

Case No: HT-2020-000226; HT-2020-000291;  
HT-2020-000292; HT-2020-000419

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION LIST (QBD)**  
**[2021] EWHC 997 (TCC)**

7 Rolls Buildings  
Fetter Lane  
London EC4A 1NL

Tuesday, 23 February 2021

BEFORE:

**MRS JUSTICE O'FARRELL**

BETWEEN:

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**(1) GOOD LAW PROJECT**  
**(2) EVERYDOCTOR LIMITED**

Claimants

- and -

**SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE**

Defendant  
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**JASON COPPEL QC with PATRICK HALLIDAY** (instructed by Rook Irwin Sweeney)  
appeared on behalf of the Claimant

**MICHAEL BOWSHER QC with IMOGEN PROUD** (instructed by Government Legal  
Department) appeared on behalf of the Defendant

**The Interested Party did not attend and was not represented**

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**JUDGMENT**  
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1. MRS JUSTICE O'FARRELL: This is the hearing of the claimants' application for a costs capping order under section 88 of the Criminal Justice and Courts Act 2015. The application is opposed by the defendant and is also opposed by the interested parties who have not attended today but have submitted written submissions.
2. The claims are brought by the Good Law Project and EveryDoctor Limited against the Secretary of State for Health and Social Care. They concern challenges to decisions to award contracts to the interested parties for the supply of personal protective equipment. The contracts are of high value with estimates ranging between some £400 million and £700 million.
3. The issues that have arisen centre around the challenges based on the following grounds: firstly, that the direct award without competition did not meet the principles of equal treatment and transparency; secondly, that no proper reasons were given for the contract awards; and thirdly, that the awards were irrational in respect of the financial or technical verification and/or the use of a high priority lane to identify the relevant contracting suppliers.
4. There are nine contracts that form the subject matter of this legal challenge in relation to three separate interested parties.
5. The jurisdiction for the court to make a costs capping order in proceedings such as these is set out in sections 88 and 89 of the 2015 Act. Section 88 provides at subsection (6):

"The court may make a costs capping order only if it is satisfied that -

(a) the proceedings are public interest proceedings,

(b) in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and

(c) it would be reasonable for the applicant for judicial review to do so."

Subsection (7) provides:

"The proceedings are 'public interest proceedings' only if -

- (a) an issue that is the subject of the proceedings is of general public importance,
- (b) the public interest requires the issue to be resolved, and
- (c) the proceedings are likely to provide an appropriate means of resolving it."

Subsection (8) provides:

"The matters to which the court must have regard when determining whether proceedings are public interest proceedings include -

- (a) the number of people likely to be directly affected if relief is granted to the applicant for judicial review,
- (b) how significant the effect on those people is likely to be, and
- (c) whether the proceedings involve consideration of a point of law of general public importance."

Section 89 provides at subsection (1):

"The matters to which the court must have regard when considering whether to make a costs capping order in connection with judicial review proceedings, and what the terms of such an order should be, include -

- (a) the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties;
- (b) the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review;
- (c) the extent to which any person who has provided, or may provide, the applicant with financial support is

likely to benefit if relief is granted to the applicant for judicial review;

(d) whether legal representatives for the applicant for the order are acting free of charge;

(e) whether the applicant for the order is an appropriate person to represent the interests of other person or the public interest generally.

(2) A costs capping order that limits or removes the liability of the applicant for judicial review to pay the costs of another party to the proceedings if relief is not granted to the applicant for judicial review must also limit or remove the liability of the other party to pay the applicant's costs if it is."

6. Therefore, first of all the court has to consider the threshold test: whether this is an appropriate case in which a costs capping order might be made, that is if it satisfies the public interest proceedings test and considering the position of the applicant for judicial review if the costs capping order were not to be made; secondly, if that threshold is passed, the court must consider whether it should exercise its discretion to make such an order and, if so, on what terms.
7. The starting point is to consider whether this case satisfies the public interest proceedings test. Mr Coppel QC, leading counsel for the claimants, submits that it does satisfy the public interest proceedings test in this case. That is disputed by Mr Bowsher QC, leading counsel for the defendant. The defendant's position is supported by the skeleton argument that has been filed by the interested parties.
8. I am satisfied that the public interest proceedings test is satisfied in this case for the following reasons. Firstly, the amount of public expenditure that has been made in relation to these contracts without an open competition or advance publication is, on any view, very substantial indeed. As I said, it runs into the hundreds of millions of pounds of public money.
9. Secondly, the central issue in the case is whether there have been breaches of the obligations of transparency and equal treatment. Although those topics are the subject of a very substantial amount of authority, both in European jurisprudence and in

English and Welsh case law, there is, I understand, no direct authority on the application of those principles in the context of regulation 32(2)(c) of the Public Contracts Regulations 2015 which is engaged in these proceedings.

10. Thirdly, the issue of law that arises in this case concerns the nature and extent of the steps or measures that would be required to satisfy the obligations of transparency and equal treatment where the emergency procedure in regulation 32(2)(c) has been operated. Given the absence of any direct authority on that particular issue, it seems to me that it clearly raises a point of law that is of general public importance.
11. Fourthly, I have considered whether the courts are the appropriate place to carry out the exercise of scrutinising the contracts to determine whether the awards were lawful in the circumstances of each case. I am satisfied that it would be appropriate for the courts to carry out that exercise. I appreciate that there are a number of other investigations going on, whether through the public accounts investigation or other Parliamentary committees or other areas of investigation. However, there is a part for the courts to play in concerning itself with the legality of the procurement procedures used in these particular contracts, as opposed to the general efficacy and efficiency of the procurement exercises that were undertaken.
12. I have had regard, fifthly, to the provisions of section 88(8) which requires the court to consider the number of people likely to be directly affected if relief is granted to the applicant for judicial review, and (b) how significant the effect on those people is likely to be. The reality is that there is no direct effect on the claimants by the relief, if any, that might be granted in these proceedings. However I accept Mr Coppel's submission that there would be indirect effect. Potentially it could affect other suppliers for future public contracts. Although it has been stated by the defendant in its evidence that regulation 32 is no longer being used, regulation 32 remains part of the current regulations and it is not possible for any of us to say that the urgency that arose back in spring and summer of last year would not be repeated. The whole point is that regulation 32 only applies in circumstances where there is some unforeseen urgency.
13. Further, it is not just taxpayers who might have an interest in the outcome of this case. All citizens are likely to have an interest in whether or not procurement on the part of

the Government is carried out using good governance procedures and integrity.

Therefore, there is a real wider public interest that has been represented by the claimant group (which is a not for profit group) in bringing this challenge.

14. In any event, the third limb of subsection (8) is clearly satisfied because the proceedings involve consideration of a point of law of general public importance. I have identified the point of law. The point is of general public importance and could be of significant effect. If regulation 32 is used in the future, perhaps in very different circumstances, then it will be of value for everyone to have the court's guidance on the appropriate steps, if any, that need to be taken in order to ensure compliance with the obligations of transparency and equal treatment.
15. Mr Bowsher has made the point that no useful relief has been sought in the sense that there is no order to quash the decision and declare ineffectiveness or to undo the contracts that have in fact been ordered and in large part performed. That is clearly correct but there is still value to be had through a declaration. As Chamberlain J stated in *R (on the application of Good Law Project Limited & Ors) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin) it would be appropriate to mark any illegality, *if found*, by a declaration, even if no other substantive relief is sought or appropriate.
16. One further issue that has been raised by the defendant is that it would be more appropriate for any such challenge as has been made in this case to be made by an economic operator, but the fact is that it is simply unrealistic in these circumstances to wait for an economic operator to mount a challenge. That is because where there has been no open competition given the use of regulation 32, which this court has accepted was engaged and appropriate, there are therefore no disappointed bidders who have been through an advertised procurement exercise. It is therefore particularly difficult in the circumstances of the use of regulation 32 to identify any economic operator who would have a realistic prospect of success in mounting a judicial review or other challenge under the Public Contracts Regulations.
17. For all of those reasons, I am satisfied that these are indeed public interest proceedings for the purpose of section 88.

18. Turning then to the other two limbs under subsection (6), it is not disputed that, in the absence of a costs capping order, the claimants would withdraw their application for judicial review and it would be reasonable for them to do so in the circumstances of this case. That therefore satisfies the threshold for the court to go on and consider whether it should exercise its discretion in this case and, if so, on what terms.
19. I am satisfied that the court should exercise its discretion and make a costs capping order in this case for the following reasons. Firstly, the claims raise significant issues of public interest for the reasons I have already given.
20. Secondly, the costs are substantial on both sides. The claimants estimate that their costs will be at least £250,000 with the possibility of an uplift, I understand, if they are successful. The defendant's costs are estimated to be some £1 million. I understand why the costs are very high because the matter concerns nine separate contracts. Further, although the central issue is the transparency issue, it does also include grounds relating to irrationality. The court is not concerned with the performance of the contracts; it is merely concerned with the lawfulness of the award of the contracts. Nonetheless, it requires substantial disclosure to be given by the defendant and a significant amount of documentary evidence is likely to be put before the court when the matter is being considered.
21. Thirdly, the claimants' resources are limited. The claimants are a not for profit organisation. The claimants' costs are being funded by way of crowdfunding, and that has raised the required £250,000 (or thereabouts). The claimants do have reserves, some £777,000 worth of unrestricted reserves, however, not all of that could be made available if the claimants are to continue running the organisation and running other challenges. The claimants have stated, and it is not in dispute, that they will obtain no personal benefit from any relief that might be obtained in these proceedings. Likewise, their funders will obtain no personal benefit from the relief in this case. The lawyers are not acting for free, but they are acting at greatly reduced rates.
22. Fourthly, the defendant's resources are not unlimited. Although it is always tempting to consider that the public purse is a bottomless pit, the fact is that there are pressures on public spending, which no doubt will continue for some time to come given the

amount of spending required in order to support the public through the pandemic. But more importantly, if large sums of money are spent by the defendant on this case, it does have an impact on the resources that are available for other cases. Therefore it is not a simple exercise of assuming that the defendant, as a public authority, will always be able to fund, not only its own costs but those of its opponent, without any concerns.

23. Further issues are that there are reserves available to the claimant beyond the immediate crowdfunding reserves of £250,000, although I accept that they are limited.
24. Finally, I accept that the claimants are the appropriate persons to represent the public interest in this case really for the reasons that I have already given in considering whether or not these are public interest proceedings. I accept Mr Bowsher's submission that these claimants do not have particular expertise in mounting this particular challenge but I go back to the absence of economic operators who are likely to be in a position to make the challenge and I also bear in mind that these claimants have demonstrated a genuine interest in conduct of these proceedings. So for those reasons I accept that they are the appropriate persons to represent the public.
25. Having regard to all of those factors as set out in section 89 of the 2015 Act, I then go on to consider the level of the cap.
26. The claimants put forward a proposed cap of £100,000 in respect of any costs order against the claimants should they lose and they propose a cap of £250,000 in respect of any costs order against the defendants should they win. I do not consider that this would be an appropriate case in which to have different caps applicable to different parties. The reason for that is really the matters that I have already identified which is that the costs are already very substantial. They are likely to be very substantial at the end of the case. That is partly the nature of the challenge but also includes the number of contracts that the court will be required to investigate. On both sides the resources are limited. I accept Mr Bowsher's point that in cases like this it is the defendant who carries the overall burden of, in particular, disclosure. I have sympathy with Mr Coppel's concern at the amount and time spent on disclosure to date, without first having had any discussions with the claimants. Nonetheless it will undoubtedly be a very heavy exercise and is likely to involve both sides in substantial future costs.



27. For all those reasons, I consider that it would be appropriate to make a costs capping order in respect of both the claimants and the defendant in the sum of £250,000.
  
28. In relation to the interested parties, I want to confirm that I did receive their skeleton submissions, I did read them and I have taken account of the points that they make. However, the interested parties will not be directly affected by the grant or refusal of relief in this case. I accept that there has been publicity and some of it I understand has been adverse publicity. I appreciate that that could affect their reputation and that it is a matter about which they are naturally concerned. That might give rise to a degree of interest by them in following the proceedings. It may also give rise to their desire to ensure that there is someone at the hearing to protect their position. But their involvement will be limited, as it inevitably is for interested parties in claims of this kind. Therefore I decline to make any order in relation to the interested parties. The issue of costs is something that the court will concern itself with at the end of the case in general, and it certainly does not take this opportunity to tie its hands at this stage.
  
29. In conclusion, the court will make a costs capping order. It will be made in respect of both the claimant and the defendant in the sum of £250,000.

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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