking manifestly ill-suited to delivering it, both in financial and technical terms, without first ensuring that the requirements ordinarily imposed to ensure financial and technical robustness were put in place and could be adhered to.

Ground 2: Failure to seek to apply the guidance / provide reasons

16. PPN 01/20 expressly 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.”*

17. The Claimant again acknowledges that DHSC considered that it needed to act with expedition in issuing this direct award. However, it will be evident that DHSC has simply re-stated these conditions in the Contract Award Notice, albeit without explaining why, on the particular facts, a competitive procedure could not be run or, more fundamentally, why in relation to this contract, the urgent position in which DHSC found itself necessarily required it to award this contract to PestFix without seeking to negotiate with or making an award to any other established and

experienced PPE supplier. Nor has the DHSC engaged with 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. The DHSC has simply, and slavishly, re-stated the conditions set out in PPN 01/20 without providing any explanation at all as to why, notwithstanding the shortness of time, no other supplier, whether already supplying PPE equipment under one of the many other PPE contracts that had been let, or any other supplier financially and technically better placed to make such a supply, considered it appropriate only to accept a single tender from a single (novice) supplier. In circumstances where, as the Claimant contends, the need for PPE was no longer unforeseen, then absent the degree of urgency that justifies a direct award, the DHSC should not have sought to commit to a 12 month contract and instead should have sought to meet the immediate need by much shorter direct awards to established PPE suppliers, while in parallel making provision for longer terms supplies by way of an open and accelerated competition.

18. Moreover, in light of the facts that PestFix (i) had no relevant experience such as to makes it in any way a suitable undertaking to whom DHSC might award a £108 million contract and (ii) had no or no sufficient financial resources to demonstrate that it could reliably deliver this contract, it was incumbent on the DHSC to explain:
 - a. Why it only approached and/or had discussions with and/or proceeded only to consider the proposal tendered by PestFix and thus why it failed to approach or seek to engage in discussions with any other contractors with experience of sourcing PPE, for the NHS, particularly when in excess of 100 other such contracts had been let;
 - b. How it had satisfied itself that PestFix 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 any 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 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

- c. How it might be said to be sufficiently financially robust to deliver the contract given PestFix's financial position as filed in May 2020.

19. PPN 01/20 states that "Contracting authorities should keep a written justification that satisfies these tests. You should carry out a separate assessment of the tests before undertaking any subsequent or additional procurement to ensure that they are all still met, particularly to ensure that the events are still unforeseeable. For example, as time goes on, what might amount to unforeseeable now, may not do so in future." That written justification does not appear on the face of the Contract Award Notice which simply restates the conditions set out in PPN 01/20 and the DHSC has not otherwise published any written justification or any separate assessment that explains why these tests were satisfied specifically in the context of the proposed award to PestFix.
20. Finally, no explanation has been given, in particular, as to why a 12-month contract was required to meet a much more immediately urgent need. The only public statement that has been issued by the DHSC in response to media reporting states "Our priority is to protect health and social care staff, including making sure they have the equipment they need to do their job safely." That does not address why such a large contract was required to be let for 12 months. It would be entirely wrong for a challenge – and this challenge does not seek to – curtail supplies of PPE currently being received pursuant to the contracts that have been let. But it is evident that as a matter of law, 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. It follows that the DHSC should not have let such a large contract for such a long period of time. The immediate need could have been met by much shorter, and potentially renewable direct awards. That would have enabled the DHSC to conduct an open and accelerated competition for a longer term supply in parallel. 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.
22. Moreover, Covid 19 was not unforeseeable as at 13 April 2020. The UK went into lockdown on 23 March 2020, three weeks previously. The DHSC must have foreseen this need well before 23 March 2020. On any view, the DHSC could have undertaken a 15 day open procedure, and provided a 10 day standstill, well before this contract was awarded to PestFix on 13 April 2020 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.”*

23. Each of these exclusions apply on the facts of the present case. In the circumstances, any urgent need as at 13 April 2020 can only be due to the

failure of DHSC to plan efficiently, having known at least two months previously that there was a requirement for the supply of PPE. It follows that the situation of urgency that had arisen by mid-April was entirely attributable to the DHSC. In this regard, the Claimant notes 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”):²

- 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”.

² <https://www.gov.uk/government/publications/wuhan-novel-coronavirus-infection-prevention-and-control#history> The Claimant notes 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.

24. In light of those developments, the DHSC cannot contend that the need for PPE was unforeseen as at 13 April 2020: the situation had only become acute because of its failure to seek to procure sufficient levels of PPE in March 2020 by which time the need was already clear and obvious. However, insofar as the DHSC still contends that such need remained unforeseeable as at 13 April 2020, the Claimant requires it to explain why it so contends. In addition, the Claimant requires 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 mid-April; or (ii) that it had no opportunity to undertake an accelerated competition before mid-April.. 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 was long since aware.

25. In this regard, the Claimant refers 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. By 13 April 2020, the date on which the PestFix contract was signed, 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 briefing, admitted that there were

supply problems, relying on the fact that there was “a competitive market out there”.

26. Again, there can be little doubt that the DHSC was well aware of the need to undertake the procurement of PPE long before the political pressure had grown sufficiently such that, as at 13 April 2020, the Government accepted that real problems had arisen in relation to the supply of PPE. 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 mid-April. It is therefore no answer for the Government to seek to contend that there was a worldwide shortage of PPE supplies at the point at which it sought to source that equipment through PestFix. That shortage was exacerbated because of the UK Government’s failure to act earlier, whether through the EU Joint Procurement scheme, or on its own account.
27. In the circumstances, the DHSC has sought to formally apply Cabinet Office Guidance albeit where it has not in any way turned its mind to why the conditions for urgency are 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 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 direct award to undertakings with the experience and resources to be able to credibly deliver PPE to the NHS.

Ground 3: The award is disproportionate

28. 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 tide the authority over pending a more open or competitive process being adopted to procure a longer-term supply.

29. As noted above, it is understood that the length of the contract awarded to PestFix is 12 months. On any view, such a direct award is wholly disproportionate: were the DHSC, as at 13 April 2020, genuinely facing an unforeseen and urgent need to immediately procure PPE, then it was open to the DHSC to make a direct award of a contract for such period as would enable it to run an open competition on accelerated basis in the interim (or at the very least to have created the time and space to enable the DHSC to enter negotiations with a much wider field of PPE suppliers even if that ultimately led to a further direct award). As noted above, an accelerated procurement could have been completed – allowing for a standstill period – in 25 days. In opting to grant a contract, by way of direct award, for 12 months, the DHSC has acted disproportionately and in a manner that cannot be justified. That the award of a 12 month contract to a company that was manifestly ill-suited to deliver the DHSC's requirement compounds the extent to which the award was disproportionate.

Reserve grounds

30. The Claimant reserves the right to expand on the grounds set out above following provision of the information and documentation sought below.

Standing

31. This claim for judicial review is a public interest challenge to the lawfulness of a direct award 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. In those circumstances, the Claimant has a sufficient interest to challenge the expenditure of £108 million of taxpayers' money on a company that coincidentally appears to have been in a position to submit a tender at the very moment when the Government accepted that there were 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. This is therefore not a disappointed bidder challenge where there may be some limits on the scope for a disappointed bidder to bring a challenge outside of the PCR regime. As a challenge to the wholly disproportionate deployment of £108 million of public money, the Claimant plainly has sufficient interest in accordance with the ordinary principles of standing.

Limitation

32. This pre-action letter has been served as soon as possible and well within the 3 month limitation period. As noted above, although the contract was signed on 13 April 2020, the decision was not made public until 18 May 2020. The DHSC, in this regard, could have published the Contract Award Notice immediately but chose not to. That prevented earlier scrutiny of the award for a further 35 days. In any event, it appears that the award only came to public attention through the publication by Tussell of its review of direct awards in response to Covid in early June 2020. The matter having been published in The Times on 4 June 2020, this letter has been served 6 days later.

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

The Claimant 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. However, the Claimant recognises that the DHSC must be able to have access to and distribute PPE to frontline staff. Moreover, it does 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, terminate its contract with PestFix, and procure PPE by way of an open (and accelerated) procurement procedure.

The Claimant 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 award that has been made to PestFix. The

public and media response to the award has been one of disbelief. The Claimant reminds the DHSC of its duty of candour which the Claimant considers arises particularly acutely on the facts of this case. The Claimant's 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 PestFix contract raises – are answered fully and candidly by the DHSC.

9 ADR proposals

The proposed Claimant 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 Claimant is 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

The DHSC is urgently required to provide the following information:

- a. On what forum or platform was the opportunity to tender for the contract awarded to Pestfix posted and how long was that opportunity accessible to the public/tenderers;
- b. 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 13 April 2020;
- c. Did PestFix approach the DHSC first (and if so when) or did the DHSC approach PestFix first (and if so, when) in relation to its proposed sourcing and supply of PPE. And if PestFix was 'quickest off the mark' in submitting an expression of interest why did the DHSC not seek to have discussions

with any other more established providers in the week between PestFix submitting its expression of interest and the contract being executed;

- d. If the DHCS did have any discussions with any other commercial undertakings in relation to the proposed supply of the PPE that was let under the PestFix contract, 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 PestFix notwithstanding discussions with other undertakings were ongoing;
- e. What consideration, if any, was given to the running of an accelerated open competition in respect of this or any other PPE contract? In that regard, please explain when (if at all) that possibility was first raised, the reasons why it was decided that an accelerated open competition would not be run, and the date on which that decision was taken;
- f. What requirements as provided for in Regulation 58 of the PCR 15 were imposed on PestFix such that the DHSC sought to satisfy itself of PestFix's financial standing and technical capabilities; if none were imposed, on what basis was the DHSC satisfied that such requirements did not need to be imposed in the circumstances; if no such requirements were considered, why not;
- g. Detail whether any consideration was given to making a direct award of more limited duration (e.g. 1-2 months) such 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. 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;
- h. Explain the termination provisions set out in the contract awarded to PestFix. In particular, can the DHSC terminate the contract on notice, for no (or any) reason and if so, what is that notice period;

- i. 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;
- j. How much PPE has been delivered by PestFix to date under the contract and what sums have been paid to it in respect of those supplies or otherwise.

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

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

- a. Provide all communications to and from PestFix from the first initial approach to the signing of the contract on 13 April 2020;
- b. Provide copies of the information publicly posted about the PestFix contract 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;
- 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 decision to award to PestFix
- e. Provide the contract as entered into with PestFix, 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 17 June 2010**. We acknowledge that this is a significant abridgement of the usual time for response under the pre-action protocol, however the unprecedented circumstances of this case plainly require an urgent response.

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

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Rook Irwin Sweeney LLP